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The Practical Impacts of Burlington Northern

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ABSTRACT

On May 4, 2009, the United States Supreme Court issued its opinion in two consolidated cases, Burlington Northern and Santa Fe Railway Co. v. United States (“BNSF”) (No. 07-1601) and Shell Oil Company v. United States, (“Shell”) (No. 07-1607), 129 S. Ct. 1870 (2009), on the related issues of joint and several liability and arranger liability under Section 107 of the Comprehensive Environmental Response Compensation and Liability Act, commonly referred to as CERCLA or Superfund. In the first case, based on the facts before it, the Court held that BNSF was severally liable for a portion of site cleanup costs rather than jointly and severally liable for all. How significant this opinion is for Superfund defendants has been a topic of discussion among members of the environmental bar. This paper explores this question further and suggests how the BNSF opinion folds into a hierarchical approach for defending Superfund cases.

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I. Background

Before CERCLA's enactment in 1980, environmental statutes generally regulated conduct prescriptively, providing penalties for violations. In CERCLA, Congress created a new paradigm, imposing liability based not on a violation of law, but rather on a person's relationship to a site from which there has been a release or threat of release of a hazardous substance. Those liable under section 107(a) of CERCLA, referred to as potentially responsible parties or PRPs, include present owners and operators of a hazardous substance-contaminated site, those who owned or operated the site at the time of disposal, transporters who selected the site, and those who arranged for disposal of their wastes at the site. 42 U.S.C. § 9607(a). Damages recoverable under CERCLA include costs of investigating and remediating the site and associated natural resource damages.

Liability under section 107 is strict, regardless of whether the PRP's actions were in compliance with law or non-negligent, and generally joint and several. Under section 113(f), a PRP who pays more in response costs than its fair share has a right to recover the excess in a contribution action against other PRPs, but cannot hold other parties jointly and severally liable. *See Amoco Oil Co. v. Borden, Inc.* 889 F.2d 664, 672 (5th Cir. 1989). In *Cooper Industries, Inc v. Aviall Services, Inc.*, 543 U.S. 157 (2004), the Supreme Court held a PRP who conducted response actions could not bring a CERCLA contribution claim under section 113(f) unless it brought that claim during or following a civil enforcement action, or settlement resolving plaintiff's CERCLA liability to the United States or a state. In *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007), the Supreme Court held that PRPs who did not qualify to bring contribution actions under section 113(f) could bring cost recovery actions under section 107 and suggested -- but did not hold -- that liability then could be joint and several.

In *BNSF*, the Court relied on what is described as the seminal opinion on apportionment, *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), in which the district court concluded that though CERCLA liability was strict, whether it were joint and several was to be determined by traditional and evolving principles of common law. *Id.* at 808. The Supreme Court confirmed that section 107(a) does generally provide for joint and several liability, but offered some clarification regarding the exceptions to that general rule. It indicated a PRP might limit its exposure to several liability to an apportioned share of the entire cleanup costs if it could establish that there were either distinct harms or a reasonable basis for apportioning a single harm. To understand the significance of *BNSF* requires an understanding of the facts.

II. BNSF – The Facts

In 1960, Brown & Bryant, Inc. (B&B) began operating an agricultural chemical distribution business, purchasing pesticides and other chemical products from suppliers such as Shell Oil. B&B opened its business on a 3.8 acre parcel and, in 1975, expanded operations onto an adjacent .9 acre parcel owned by two railroads, BNSF and the Union Pacific Railroad Company. During its years of operation, B&B allowed the pesticides and other chemicals to escape from its equipment and its operations and to leak out on the ground, which resulted in contamination of soil and ground water, threatening an adjacent supply of potential drinking water. In 1989, B&B became insolvent and the site was added to the National Priorities List (NPL).

In 1991, EPA issued an order to the railroads to perform certain remedial tasks, which they did at a cost of more than \$3M. In 1992, the railroads sued B&B, and, in 1996, that lawsuit was consolidated with recovery actions brought by the governments against the railroads and Shell. By 1998, the EPA and the state had spent more than \$8M in cleanup efforts.

III. BNSF – The Law

Following a bench trial, the district court held that both Shell, as an arranger, and the railroads, as owners, were PRPs. Although finding that the contamination created a single harm, the court found that the harm was divisible and capable of apportionment.

Based on the percentage of the total facility area that was owned by the railroads, the duration of B&B's business divided by the terms of the railroads' lease, and its determination that only two of three chemicals were responsible for roughly 2/3 of the overall site contamination requiring remediation, the district court assigned a percentage of the remediation costs (9%) to the railroads. Although the railroads did not produce precise figures regarding the exact quantity of chemical spills on each property for the years of operation, the court found it indisputable that the overwhelming majority of hazardous substances released on the site were attributable to B&B. The court apportioned responsibility among the PRPs, including Shell, for the governments' costs based on this analysis. On appeal, the Ninth Circuit affirmed that Shell was an arranger, but reversed the district court and held that the parties were jointly and severally responsible. Though the Ninth Circuit agreed that the harm was theoretically capable of apportionment, it found the facts in the record insufficient to support it.

On certiorari, the U.S. Supreme Court reversed the Court of Appeals and held that Shell was not a PRP and that there was a reasonable basis by apportionment. In apportioning liability, the Court noted its agreement with other courts holding that "if adequate information is available, divisibility may be established by 'volumetric, chronological, or other types of evidence' including geographic considerations." *BNSF*, 129 S. Ct. at 1883.

The Court explained, "the courts of appeal have acknowledged that '[t]he universal starting point for divisibility of harm in CERCLA cases' is Section 433A of the Restatement (Second) of Torts" and, applying the Restatement, held that liability could be several when there is a reasonable basis for apportioning the harm among two or more responsible parties even if the harm were singular. *BNSF*, 129 S. Ct. at 1881. The Court agreed that the burden was on the railroads to prove that the harm was divisible, but went on to hold that the facts in the trial record were sufficient to support several liability, even in the absence of detailed records and precise calculations, based on estimates derived from relative contributions, impacted areas, and periods of time of conduct and ownership. *Id.* At 1882-1883.

Prior to *BNSF*, in only one significant CERCLA case, *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 902 (5th Cir. 1993), did a court hold a defendant had established a reasonable basis for apportioning a single harm.² In *Bell*, the contamination resulted from a single industrial plant that had been operated by three different manufacturers.

A case involving similar circumstances, *U.S.A. v. Marathon Battery Co.*, settled.³ The basis for that settlement was a nonbinding allocation of responsibility (NBAR) by EPA. The NBAR was based on information regarding operation of a nickel cadmium battery manufacturing plant, which had discharged wastewater from 1953 to 1979 at several locations, including into a cove

² Steve C. Gold, *Dis-Jointed? Several Approaches to Divisibility After Burlington Northern*, 11 Vt. J. Envtl. L. 307, 316 (2009).

³ No. 7:91-CV-06544 VLB. The case was pending in the United States District Court for the Southern District of New York, in which a consent decree was entered on April 1, 1993. *See* <http://www.epa.gov/superfund/sites/fiveyear/f2008020002578.pdf>.

adjacent to the Hudson River and into the river itself. The plant was constructed for the Army Corps of Engineers and operated by a company that subsequently acquired it. That company then sold it to another, which operated it for a number of years, until the plant was closed. The property was later sold to a book dealer. The site included 3 operable areas, which contained contamination from either wastewater discharges or air emissions.

The NBAR allocated responsibilities based on detailed information provided by one of the PRPs, regarding wastewater treatment efficiencies and flow, on the one hand, and air emissions, on the other, for different periods of operation. That allocation helped the parties settle. The NBAR did not attempt to allocate shares between the owner and operator. Arguably, the burden of proof for those periods where the owner and operator were not the same should have been on those parties, not on the party who was able to establish what its share was. *But see Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607, 613 (5th Cir. 2006).

There are several significant lessons to be learned from *BNSF* and *Bell*. In specific circumstances, the Court is willing to consider apportionment, applying the principles of the Restatement, and the imposition of several, rather than joint and several, liability, even if there were not a single harm.⁴ Second, the burden on the defendant necessary to establish the existence of a reasonable basis for apportionment presumably is lower than previously thought. Finally, it will take a particular set of circumstances to establish divisibility and the analysis will be very fact-specific. Whether a PRP can establish its liability is several, based on the reasoning of *BNSF*, has a number of significant legal implications. Among other things, a party who can establish its liability is several: (1) has its liability capped at its apportioned share; (2) is not responsible for orphan shares.

Based on *BNSF* and especially *Bell*, attached as Exhibit A is a chart diagramming how apportionment fits into the overall liability schemes under CERCLA.

IV. BNSF's Progeny

As a general matter, the cases following *BNSF* on apportionment have not broken significant new ground. The common theme is that the Court's holding was fact specific and thus the lower courts are requiring more factual development prior to making apportionment decisions, rather than addressing the issue through preliminary motions. The courts are still struggling to determine whether *BNSF* was simply reaffirming pre-existing law or was setting a different standard and burden of proof for apportionment.

In *ITT Corp. v. BorgWarner, Inc.*, 2009 WL 2356263 (W.D. Mich. July 29, 2009), a cost recovery action related to two Superfund sites, one defendant sought a partial summary judgment on a portion of the response costs, asserting that the costs associated with metals and hydrocarbons were distinct and divisible, and that it did not have responsibility for any metals and hydrocarbons. The district court accepted the defendant's argument that there was a "plausible basis of apportionment" based on the contention that certain costs were allocable only to certain contaminants that the defendant did not cause. *Id.* at *4. However, the court declined to grant a partial summary judgment on the point because of the factual nature of the issue. *Id.*

⁴ Whether analogous state laws will be interpreted similarly, of course, depends on the precise wording of the state statute. In Texas, for example, liability is several if the defendant can demonstrate the release or threatened release is "divisible," that is, "the waste released or threatened to be released has been and is capable of being managed separately under the remedial action plan." TEXAS HEALTH & SAFETY CODE §361.275.

Evansville Greenway and Remediation Trust v. Southern Indiana Gas and Electric Co., Inc., involved a dispute over responsibility for the response costs associated with two adjacent sites used by a former scrap metal business. 661 F. Supp. 2d 989 (S.D. Ind. 2009). A remediation trust formed to cleanup the sites filed a motion for summary judgment to hold a company that supplied materials to the scrap metal business jointly and severally liable for all of the remediation costs at both adjacent sites. The generator argued that the costs were capable of being apportioned (apparently based on factors such as the quantity of scrap), but that the remediation trust had destroyed records that would allow it to make the showing. The court denied plaintiff's motion and stated that it would hold a trial at which the parties could present evidence on allocation.

The district court noted that the parties "hotly debated" whether *BNSF* was simply an application of the "old principles widely adopted since *Chem-Dyne*" or whether it was a "dramatic change" allowing PRPs to avoid joint and several liability. *Id.* at 1012. The court declined to pick an interpretation of *BNSF*, denied the motion for summary judgment, and stated that "where the applicable law appears to be in flux like this, perhaps the best role the district court can play... is to hold a trial and make the detailed findings of fact needed to inform higher courts as they address the questions of law." *Id.* at 1012-1013. The court noted that pre-*BNSF* there would have been "little difficulty" in determining that the harm was not divisible and that the defendant was jointly and severally liable. *Id.* at 1011.

In *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, the plaintiffs argued that they should be allowed to amend their petition to assert section 107 claims because, following *BNSF*, the first step in the case should be to make a determination of divisibility; if the plaintiffs are able to show divisibility, then they are no longer jointly and severally liable, and thus able to assert 107 claims. 2009 WL 3931036, at *1 (E.D. Wis. Nov. 18, 2009). The court viewed the *BNSF* decision as a "watershed apportionment case" that "significantly eases the burden on defendants who seek to avoid joint and several liability" and that confers more leeway on the lower courts in determining whether and how to apportion damages. *Appleton Papers, Inc.*, 2009 WL 3931036, at *1. But, the court did not view *BNSF* as requiring a preliminary determination on divisibility prior to determining the appropriateness of section 107 or 113 claims. *Id.* at *2.

In *United States v. Saporito*, the district court declined to apportion liability in what is an interesting and unique set of facts. 684 F. Supp. 2d 1043, 1061 (N.D. Ill. 2010). *Saporito* undoubtedly attracted more attention for its questionable holding on lessor liability than for its apportionment determination. The court held that the owner of leased equipment, which was key to a plating business, including rectifiers and a filter press, was an owner of a plating facility and thus liable under CERCLA. But the court also addressed whether the liability should be apportioned or whether the defendant equipment owner was jointly and severally liable.

The court found that apportionment was not appropriate because there was "only one cause" of the harm – the plating process -- and that although the ownership of the plating equipment was divided, that division of ownership was not comparable to the division of ownership of separate parcels of land seen in *BNSF*. *Id.* at 1062. The court held that even if apportionment were possible, the defendant had failed to meet its burden by showing apportionment by a preponderance of the evidence. *Id.* This court appears to not view *BNSF* as lowering the bar for defendants seeking to avoid joint and several liability.

In *Reichhold, Inc. v. United States Metals Refining Co.*, the district court found that there was a reasonable basis for apportionment. 655 F. Supp. 2d 400, 448 (D.N.J. 2009). At issue was the

responsibility for costs associated with a cap over metals contaminated soil. The court found that the cap was required because of two distinct events – one defendant’s use of large amount of slag on the property and a third party’s placement of contaminated fill over the property. *Id.* at 448. Either of these events would have required the cap. Turning to apportionment, the court found that the metals contamination is a single distinct harm with two separate causes. *Id.* at 448-449. The basis for apportionment was not the “exact amount of metals contamination” contributed by each party, but instead “it is the circumstances that each was responsible for a sufficient amount of metals contamination that required the cap.” *Id.* at 449. Liability was apportioned equally between the two parties.

In *United States v. Iron Mountain Mines, Inc.*, a case that had been ongoing for nearly 20 years, the United States District Court for the Eastern District of California rejected defendants’ motion for reconsideration, which was based on *BNSF. United States v. Iron Mountain Mines, Inc.*, No. 91-076-JAM-JFM, slip. op. at 6 (E.D. Ca. May 5, 2010). The defendants had sought to reopen their divisibility of harm defense. The court previously had held that, given the nature of the pollution at the site, it would be difficult to identify distinct harms. The court rationalized its earlier failure to analyze whether there were a reasonable basis for apportionment of liability by explaining that it had authorized relative culpability for acid mine drainage to be raised at the contribution proceeding. The court refused to reconsider its decision, concluding that *BNSF* did not represent an intervening change in law that mandated reconsideration.

In ruling that *BNSF* did not constitute a change in law, the court concluded that *BNSF* “simply reiterated the law as established in 1983 by *Chem-Dyne*, and asserted that the Supreme Court had merely examined the record to resolve a factual question of whether the record supported apportionment.” *Id.* The *Iron Mountain* court, therefore, ruled that *BNSF* did not add a new mandate that district courts must apportion harm. The question the court did not answer is whether district courts must determine whether a single harm is capable of apportionment.

V. BNSF – The Companion Case

BNSF’s companion case clarified a related liability issue – who is an arranger. Shell had sold pesticide to B&B, encouraging it to buy in bulk, though Shell was aware B&B routinely experienced minor spills in its handling of the bulk pesticide. Shell also had given directions to B&B how to minimize those spills. The government argued, based on these facts, that Shell was an arranger. The Court held that for Shell to have qualified as an arranger, it must have taken intentional steps to dispose of a hazardous substance. Mere knowledge that spills had occurred did not equate to intention.

The interplay between these two companion cases suggest a hierarchical framework for defending Superfund cases. Before discussing that framework, we first review the various Superfund defenses, their elements, and the relationships among them.

VI. Defenses

As originally enacted, CERCLA provided three defenses: (1) Act of God; (2) Act of war; or (3) Act or omission of a third party (“third party defense”). 42 U.S.C. § 9607(b). To claim one of these defenses, a PRP must show that the release or threat of release of hazardous substances and the resulting damages were caused solely by one or a combination of these three actors. 42 U.S.C. § 9607(b). Of these three original defenses, the most viable and frequently asserted has been the third party defense.

To successfully assert the third party defense, the defendant must show not only that the release or threat of release was caused solely by the act or omission of a third party, but also that: (1) the third party was not the defendant's employee or agent, or one whose act or omission occurred in connection with a contractual relationship, existing directly or indirectly, with the defendant; (2) the defendant exercised due care with respect to the hazardous substances; and (3) the defendant took precautions against the foreseeable acts or omissions of the third party and the consequences that could foreseeably result from the acts or omissions. Case law is split as to the contractual nexus necessary to preclude use of the third party defenses; some courts have ignored the requirement that there be an act or omission "in connection with" a contractual relationship. See Civins, Mendoza, and Fernandez, "The Third Party and Transaction-Related Defenses of CERCLA: An Overview," ABA SEC. ENV'T, ENERGY & RESOURCE ENVTL. LITIG. & TOXIC TORTS COMMITTEE NEWSL. at 3 (July 2005).

In 1986, Congress enacted the 1986 Superfund Amendments and Reauthorization Act ("SARA"), which modified the third party defense with the innocent landowner ("ILO") defense -- the first defense to focus on parties to a real estate transaction. Under this defense, even if the proscribed contractual relationship were present, the PRP nonetheless could take advantage of the third party defense if it could show that it satisfied the requirements for being an innocent purchaser: the PRP acquired the property after disposal of the hazardous substances and, at the time of acquisition, the PRP did not know and had no reason to know that any hazardous substances were disposed at the facility. 42 U.S.C. § 9607(b)(3) and § 9601(35)(A)(i). SARA placed the defense in a carve out from the definition of "contractual relationships" and defined contractual relationship to include land contracts, deeds, easements, leases or other instruments transferring title or possession, without addressing the nexus requirement. 42 U.S.C. § 9601(35). Also included within the ILO defense were governmental entities that acquired property involuntarily or through the exercise of eminent domain and those that acquired property by inheritance.

To show at the time of the acquisition that a party "had no reason to know," the party must show that it conducted *all appropriate inquiries* ("AAI") into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices." 42 U.S.C. § 9601(35)(B)(i). Of the three ILOs, only innocent purchasers were required to show AAI; government entities and inheritors were not.

In the 2002 Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Amendments"), Congress added to CERCLA new defenses for prospective purchasers of Brownfields, specifically, the transaction-related defenses of bona fide prospective purchaser ("BFPP") and of contiguous landowner ("CLO"). These two defenses, together with the innocent purchaser prong of the ILO defense, each require that AAI be performed. They also generally require a showing of no affiliation with a liable party. Together these two requirements comprise the so-called "threshold criteria." In addition to the threshold criteria, the three defenses also require satisfaction of certain continuing obligations. Collectively, the threshold criteria and continuing obligations are referred to as "the common elements." Of these defenses, the most viable is the BFPP because it, unlike the other two, is not precluded by knowledge of contamination. Attached as Exhibit B is a diagram illustrating the relationships and requirements of the various Superfund defenses.

VII. Hierarchical Approach

As noted, the two companion cases, *BNSF* and *Shell*, help flesh out steps in a hierarchical approach to defending Superfund cases. Attached as Exhibit C is a diagram illustrating this hierarchical approach.

The initial inquiry is whether the defendant is a PRP. *Shell* bears on this issue for arrangers; *Bestfoods*, which dealt with parent company liability under CERCLA, is relevant regarding owners and operators. *United States v. Bestfoods*, 524 U.S. 51 (1998). The burden, of course, is on the plaintiff to show a defendant is a PRP. See, e.g., *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993) (hereinafter *Alcan* (2d Cir.)); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 68 (5th Cir. 1989) (citing *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152-53 (9th Cir. 1989), among others); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989).

The next inquiry is whether the defendant is entitled to any defenses. The burden, of course, is on the defendant to show that a defense applies. See *Amoco*, 889 F.2d at 668; *United States v. Monsanto Co.*, 858 F.2d 160, 170 (4th Cir. 1988).

The next inquiry is the inquiry suggested by *BNSF* – whether there is a basis for asserting liability is several, with the burden being on defendant. As noted, if a severability showing can be made, the defendant’s exposure is limited to only its share; the defendant is not responsible for orphan shares.

If a severability showing cannot be made, the next inquiry is what arguments can a defendant marshal to lessen its equitable share where liability is joint and several, responsibility for orphan shares is allocated among the defendants. See *United States v. Township of Brighton*, 153 F.3d 307 (6th Cir. 1998); *Allied Signal, Inc. v. Amcast Int’l Corp.*, 177 F. Supp. 713 (S.D. Ohio 2001). In equitably allocating liabilities, courts will often look at the so-called Gore factors, which include: “(i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (ii) the amount of the hazardous waste involved; (iii) the degree of toxicity of the hazardous waste involved; (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (vi) the degree of cooperation by the parties with Federal, State or local officials to prevent any harm to the public health or the environment.” *Environmental Transp. Systems, Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508 (7th Cir. 1992); see also *United States v. Consolidation Coal Co.*, 345 F.3d 409, 413-14 (6th Cir. 2003); *United States v. Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir. 2001).⁵

The final inquiry is whether the remediation costs can be reduced, with defendant have the burden, by showing the costs incurred were inconsistent with the National Contingency Plan. *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F. 2d 726 (8th Cir. 1986); *New York v. General Elec. Co.*, 592 F. Supp. 291 (N.D.N.Y. 1984).

VIII. Conclusion

Although *BNSF* has provoked much discussion and arguably lowers the threshold for demonstrating a single harm is divisible, it does not change the fact that unique factual circumstances need be present for a PRP to establish its liability is several. *BNSF* and its companion case, *Shell*, do help flesh out some of the elements pertinent to a hierarchical approach for defending Superfund cases.

⁵ In Texas, the factors relevant to equitable apportionment are specified by statute and include many of the Gore factors. See TEXAS HEALTH & SAFETY CODE §361.343.

Analysis of PRP Liability* Apportionment/Allocation

Should damages for harm be apportioned among multiple causes?
A Question of Law

Are there distinct harms?

Is there a reasonable basis for determining
the contribution of each cause?

E.g., succeeding factory owners'
discharges into stream

E.g., multiple factory owners'
simultaneous discharges into stream

Yes

Liability is several

How is liability to be apportioned?
A Question of Fact

Determine Each Party's Contribution to Harm

Ability to Distinguish
Contribution

Amount of
Waste

Toxicity of
Waste

No

Liability is joint and several

How is liability to be allocated?
A Question of Fact

Apply Gore Factors

Degree of
Involvement

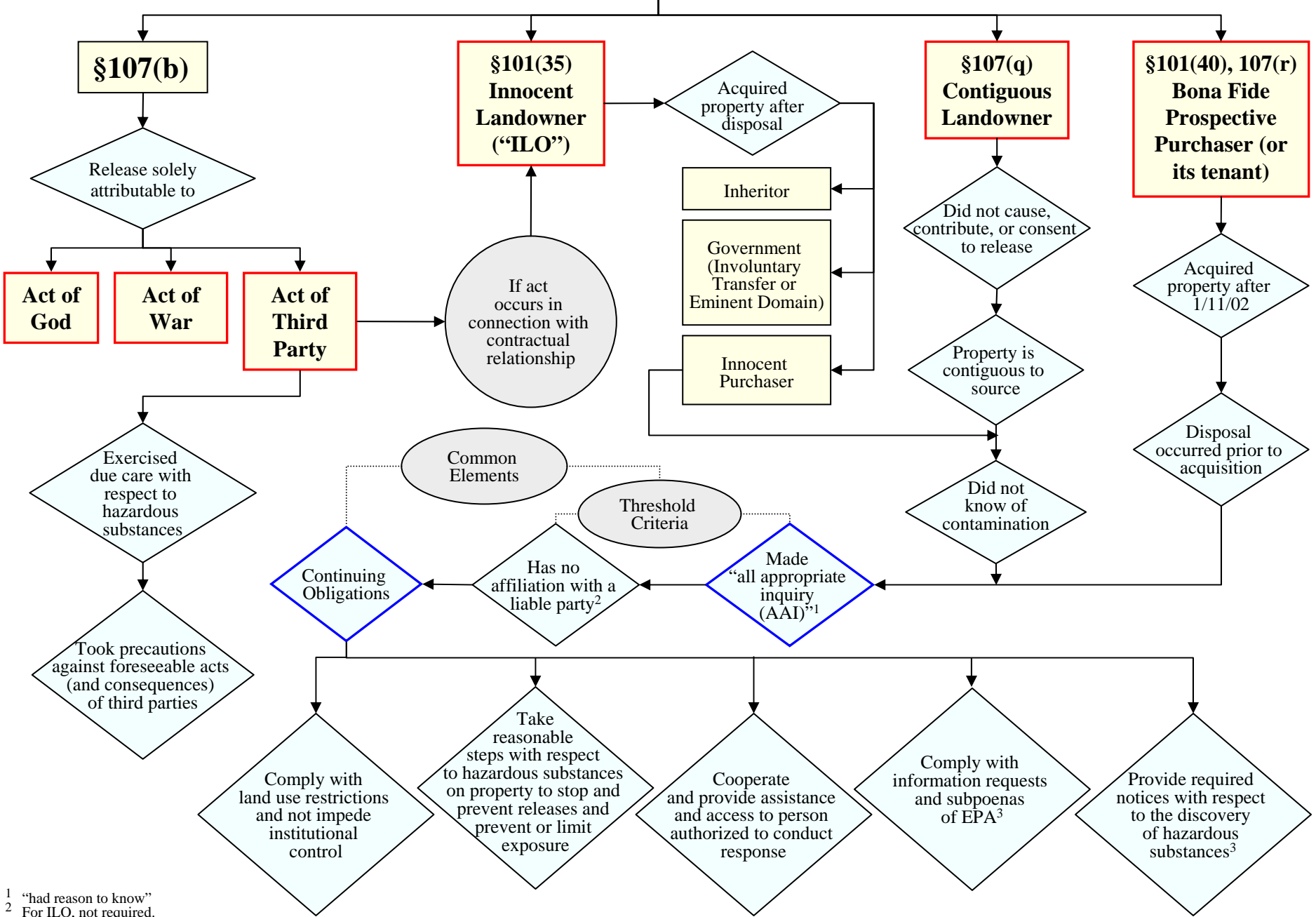
Apply Other Equitable Considerations

Degree of Care

Degree of Cooperation
with the Government

*Based on *In re Bell Petroleum Services, Inc.*, 3 F.3d 889 (5th Cir. 1993).

Superfund Defenses



¹ "had reason to know"
² For ILO, not required.
³ For ILO, not explicitly required.

A Hierarchical Approach to Defending Superfund Cases

