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Focus On

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"Arranger" Liability and Apportionment after *Burlington*

On May 4, 2009, in its decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009), the U.S. Supreme Court narrowed "arranger" liability as defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Court held that, under CERCLA, (1) parties are not liable as "arrangers" unless they have an "intent to dispose" of at least a portion of a product and (2) apportionment of liability, not joint and several liability, applies when there is a "reasonable basis" for determining the contribution of each defendant to the contamination. Subsequent decisions on arranger liability, however, have limited *Burlington* to its facts, suggesting that its impact may not be as significant as once believed.

Background

The case involved a site used by an agricultural chemical distribution business—Brown & Bryant Inc. (B & B), which is now defunct. Beginning in the 1960s, B & B stored hazardous chemicals on parcels of land that it both owned and leased from two railroad companies now known as Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company. B & B purchased pesticides and other chemical products from suppliers, including Shell Oil Company, the defendant. Shell arranged for the delivery of its chemicals to B & B by common carrier and specified them as "F.O.B. Destination."

During the course of these deliveries, leaks and spills of the chemicals often occurred. Shell knew of these incidents and took numerous steps to encourage the safe handling of its products. Throughout the 1990s, the Environmental Protection Agency and the California Department of Toxic Substances Control spent more than $8 million to remediate the site. The two railroad companies incurred more than $3 million in cleanup costs and sought contribution from B & B. The Environmental Protection Agency and the California Department of Toxic Substances Control brought actions against the two railroad companies and Shell to recover the costs for the cleanup.

The district court found that Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company were potentially responsible parties (PRPs) as owners of a portion of the site and Shell was a PRP as an arranger of hazardous waste disposal. The district court allocated 6 percent of the cost of the cleanup to Shell and 9 percent of the cost to the railroad companies. The court based this determination on three factors: (1) the percentage of the total site area owned by the railroad companies, (2) the duration of B & B's business divided by the duration of the railroad companies' lease, and (3) a determination that only two of the three polluting chemicals spilled on the leased parcel required remediation. After taking into account these factors, the district court reduced the percentage of liability by 50 percent to account for a "margin of error."

The Ninth Circuit Court of Appeals upheld the "arranger" liability determination against Shell because "the disposal of hazardous wastes was a foreseeable byproduct of, but not the purpose of, the transaction." The Ninth Circuit reversed the district court's allocation of damages against both Shell and the railroad companies. Even though there was "no dispute" as to whether the harm was capable of apportionment, the court found that the parties had failed to establish a reasonable basis for apportionment. Consequently, the court of appeals held the parties jointly and severally liable for the entire cost of the cleanup.

Arranger Liability

The Supreme Court reversed the Ninth Circuit's decision, finding errors on both the arranger liability and apportionment issues. Finding that CERCLA did not define what it means to "arrang[e] for" disposal of hazardous substances, the Court assigned the ordinary meaning to the phrase. The ordinary meaning of "arrange" requires a party to "take intentional steps to dispose of a hazardous substance." The Court went on to state that a party's "knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes." This knowledge alone, however, is insufficient to prove that the party "'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product."

The Court found that, even though Shell had

knowledge of "minor, accidental spills," it lacked the requisite intent to be deemed an arranger under CERCLA. The Court reasoned that the evidence did not support "an inference that Shell intended such spills to occur," particularly in light of the fact that the oil company had "taken numerous steps to encourage its distributors to reduce the likelihood of such spills."

The dissent, written by Justice Ruth Bader Ginsberg, disagreed with the majority's determination that Shell was not subject to arranger liability. Justice Ginsberg criticized the majority for relying on the "F.O.B. Destination" to establish that the transfer of the chemicals' ownership occurred before delivery. Justice Ginsberg stated emphatically, "In my view, CERCLA liability, or the absence thereof, should not turn, in any part, on such an eminently shipper-fixable specification such as 'F.O.B. Destination.'"

Apportionment

The Court also reversed the Ninth Circuit's decision to apply joint and several liability to the defendants, finding that there was a "rational basis" for apportionment. The Court followed the decision in *United States v. Chem-dyne,* 572 F. Supp. 802 (S.D. Ohio 1983), written by Chief Judge Carl Rubin of the U.S. District Court for the Southern District of Ohio. In that case, Chief Judge Rubin held that, although CERCLA imposed a "strict liability standard," it did not require the application of joint and several liability in every case. Following the Restatement of Torts, the Supreme Court held that "apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'" The Court also found that the remaining parties—Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company—had satisfied their burden of showing that there was a reasonable basis for apportionment and upheld the district court's apportionment calculation. Justice Ginsberg questioned whether the district court should have pursued the issue of apportionment sua sponte.

Conclusions and Implications

The implications of the portions of the *Burlington* decision that deal with arranger liability are uncertain. One court has gone so far as to characterize the decision as raising "new questions and legal uncertainty." The Supreme Court's own language and subsequent opinions by other courts suggest that the opinion's definition of arranger liability may be limited to its facts. The Court departed from precedent by holding that a party's mere knowledge that its product will be leaked or spilled is insufficient to establish arranger liability, especially when the product is an unused and useful product. This caveat creates the possibility of an argument that the disposal of used or recycled products should be treated differently.

Two courts have departed from the result in *Burlington* by distinguishing its facts. The U.S. District Court for the District of Maine applied the new definition of arranger liability to a railroad company and held that it was subject to liability. The court distinguished the facts in *Frontier Communications Corporation v. Barrett Paving Materials Inc.*, no. 1:07-cv-113-GZS, 2009 WL 1941920 (D. Me. July 7, 2009), from those in *Burlington*, finding that allegations that the railroad company had disposed of tar and other contaminants via sewer lines exceeded "mere knowledge that spills and leaks continued to occur."

The U.S. District Court for the Western District of Washington also limited *Burlington*'s application to its facts. In *United States v. Washington State Department of Transportation* (WSDOT)*,* no. C08-5722RJB, 2009 WL 2985474 (D. Wash. Sept. 15, 2009), the WSDOT sought contribution from the United States based on the U.S. Army Corps of Engineers' alleged dredging activities on a Superfund site. The United States cited *Burlington* in its motion to dismiss, arguing that the Army Corps of Engineers was not subject to arranger liability. The court denied the motion, calling the United States' comparison between the Corps of Engineers in the case being heard and Shell in *Burlington* incomplete. The court noted that, because Shell was involved in the "manufacturing, sale, and eventual disposal of hazardous chemicals," possession of the chemicals was the determining factor for liability. The court held that the Corps of Engineers' liability turned on its level of involvement in "granting permits for dredging and disposing of dredged materials."

The Supreme Court's decision regarding the availability of apportionment will increase the ability of potentially responsible parties to limit their exposure for cleanup costs. The ruling may, however, be problematic for government agencies that will be left funding larger portions of the cleanups at Superfund sites when PRPs can show a rational basis for apportionment. Agencies will be forced to fund the shares of cleanup costs for defunct or insolvent PRPs, orphan shares, or when the remaining PRPs can show a rational basis for apportionment. Under joint and several liability, the remaining potentially responsible parties would be responsible for the entire cost of the cleanup. **TFL**

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