

Disclosure ([00:00](#)):

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David Mandelbaum ([00:19](#)):

Hello and welcome to episode 17 of Greenberg Traurig's E2 Podcast. My name is David Mandelbaum. I'm a Shareholder in the Environmental Practice of Greenberg Traurig, and I'm joined today by Bill Hengemihle of FTI Consulting. Good morning, Bill.

William Hengemihle ([00:40](#)):

Good morning, David.

David Mandelbaum ([00:42](#)):

This is the second conversation between Bill and me about Superfund Allocation. Superfund is the federal program to clean up the nation's most contaminated sites. The issue we're dealing with is how to divide up what can sometimes be a very large cost of cleanup among the multiple parties that are often responsible for the same cleanup costs. The statute as we discussed in our first conversation really provides no clear guidance as to who pays what.

David Mandelbaum ([01:26](#)):

The standard is that a court is to divide among the viable parties using such equitable factors as it determines are appropriate. There is no other clear prescriptive black letter way of dividing costs. There are two procedures in which people like me make arguments.

David Mandelbaum ([01:52](#)):

One is federal litigation, and the other is a fairly common process under which groups of responsible parties or potentially responsible parties retain someone like Bill who conducts a private allocation, somewhere between a mediation and an arbitration, trying to come up with a way to divide these common costs.

David Mandelbaum ([02:22](#)):

The dispute over how you allocate, if you knew all the facts in the case, how you would take those facts and run them through a formula or a spreadsheet or an algorithm or whatever you want to call it, we're going to call it an allocation methodology, to come up with a list of numbers that add up to 100%. That's what an allocation is. How you do that can be controversial.

David Mandelbaum ([02:50](#)):

And in fact, there are process cost savings if you resolve that dispute ahead of resolving all the factual disputes for all the inputs at least in many cases. Today, we'd

like to talk a little bit about how you get to that allocation methodology. Bill, would you talk a little bit about the factors you use in your work?

William Hengemihle ([03:19](#)):

Right. Well, David, as you mentioned, I conduct consensual out of court allocation proceedings, and my objective is to get the parties to agree on an allocation for settlement purposes. In terms of methodology and factors, I find that what's very effective, and I mentioned this in the last episode, is interviewing the parties privately upfront to get an understanding of whether there is some degree of consensus around methodology and factor selection. I think that gets the process off to a good start.

William Hengemihle ([03:54](#)):

The neutral can understand party's initial biases and perspectives on what would be a fair factor, a fair methodology. Some upfront exploration by the party's views privately often helps. Most parties tend to favor what I'll call cost causation based allocation, meaning an allocation method that attempts to link the party's conduct, where the waste they sent to a site, with the costs to be incurred in the cleanup.

William Hengemihle ([04:26](#)):

Linking costs back to party's waste or conduct is the essence of a cost causation based allocation. A number of courts have adopted cost causation based allocations. I tend to see that most parties favor that. At least at the outset, they like the notion of cost causation as a methodology and the factor should look at cost causation principles. That's what I typically find in these proceedings, David.

David Mandelbaum ([04:54](#)):

I'm going to agree with you that most Superfund practitioners really like cost causation or harm causation as the allocation principle. That is what you're trying to get at with your algorithm, in part because it doesn't involve any subjective or soft or hard to quantify or hard to even to conceptualize how you would quantify issues. In a minute, I'm going to want to poke at the question whether that's the way courts really think about allocating common costs.

David Mandelbaum ([05:37](#)):

Let's deal with a couple of issues just in cost or harm causation. First, how do you... Suppose you know that X put in a hundred tons and Y put in a thousand tons and they're somewhat different substances. How do you go about thinking about cost causation there?

William Hengemihle ([06:02](#)):

Well, it begins with a study of the costs at issue. Oftentimes when you get into the allocation, you find that the costs are of a common nature. All parties relate to the costs in one way or another. Like a landfill cap is oftentimes a common cost in that it covers all the party's wastes at a site. Common costs are often allocated using an

approach called the ratio standalone costs, where the allocator would evaluate each party's contribution on a standalone basis.

William Hengemihle ([06:38](#)):

Look at each party's waste contribution and assess what would be the cost of that party's remediation for its waste on a standalone basis. And then the allocator takes the sum of the standalone costs and computes a ratio percentage for each party. In a simple example, suppose we have three parties and the standalone costs for each party's waste are 50 million, 25 million, and 25 million respectively.

William Hengemihle ([07:07](#)):

The allocation percentage to the first party would be 50%, meaning 50 million divided by the sum of the standalone costs or 100 million. 50% would be the first party's allocation based upon standalone cost ratio approach. That's one methodology. It can become a bit unwieldy when you're talking about potentially tens, if not hundreds of parties, and difficult to estimate standalone cost relationships.

William Hengemihle ([07:36](#)):

But I find that in some cases, David, the ratio of standalone costs can be a way to capture cost causation principles in an allocation. I've seen it used successfully in a consensual process. I'll note that to date, the courts have not embraced ratio of standalone costs I think because some of the difficulties in arriving at the individual estimates for standalone costs. But that is an approach to conducting a cost causation based analysis in an allocation.

David Mandelbaum ([08:10](#)):

That is an approach, and there are a number of people who like that approach. I'm going to disagree with you about it, and here's the reason. This is going to sound a little theoretical and formologicky, but it's got real practical content, right? Standalone cost is what the logicians would call sufficient cost. If I do what I did, there will be this cost no matter what anybody else does. That's distinguished from necessary causation, which means if I did not do what I did, the cost would not be incurred.

David Mandelbaum ([08:55](#)):

That's often called but-for causation. Now, if you've got a lot of costs that are caused by the fact that everybody's waste is all put together in a pile, where everybody's discharge is all out in a river, where all these plumes have combined in the groundwork, then there may be lots of necessary causation, right? If my waste hadn't been in there, you wouldn't have incurred costs, right? That's also true for other people.

David Mandelbaum ([09:33](#)):

That standalone causation, which is what would happen if I were alone, may yield these very counterfactual kind of hypotheticals. If I was the only person who put my three truckloads into this large hole, what would be the Superfund cleanup cost? The answer is nothing, right? Nobody would care about that. And if I put my one truck of highly toxic material into this hole, what would be the cleanup cost? Well, maybe you'd have to clean up the highly toxic stuff, but it's one truckload.

David Mandelbaum ([10:06](#)):

It would cost almost nothing to take it out. You've got all these people with very low standalone costs. Whereas when you put them all together, there's a very large joint cost. You might think that necessary causation is a better way to think about this, or maybe even something else, but necessary causation looks at the site that we have and takes out some waste, right? The hypothetical is the very site we have with a small change. Standalone causation is a large series of sites that never existed, right?

David Mandelbaum ([10:40](#)):

Each party's individual small pile. It gets away from reality of it and doesn't necessarily have all the standalone costs add up to the total cost of the whole site.

William Hengemihle ([10:51](#)):

Right. Now, if your site did have a necessary cause as opposed to sufficient causes, you can still allocate on a cost causation basis that necessary cause. Back to my landfill example, suppose one of the parties, only one, contributed chlorinated solvents that reached the groundwater and necessitate not just the landfill cap, but a groundwater pump and treat remedy. It could be that but for that one party's contribution of chlorinated solvents, there'd be no groundwater remedy.

William Hengemihle ([11:22](#)):

Therefore, that necessary cause contribution of groundwater contamination of chlorinated solvents would be allocated solely back to that parties who has attributed to a necessary cause. I think we can look at both necessary and sufficient causes together in one allocation method, David. But I would agree with you that oftentimes when you're dealing with dozens, if not hundreds of parties coming up with individual standalone costs, it kind of breaks down in terms of efficient application or practical application.

William Hengemihle ([11:57](#)):

And an allocator is typically going to use a different type of approach, like looking at the relative volume of each party's contribution and ascribing some type of correlation between overall volume metric input and result in cost.

David Mandelbaum ([12:10](#)):

Right. Even if everybody agrees that you're going to have a cost causation based allocation, there may be lots of disagreement over, first, whether the costs you're looking at are sufficient causes or necessary causes, sufficient causation or necessary

causation, and secondarily, how you're going to approximate those. How are you going to guess at what costs in fact were caused exclusively by party X and which cause required two parties to act and each party is a necessary cause of those costs.

David Mandelbaum ([12:53](#)):

The other dispute, I think, you see pretty frequently is whether the causation is cost causation or harm causation. Because if you look at the Restatement of Torts about allocating tort liabilities among joint tortfeasors, it talks about harm causation, not cost causation, right? There are some courts out there that'll say, "Well, maybe you can estimate the harm as the cleanup cost, but ordinarily you would think of harm as the damages, right?"

David Mandelbaum ([13:32](#)):

How many cows died? How many trees died? How many people got sick? Not the cost to fix it." Do you run into this dispute between cost causation, which is connected to remedial costs, or harm causation, which might be something like contribution to overall toxicity or something like that?

William Hengemihle ([13:54](#)):

Harm causation comes into play in natural resource damages, injuries, allocations under circ law. But for circle of response cost allocations, David, I usually see that the parties are happy to consider the harm to be the cost, the financial damages in a monetary sense. And that's because by the time you get to a final allocation process at a site, you have an EPA record of decision prescribing a remedial alternative based upon a cost analysis and a feasibility study.

William Hengemihle ([14:29](#)):

You have information on the harm in terms of monetary damages. I think that's what parties want to focus on. In the natural resource damage or NRD context, the trustees typically measure an injury in some type of eco currency. The allocator will use that trustee determined eco currency for resource injuries in the allocation. But I find mostly we're talking about harm as it manifests itself in dollars when the allocation is going.

David Mandelbaum ([15:02](#)):

You may be right. I just think you can find appellate opinions that say the opposite. And that creates an opportunity for advocacy among the people or between the people who would be benefited by cost causation, right? That is, I've got a small volume... For example, on the landfill site, I've got a small volume of high toxicity waste and everybody caused the cause by how big their stuff was, because the remedy is a cap or legate collection, which is basically determined by the size of the thing, right?

David Mandelbaum ([15:39](#)):

Against the people who say, "No, no. It's harm causation. My stuff may be big, but it didn't hurt anybody. And therefore, you ought to pay extra because your stuff hurt people." An example of that... I mean, if you look at the old municipal solid waste settlement policy that EPA and DOJ came out with, that was basically a harm causation or a harm causation standalone cost kind of approach with a lot of hand waving. That I think is what motivated that.

David Mandelbaum ([16:11](#)):

I want to talk about a couple of additional... All I'm doing here... I'm not saying what's right and what's wrong. What I'm saying is that there's an opportunity for people to disagree. I guess I should say the quiet part out loud, that is that if a bunch of Superfund practitioners and an experienced Superfund allocator are all thinking one way and we think that a generalist judge is going to come out differently, then you get the mommy-daddy problem, right?

David Mandelbaum ([16:39](#)):

There are people who would benefit with the judge's way of proceeding and people who would benefit from the allocator's way of proceeding, and that'll split the group, right? Some people are running into court and some people are running to the allocator. We have to figure out a way, I guess, if we're going to settle cases to bridge that. A couple of problems I think we ought to touch on. The first is missing parties, right?

David Mandelbaum ([17:04](#)):

If you really could attribute every dollar to a person, but some of the people are missing, then you've got dollars that are unattributed. Isn't it true that you've got to think about how to allocate that missing share? I guess the conventional response is proportionally, but that's not a necessary response, right?

William Hengemihle ([17:24](#)):

Right. The missing share is often referred to as the orphan share or the orphan contamination share. It's a shared responsibility that can't be attributed to the solvent financially viable parties in the allocation proceeding. Proportional allocation, meaning proportionally relocating the non-participant share among the participants in proportion to each participant's allocation, that's a common approach, David, but it's not the only approach.

William Hengemihle ([17:55](#)):

The way that this orphan share gets allocated is an entirely inequitable question. It's always a subject of significant debate because it's the allocator's problem. That's where a Superfund becomes especially harsh and unfair is because parties are asked to pay more than their fair share. They have to pay the missing party's share.

William Hengemihle ([18:16](#)):

And how to do that reallocation on the basis of proportionality or perhaps the nexus of each viable party's connection or nexus to the orphan party is also a way to approach the orphan sharing allocation question. Nexus or proportionality are two different competing approaches. Every site has its own unique setting that makes one approach the better for getting people to ultimately agree or some hybrid of multiple approaches.

David Mandelbaum ([18:46](#)):

And that creates an opportunity for advocacy and dispute, right?

William Hengemihle ([18:50](#)):

Yes, and sometimes an opportunity in that if EPA incensed parties to settle by sometimes providing orphan share compensation, so that if parties are willing to settle and do work at a site in an agreement with EPA, EPA has an orphan share compensation policy where within limits, EPA can compensate or compromise its claim for cost recovery to recognize the orphan share at a site. Sometimes it could be an opportunity to drive parties towards settlement if we can get some federal funding of the orphan share.

David Mandelbaum ([19:29](#)):

Now, we have the flip flop problem when you got jointly cause costs. That is there's a dollar and my action caused that dollar and so did your action, right? In fact, maybe if you're thinking about necessary causation, the only reason we incurred that dollar is because both you and I did what we did. If one of us had not, that dollar would not have been incurred. We both caused it, right?

David Mandelbaum ([19:57](#)):

If you add up all of the costs that each of us caused, you would end up with more than the total. This is the flip flop of the orphan share problem, which is if you add up everybody's costs, you add up to more than 100%, do you reduce it proportionately? And at least sometimes we know that the government, for example, has decided that's not the right thing to do.

David Mandelbaum ([20:25](#)):

In the municipal solid waste settlement policy that we mentioned before, and we mentioned it because it doesn't come up much, but the idea there was you assign the full cost causation to non-municipal waste and left municipal waste with just the extra, which would not be a proportional allocation of the extra of the over allocation, if you will. Do you find yourself in disputes over how you manage the adding up constraint?

William Hengemihle ([21:03](#)):

Always. The unfunded share, the adding up constraint is sometimes the central part of an allocation, David, and it's entirely inequitable solution. There's no guidance document or cookie cutter approach to how that unfunded share is going to be

reallocated. It's inequitable analysis. The parties will brief it. And then the neutrals is charged to try to come up with the least unfair approach to relocating that share among the parties.

William Hengemihle ([21:39](#)):

I think most parties realize that it's better to do that in the context of an out of court process, because there is significant risk in how a court's going to ultimately assign that orphan share. It could go to one party entirely, which is sometimes an adjudicated result. Parties can sometimes in a court approach, an adjudicated allocation, David, sometimes a non-cooperating party is disproportionately saddled with that orphan share you're describing.

William Hengemihle ([22:08](#)):

That's happened before. Non-cooperating parties sometimes bear disproportionately that orphan share.

David Mandelbaum ([22:14](#)):

And the same is true for the overshare. That is, if the site costs a dollar to clean up and I cost the dollar and you cost the dollar, and we each get allocated the dollar, then the allocation is \$2 and we have to reduce that to one. The question is, how is that two reduced to one? And the answer is it could be proportional, or it could be something different. If you think you're going to win in court, you want to be in court.

David Mandelbaum ([22:43](#)):

Yes, there's risk, but sometimes the risk is upside. Well, it's been very interesting and I think we're sort of at the time. I enjoyed this, Bill. Is there anything else you want to add?

William Hengemihle ([22:56](#)):

Likewise. I enjoyed the dialogue and the discussion. Thanks for inviting me again for another episode on this topic, David.

David Mandelbaum ([23:03](#)):

Join us soon on another episode of the E2 Podcast.