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The Supreme Court's Decision in Burlington: Arranger Liability Under CERCLA Has Limits; Apportionment Claims Do Not Require Precise Evidence

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On May 4, 2009, the U.S. Supreme Court ruled in *Burlington Northern & Santa Fe Railway Co. v. United States* ("*Burlington*") that "arranger" liability under CERCLA requires that the owner or supplier of material must enter into the transaction for the *purpose* of disposing of at least a portion of the material supplied. Mere knowledge that some material may be spilled or disposed of is not sufficient to support CERCLA liability. This opinion overturned Ninth Circuit and other decisions, and assures manufacturers and similarly situated entities that incidental spills that occur in connection with the transfer of products do not generally constitute "arrangements for disposal."

In *Burlington*, the Court also considered the appropriate test for determining when liability under CERCLA is divisible, and the evidentiary requirements for establishing a particular defendant's portion of divisible liability. The Court held that a Potentially Responsible Party ("PRP") can establish the required "reasonable basis" for determining its contribution to a single harm using estimates, witness approximations, and rough math, as opposed to precise, detailed records. Proving the precise portion attributable to each PRP has historically presented a nearly insurmountable obstacle in apportionment cases, especially for absentee landlords and other indirect PRPs who did not participate in, or even observe, disposal activities. *Burlington* appears to have considerably lowered this burden of proof, and the Court's holding may signal a departure from the outcome-driven approach to CERCLA liability taken by the Ninth Circuit, with its focus on ensuring that "*some* entity with connection to the contamination picks up the tab."[1]

Factual Background

From 1960 through 1988, Brown & Bryant, Inc. ("B&B") owned and operated an agricultural products storage and distribution facility. Initially, B&B conducted its operations on its own 3.8 acre parcel (the "B&B Parcel"). However, in 1975, B&B entered into a lease for a neighboring 0.9 acre parcel owned by the Burlington and Santa Fe Railway Company and the Union Pacific Transportation Company (the "Railroad Parcel" owned by the "Railroads"). B&B kept pesticide containers and application trucks on the leased property and as a consequence of these activities, some pesticides (D-D, Nemagon and dinoseb) were recurrently spilled or released into the soil and groundwater.

B&B also conducted mixing, formulating, loading, and unloading activities, primarily on the B&B Parcel. As a result of these additional activities,

contamination of D-D on the B&B Parcel was significantly greater, as handlers routinely spilled D-D during transfers from delivery trucks to bulk storage tanks. D-D was extremely corrosive, and additional spills resulted from sudden tank failures.

The manufacturer of D-D, Shell Oil Company, used common carriers to deliver the material to B&B, who accepted responsibility for the delivery upon arrival. Shell thus did not directly control or supervise the activities that resulted in routine releases. It was, however, fully aware of these releases and would even reduce the purchase price of D-D by an amount related to the loss due to leakage or spills. Shell also offered discounts to incentivize distributors to make facility improvements and eventually required distributors to have their tanks inspected by a qualified engineer. Although B&B certified in 1981 that it had made a number of recommended improvements, its equipment still failed regularly.

In 1983, California's Department of Toxic Substances Control ("DTSC") and later, the United States Environmental Protection Agency ("EPA"), began investigations into suspected violations of hazardous waste laws. These investigations uncovered significant soil and groundwater contamination on both parcels. B&B became insolvent in 1989 and ceased all operations. DTSC and EPA undertook their own efforts to clean up the site. By 1998, they had spent over $8 million in response costs, which they sought to recover from the Railroads and Shell under CERCLA.

District Court Opinion

The district court held that the Railroads were liable under CERCLA as owners and that Shell was liable as an "arranger" for the disposal of hazardous substances. Because the Railroads had continuously owned the site, their liability was clear. Shell's liability, however, presented a more complex question. The government plaintiffs argued that Shell "arranged for" the disposal of its product when it delivered hazardous substances to the facility, knowing that accidental releases routinely occurred incidental to delivery. Following the Ninth Circuit's broad interpretation of arranger liability, the district court reasoned that Shell could be liable given that the generation of waste was a known and inherent part of the sales transaction.

On the issue of damages, however, the court determined that liability among Shell, the Railroads and B&B for site-wide contamination of a single facility was divisible.

Regarding the Railroads, the court apportioned liability using three factors: the percentage of the facility owned by the Railroads (0.9 acres / 4.7 total acres = 19.1%), the duration of B&B's activities on the Railroad Parcel compared to the duration of its activities overall (13 years / 29 years = 45%), and the fraction of contaminants on the Railroad Parcel (66%, calculated by assigning each pertinent chemical an equal share and subtracting out D-D because the substantially higher concentration of this chemical on the B&B Parcel suggested that contributions from the Railroad Parcel were insignificant). Multiplying these values together, and applying another 50% fudge factor value to account for calculation errors, the court assigned 9% of the total response costs to the Railroads.

Regarding Shell, the district court estimated the amount of material resulting from leaks that occurred during product delivery based on witness observations, sales data and a variety of assumptions about the volume and frequency of spills, and then divided this amount by the total amount of chemicals spilled. Pursuant to this calculation, Shell was liable for 6% of the total cleanup costs.

As a result of the court's division, the government plaintiffs were left with responsibility for the share attributable to the defunct B&B—roughly 85% of the cleanup costs.

Ninth Circuit Opinion

On appeal, the Ninth Circuit ostensibly recognized the validity of the divisibility doctrine at the liability stage in CERCLA cases. It nevertheless went on to conclude that the district court's calculations, although based on over 80 pages of factual findings, failed to demonstrate a reasonable basis for concluding that a portion of the contamination did not originate on the Railroad Parcel, which was part of the overall dynamic operation of the unitary B&B facility. Similarly, although Shell's evidence provided *some* volumetric basis for evaluating its contribution, it still fell short of the concrete and specific evidence that the Ninth Circuit expected. Because the defendant PRPs failed to provide sufficient evidence of their proportionate share of liability, the Ninth Circuit held that the defendants were jointly and severally liable for all response costs.

Separately, the Ninth Circuit affirmed that arranger liability can attach based on a transaction where leaks or some other form of disposal of hazardous substances is a necessary part of the delivery process.

In a dissent from the order denying a petition for rehearing en banc, eight judges harshly criticized the majority opinion for, among other things, imposing an "impossible-to-satisfy burden on CERCLA defendants" that would require "'perfect information' sufficient to trace every molecule of pollution to the landlord's parcel."[2] The dissent also took issue with the majority's holding regarding arranger liability, opining that "[i]t is an oxymoron for an entity *unintentionally* to make preparations for disposal."[3] Even if this were not the case, they further reasoned that Shell's *influence* over the transfer process did not amount to *actual control* over the disposal, part of the Ninth Circuit's arranger liability test.[4]

The Supreme Court Decision

Arranger Liability Under CERCLA

CERCLA imposes liability on persons who "by contract, agreement or otherwise arranged for disposal or treatment of hazardous substances." Often these parties generated the hazardous substances in question, but that is not always the case.

Because the statute does not define the phrase "arranged for", courts have fashioned an elaborate body of law interpreting that term. Most courts have required some degree of intention to dispose of these substances, but they have often allowed that intent to be inferred from a wide variety of circumstances. A number of courts have focused on the phrase "or otherwise" as indicating Congress' intention to cast the liability net broadly to encompass transactions that might not be typically thought of as "arranging for disposal".

Thus, for example, chemical companies who send raw materials to "toll manufacturers" for processing have been held liable for contamination at the toll manufacturers' sites on the basis that they knew, or should have known, that the production process would create hazardous by-products that could be improperly disposed. Likewise, companies that sell scrap metal or batteries for reclamation by others have been required to pay for cleanups at the purchasers' sites because courts have interpreted such sales as "arrangements for disposal" rather than the sale of a commodity in the companies' ordinary course of business. Defendants have strenuously objected to the courts' characterization of these transactions.

In *Burlington*, the Court significantly limited the broad interpretation of arranger liability embraced by the Circuit Courts. In particular, the Court reasoned that "[b]ecause CERCLA does not specifically define what it means to 'arrang[e] for' disposal of hazardous substance," the phrase should be given "its ordinary meaning."[5] It then held that to "arrange for"

disposal requires "intentional steps to dispose of a hazardous substance". Knowledge that some disposal by the transferee might occur as a collateral consequence of the sale is not, standing alone, sufficient to prove intent. Thus "particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product," there should be no inference that the seller "intended" that a disposal occur.

Consistent with these principles, Shell, as the seller of a useful product, was not liable as an "arranger for disposal" of the chemicals in question.

Apportionment Under CERCLA

Having determined that Shell was not an arranger, and therefore not liable, the Court did not further consider Shell's proportionate share of liability. It focused solely on the Railroads' evidentiary showing of divisibility.

Following the approach taken by the lower courts, the Supreme Court began its analysis by borrowing from section 433A of the Restatement (Second) of Torts the rule that liability can be apportioned if a defendant can demonstrate "a reasonable basis for determining the contribution of each cause to a single harm."[6] Applying this principle to CERCLA defendants, the Court departed sharply from the Ninth Circuit's analysis, holding instead that the evidence of the duration of B&B's lease relative to its overall operations and the size of the Railroad Parcel relative to the entire facility provided a reasonable basis for assigning 9% of the response costs to the Railroads.[7]

The Court did not comment on the significance of the district court's conclusion that contamination on the Railroad Parcel, some of which did not require remediation, "contributed to no more than 10% of the total site contamination."[8] However, like both the majority and the dissent in the Ninth Circuit opinion, the Court questioned whether the district court's estimate of the fraction of contaminants on the Railroad Parcel had a factual basis. The Court may thus have recognized that although the evidence behind apportionment need not be exact, courts should not simply split the difference to achieve equity in apportionment cases.[9]

Implications and Future Impacts of the Supreme Court's Decision

Arranger Liability

The commonsense result in *Burlington* marks a major change in Superfund jurisprudence. No longer will plaintiffs be able to contend that parties are arrangers merely because some disposal of hazardous substances occurs later in the life of a product or by-product, even if such disposal is arguably foreseeable by the seller. As noted by the Court, that admonition applies with particular force in the sale of a "useful, unused" product.

The extent to which that same logic will be applied by courts to the transfer of products that have already had a useful life—e.g., recycled materials—remains to be seen. The Court suggested that an arranger need only have intent to dispose of a *portion* of the product, providing grounds upon which recycling cases may be distinguished.[10] In addition, it is not clear to what extent businesses will need to take affirmative steps to prevent spills, as Shell did, in order to defeat inferences of intent to dispose drawn from knowledge that disposal will inevitably occur. At a minimum, however, courts will need to undertake a much more detailed factual inquiry of the nature and intent of transactions involving hazardous or potentially hazardous substances before assuming that they are "arrangements for disposal". And both governmental and private plaintiffs must carefully develop their lists of PRPs to pursue for cost recovery.

Apportionment

Regarding apportionment, *Burlington* significantly alters the proof required to establish a reasonable basis for apportionment. Once

perceived to be a very difficult proposition that required proof of the precise portion attributable to a PRP, apportionment cases can now rest on approximations and informal estimates, provided that they have at least some basis in fact. Note, however, that in *Burlington*, this factual analysis was fairly simple, as the parties did not actually brief arguments on the conclusions to be drawn from the numeric facts. More difficult cases may arise in the future when courts face competing approximations and inferences drawn from the same data.

Burlington additionally stands to change the game in cases where orphan shares represent a significant portion of the liability. As noted by the Ninth Circuit, in cases where all or most PRPs are known and solvent, defendants have always had the option of contribution claims against one another. Such claims can be based on limited evidence, with equitable considerations filling in the gaps. Contribution claims cannot, however, reduce one's cost allocation if other PRPs are not around to sue. In lowering the bar in apportionment cases, *Burlington* thus provides PRPs with an opportunity to avoid being saddled with a disproportionate share of liability from the start. These new realities will no doubt influence PRPs' strategies about when and in what context they will present evidence of several liability.

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[1] *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 945 (9th Cir. 2008).

[2] *Id.* at 952-53 (Bea, J., dissenting).

[3] *Id.* at 961.

[4] *United States v. Shell Oil Co.* ("*McColl*"), 294 F.3d 1045, 1055 (9th Cir. 2002).

[5] *Burlington N. & Santa Fe Ry. Co. v. United States*, No. 07-1601, slip op. at 10 (May 4, 2009) (internal citations omitted).

[6] Restatement (Second) of Torts § 433A(1)(b) (1963–1964); *see also Burlington*, slip op. at 14.

[7] *Burlington*, slip op. at 18.

[8] *Id.* at 17.

[9] *Id.* at 15 n.9 ("Equitable considerations play no role in the apportionment analysis; rather, apportionment is proper only when the evidence supports the divisibility of the damages jointly caused by the PRPs.").

[10] *See id.* at 12.