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§ 3:189 —Results of the stand-alone plume analysis can be used in many ways to distinguish relative PRP contributions
§ 3:190 —Once stand-alone plumes for each site/PRP are determined, costs can be allocated using several approaches
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§ 3:192 Volume of contribution method: similar to area of contribution method, but incorporates information concerning depth of environmental impact to calculate volumes of impact
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§ 3:198 Unpaid liabilities, but not bare assertions that the plaintiff will perform future cleanup, constitute costs incurred in responding to a release
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§ 3:200 A PRP's right to sue for contribution—When is it triggered?
§ 3:201 —Parties that perform cleanups can demand reimbursement from other PRPs without fear that their contribution actions will be sabotaged by the impossibility of making meticulous factual determinations concerning each party's causal contribution
§ 3:202 It is an open question whether a solvent identified party's share of CERCLA costs qualifies as an "orphan"
§ 3:203 Assuming that a solvent and identified PRPs' contributive share of CERCLA response costs can constitute an "orphan share" (and, therefore, be allocable among other parties liable in a CERCLA contribution action), the district court may/may not abuse its discretion by declining to apply the "orphan share" doctrine—It depends on the facts
§ 3:204 It is an open question whether a solvent identified party's share of CERCLA costs qualifies as an "orphan"
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§ 3:206 Standard of Appellate Review for Compliance With the NCP
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§ 3:208 Private parties can recover certain preliminary investigation and monitoring costs regardless of compliance with the NCP
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§ 3:210 What costs are allocable?—Specific issues regarding what allocable costs comprise
§ 3:211 — —Attorneys' fees—It depends, and often, court will hold evidentiary hearings before deciding
§ 3:212 The Government Can Recover Attorney's Fees As Part of CERCLA Response Costs
§ 3:213 What costs are allocable?—Specific issues regarding what allocable costs comprise—Experts' fees—Treated the same way as attorney's fees
§ 3:214 Occasionally, parties try to obtain attorney fees in a section 107(a) action by claiming that that because cost recovery and contribution actions are so closely intertwined and the interplay between them is so complex, they should be able to use section 127(j) just as if the action were for contribution. This particular argument has never worked (at least our research has revealed no case where it has succeeded)
§ 3:215 CERCLA does not limit a government's recovery of attorney fees solely to those response cost actions that are unavoidable
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§ 3:221 — —Summary: governments, typically, entitled to all their response costs—"Arbitrary and capricious" standard applied (not "hard look" doctrine) when EPA's costs at issue
§ 3:222 Equitable allocation of response costs—The usual procedure: district courts' broad discretion; typical order of allocation
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§ 3:228 Typically, Fairness Hearings Are Not Required When Courts Choose the Pro-Tanto Method
§ 3:229 Under the UCFA (Pro Tanto), disclosure of settlement terms is not required for court approval of settlements—The opposite is true for the UTCA (Pro Rata)
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§ 3:233 Where no party presents evidence about the basis for a defaulting party's CERCLA liability, at least one case stands for the rule that, in this situation, there is no basis to assign orphan shares to the defaulting party
§ 3:234 Equitable allocation of response costs—The usual procedure: district courts' broad discretion; typical order of allocation—Creation of an "orphan share"
§ 3:235 — —Accounting for future costs
§ 3:236 — —Typically (not always), a court cannot equitably allocate response costs until a Remedial Investigation and Feasibility Study (RI/FS) is completed, a Record of Decision (ROD) is issued, and a remedy is selected; however, as just indicated, a government-approved remediation plan is not a prerequisite for the court's entry of an order allocating liability
§ 3:237 — —Where the record does not make clear that a party is defunct, bankrupt, uninsured, or otherwise lacking of resources, courts do not take ability to pay into account in determining the equitable allocation among the parties
§ 3:238 — —Assuming that a solvent and identified PRP's contributive share of CERCLA response costs can constitute an "orphan share" (and, therefore, be allocable among other parties liable in a CERCLA contribution action), does the district court abuse its discretion by declining to apply the "orphan share" doctrine?
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§ 3:243 — —Uncertainty multipliers
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§ 3:246 Monetary judgments (not just declaratory judgments) are available in contribution actions
§ 3:247 Counterclaims for contribution—When plaintiff has resolved its liability to government, it cannot be held liable to defendant(s)
§ 3:248 — —Contribution claims under state law
§ 3:249 District courts have the discretion to apply the UCFA contribution bar to state law claims in a CERCLA action

§ 3:250 For non-divisible harm, a CERCLA plaintiff PRP cannot successfully assign value to certain discrete invoice settlement amounts unless the settlement documents evidence that value: paucity of authorities on this issue, also, a split on documentation requirements, and admissibility of expert witness testimony
§ 3:251 Parties that perform cleanups can demand reimbursement from other PRPs without fear that their contribution actions will be sabotaged by the impossibility of making meticulous factual determinations concerning each party's causal contribution
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§ 3:253 For non-divisible harm, there is a paucity of authority on whether settlement amounts (including but not limited to insurance recoveries) should be automatically set off from plaintiffs' recoveries against non-settling defendants
§ 3:254 A district court can order a *per capita* (equally to each party-aka "even steven") allocation of CERCLA damages against a group of defaulting defendants that, because of their default, have failed to produce evidence that would enable the court to make a more individualized allocation
§ 3:255 Funding a settlement agreement does not automatically make the whole sum compensable in a CERCLA contribution action—Even if that payment obligation is irrevocable: Instead, the contribution seeking party still must show the settlement costs were for necessary response costs consistent with the NCP
§ 3:256 If an appellate court reverses the district court's environmental liability ruling, on remand the district court must vacate its equitable allocation ruling
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APPENDICES

Appendix 3A. Sample Points and Authorities in CERCLA Cost Recovery Action Regarding Allocation (Discussion of Gore Factors): Motion for Partial Summary Judgment
Appendix 3B. Sample Points and Authorities in CERCLA Response Costs Recovery Action: Opposition to Motion for Partial Summary Judgment
Appendix 3C. Sample Reply Points and Authorities in CERCLA Response Costs Recovery Action: Reply Memorandum in Support of Motion for Partial Summary Judgment
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§ 4:68 Settlement agreement between the plaintiff (state) and a prp third-party defendant that was neither judicially approved nor subject to administrative review does not bar the original prp defendant's 113 (f) contribution claim
§ 4:69 In deciding whether to approve a CERCLA settlement, the courts must apply three factors—Fairness, reasonableness, and consistency and faithfulness with CERCLA's objectives. These three standards also apply to the approval of settlements involving CERCLA claims between/among private parties (again, not just to settlements between the government and private parties)
§ 4:70 Insurance and CERCLA settlements
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§ 4:73 A PRP may/may not successfully use settlement discussions as evidence in an environmental liability allocation dispute—be cautious!
§ 4:74 When a federal court reviews a settlement of a case brought under both state and federal law, the court applies state substantive law to the state claims
§ 4:75 California federal district courts often combine California case law with federal case law in their determinations of whether a CERCLA settlement is in good faith (under California law) and fair and reasonable (under CERCLA)
§ 4:76 Alternative Dispute Resolution (ADR) and environmental allocation

CHAPTER 5. THE DE MINIMIS, DE MICROMIS, AND ABILITY TO PAY PRP

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§ 5:2 Recap: Sites proposed for NPL via *Federal Register*, Three mechanisms for placing sites on the NPL
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§ 5:8 Recap: Belatedly, Congress responds by passing Superfund Amendments and Reauthorization Act of 1986 ("SARA")

§ 5:9 Recap: Multiple statutory protections for "innocent landowners": innocent landowner liability exemption; contiguous landowners exemption; and bona fide prospective purchasers exemption
§ 5:10 Multiple statutory protections for limited volume "de minimis" and miniscule volume "de micromis" PRPs
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§ 5:13 Statutory support for "de minimis" PRP settlements—SARA pro-early settlement negotiations for peripheral PRPs
§ 5:14 —How a PRP proves its low level of hazardous impact and/or its limited involvement in the facility operations causing the hazardous substance release
§ 5:15 —USEPA authorized to enter into covenants not to sue
§ 5:16 —De minimis PRP who has resolved its liability with USEPA not liable for contribution; impact on other PRPs
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§ 5:21 — —USEPA considers whether the covenant or condition is in the public interest
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§ 5:23 — —Proposed consent decree must undergo public review and comment
§ 5:24 — —District Courts must give wide berth to USEPA's choice of de minimis PRP eligibility criteria, but they must still examine the adequacy of the settlement process
§ 5:25 — —District Courts do not violate the non-settling PRP's due process rights by failing to conduct a full evidentiary hearing before approving a proposed CERCLA consent decree
§ 5:26 Negotiating settlements for de minimis PRPs—What government agencies can/cannot do—For purposes of approving proposed consent decrees, if the data that the EPA uses to allocate liability is within the broad spectrum of believable/reasonable approximations, district courts should not second guess
§ 5:27 Negotiating settlements for *de minimis* PRPs—What government agencies can/cannot do—Non-settling PRPs can challenge settling de minimis PRPs' eligibility for CERCLA de minimis protections contained in consent decrees
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§ 5:29 — —USEPA has a statutory duty to require a settling de minimis PRP to waive all of the claims it may have against other PRPs
§ 5:30 — —USEPA may decline to offer a settlement to a potential de minimis PRP
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§ 5:32 — —"De minimis landowner" PRPs
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§ 5:34 — —USEPA usually waits for formation of joint defense/working groups before settling
§ 5:35 — —PRP settlement approaches and impediments to settlements to USEPA negotiating early de minimis prp settlement agreements
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§ 5:38 —Courts examine de minimis PRP settlements on an individual case by case basis
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§ 5:43 —USEPA can impose penalties on uncooperative PRPs
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§ 5:45 Definition/description of de micromis PRPs
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§ 5:47 —Significant limitations on the de micromis prp defense
§ 5:48 —Burdens of proof—Depends on who is the plaintiff: documentary evidence is critical
§ 5:49 —Under CERCLA § 107(a)(3), USEPA's toxicity contribution determinations are final, and not subject to judicial review
§ 5:50 De micromis settlements—Introduction: USEPA has sole discretion to determine total de micromis eligibility; USEPA policy on de micromis PRPs before passage of SBLRBRA; usually, de micromis PRPs are associated with waste disposal sites
§ 5:51 — —De Micromis status based on USEPA's evaluation of "waste-in lists and volumetric ranking"
§ 5:52 — —Some deserving PRPs will not qualify for de micromis PRP status—Instead, they will be classified as (a) non-exempt de micromis parties, or (b) de minimis PRPs
§ 5:53 — —USEPA has discretion to determine—On a site-by-site basis—The appropriate cut off for de minimis and non-de minimis PRPs
§ 5:54 — —USEPA assesses two component payments: "baseline" and "premium" (USEPA calculations; payment matrixes; "adjustment factors"; "presumptive premiums")
§ 5:55 — —DOJ approval mandatory for all consent decrees regarding: de minimis and de micromis settlements when site costs exceed $500,000
§ 5:56 — —USEPA has several "communication tools" to facilitate negotiation and implementation of de minimis and de micromis settlements: "model letters"; "offer letters"; "working groups" and "liaison counsel"; mediators; miscellaneous tools
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installment payment schedules—Sometimes—Available; must provide all available information
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CHAPTER 6. THE LAW ON ALLOCATION OF ENVIRONMENTAL LIABILITY

§ 6:1 Introduction: elements of a prima facie CERCLA case; four classes of PRPs; bifurification; PRPs have burden of proof; imposition of costs; economic necessity for PRPs to "spread the grief"
§ 6:2 Statutory cost allocation provisions: neither CERCLA § 107 nor § 113 include specific language/guidance for allocation, but courts still rely on them for allocation
§ 6:3 CERCLA § 122 (added by SARA) provides limited cost allocation guidance: NBARs—Not binding, but courts often consider and apply one or more NBAR factors
§ 6:4 NBARs—Not admissible, and NBAR allocations not subject to judicial review
§ 6:5 USEPA cost allocation guidance: generally, courts defer to USEPA decision making. Likewise, state courts, in state-CERCLA counterpart statute disputes, typically, defer to state environmental agency decision making
§ 6:6 NBARs primarily rely on volumetric data—Not toxicity
§ 6:7 If NBAR based partly on toxicity, courts will grant it substantial deference, but PRP has burden to show fairness requires toxicity be considered
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§ 6:9 CERCLA legislative history—Another basis for PRPs and courts to rely
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§ 6:17 Even before/without application of equitable factors, a court may decide to allocate a 0% share of responsibility to a liable party based on its finding that the liable party was responsible only for a negligible amount of harm
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§ 6:20 —Owner's benefit from the operator's activities
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§ 6:23 Specific PRP vs. PRP disputes—Present Owners v. Past Owners: decisions based on comparative fault; indemnity agreements enforcement; Gore Factors; survey of case law
§ 6:24 —Operators v. Operators: paucity of reported decisions
§ 6:25 —Owners v. Operators: several decisions—Courts apply contractual indemnity among the owners and comparative/relative fault among the operators; survey of case law
§ 6:26 —Multiple generators: extremely complex cases, posing daunting technical challenges; generator PRPs dominate the ranks of PRPs at landfill sites; generally, courts unlikely to disturb the CERCLA cost allocations USEPA develops for settling generator PRPs; typically, courts rely on volumetric contribution, but other factors may also be relevant; absent highly unusual circumstances, a generator PRP stands little chance of successfully opposing USEPA endorsed settlements
§ 6:27 *Specific PRP v. PRP disputes—Warehouse Owners v. Insolvent* E-Waste Generating Operators (Tenants) and Arrangers
§ 6:28 Specific PRP vs. PRP disputes—Generators v. Owners and operators: courts forced by circumstances to Jettison Volumetric Contribution Method; generally, courts either apply some combination of Gore Factors or allocate based on relative fault of the parties
§ 6:29 —Generators v. Transporters: only a few reported decisions; where release occurred during transport, courts often apply Gore Factors and examine relative fault of PRPs
§ 6:30 —Transporters v. Municipal PRPs: few reported decisions; courts apply equitable factors, especially parties' relative degree of involvement in the decision to dispose of the waste at the impacted site
§ 6:31 —Owner v. Neighboring Owner
§ 6:32 —Disputes involving PRPs who are in more than one PRP's class: if a PRP belongs to multiple classes of PRPs, it probably will be allocated an overall higher percentage of CERCLA costs because of (a) CERCLA-procedural mechanics regarding cost allocation for multiple PRPs, and (b) application of the Gore Factors, and comparative fault principles
§ 6:33 Allocation is rarely an easy proposition, but it becomes even more challenging where the most responsible PRP is not a party. In one such case, the court used the Gore and Torres factors to make an equitable allocation
§ 6:34 Quantum of proof required for specific apportionment: no supreme court guidance, but it appears the burden should be low enough to permit the fact finder to divide damages based on the available evidence
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CHAPTER 7. DIVISIBILITY

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§ 7:2 Causation—Under CERCLA—Is especially vexing
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§ 7:4 Causation and divisibility under CERCLA
§ 7:5 Scientific bases for divisibility: many possible factors—Quantity, nature, types, properties, and toxicity of chemicals; hydrology; and, practically, divisibility is difficult to establish
§ 7:6 The role of *Restatement (2d) of Torts*
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§ 10:75 A PRP's cleanup need not be "voluntary"—meaning that the PRP was an innocent party—for the PRP to sue under § 107(a)(4)(B)

§ 10:76 District courts within the Tenth Circuit agree; if a party seeks recover of costs incurred due to an administrative order or judicially approved settlement, it must do so under § 113(f), not under § 107(a)

§ 10:77 Under the majority rule, unilateral administrative orders are not equivalent to a "civil action" under § 113 (f) (1)

§ 10:78 Even if one of the statutory triggers for a contribution claim has occurred for particular site expenses, a party may still assert a cost recovery action for its other expenses

§ 10:79 A non-settling PRP can bring a CERCLA cost recovery action against settling and other non-settling PRPs if it was not compelled to perform the cleanup (as a result of either a direct civil or administrative action under § 106 or § 107)

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§ 10:81 If both the same parties and hazardous waste site were involved in a prior contribution action for future soil remediation costs, collateral estoppel does not apply to bar reallocation of equitable liability shares in a non-settling PRP's subsequent CERCLA cost recovery action against the settling and other non-settling PRPs for past cleanup costs

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