Outside Counsel

U.S. Supreme Court Toughens Burdens of Proof Under CERCLA

By Stanley N. Alpert

On May 4, 2009, the U.S. Supreme Court rocked the CERCLA world in *Burlington Northern and Santa Fe Railway Company v. United States*,[1] Two major issues were addressed. First, how much proof is required before a company is labeled an "arranger" for disposal of hazardous wastes under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the federal Superfund law? The answer is more than before. Second, how much proof must a single potentially responsible party (PRP) under CERCLA present before a court will find its liability divisible and refuse to apply the general rule of joint and several liability? The answer is less than before.

In *Burlington Northern*, the Court freed Shell Oil Company of arranger liability for pesticide disposal even though Shell chose to sell its chemicals in bulk in a manner that it knew was resulting in spills and leaks on the purchaser's property. The Court also disagreed with the U.S. Court of Appeals for the Ninth Circuit for insisting on joint and several liability for the two railroad owners of a portion of the property when, based on a thin fact record, the lower court was able to find divisible harm.

On its face, it looks like the Court is itching for taxpayers to foot the bill to clean up PRP-challenged sites: the Court applied a high standard of evidence before it would impose arranger liability and applied a low standard of evidence to permit the avoidance of joint and several liability. On closer examination, these cases remain intensely fact-specific, and the trial team seeking to place liability where liability should lie must investigate well and present the facts well in light of the heightened scrutiny *Burlington Northern* implies.

CERCLA imposes strict liability for environmental contamination upon broad classes of potentially responsible parties, or PRPs, one of which is:

> (3) *any person who by contract, agreement, or otherwise arranged for disposal or treatment*, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances....[2]

Knowledge that spills would result is appropriate evidence of the arranging entity's intent, but mere knowledge of spills is not sufficient to impose CERCLA liability.

Once an entity is identified as a PRP, it may be required by administrative order or court proceeding to clean up a contaminated area or it may be required to reimburse the government for its past and future response costs, including oversight costs. There is a huge incentive for a PRP to obey and take over the cleanup itself, in part due to potential penalties that may be imposed and in part because it always costs far more to remediate when the EPA cleans up a site.

Companies that directly arrange for the disposal of wastes are plainly within the CERCLA cleanup liability scheme. The issue in *Burlington Northern* related to more subtle "arranger" behavior. For example, let's say a pesticide company is not specifically seeking to arrange for the disposal of chemicals, but it owns the raw materials that it provides to a formulator, maintains control over the formulation of the final product, and during that process materials are disposed of. That's a good case for liability.[3] On the other hand, if all that oil companies do is deliver petroleum products to service stations, without much further facts, a court may find there is not enough actual control to impose arranger liability for spills at the service stations on those supplying companies.[4]

Raising the Bar

Within the arranger statutory framework, *Burlington Northern* was a close call. For years, Shell delivered hazardous chemical pesticides to Brown & Bryant, a company in the business of distributing them by spreading the pesticides on customers' farms. In the mid-1960s, Shell made a business decision to stop delivering in 55-gallon drums that ensured against leakage during delivery and transfer, instead requiring B&B to keep bulk storage facilities that leaked in the ordinary course of business, which Shell knew. California and the U.S. Department of Justice said this fit squarely under CERCLA liability for "arrang[ing] for disposal" because Shell knew that the deliveries would result in spilling. The governments conceded that the purpose of the transaction was the delivery of a useful product, but maintained that deliveries with knowledge that spills and leaks would result was sufficient to impose CERCLA arranger liability.

The Court raised the bar for the governments to impose liability. Yes, knowledge that spills would result is appropriate evidence of the arranging entity's intent, but mere knowledge of spills is not sufficient to impose CERCLA liability. The evidence as a whole must show an intent to enter into an arrangement for disposal of the wastes. Shell must have entered into the arrangement with B&B with the intention that at least a portion of the product would be disposed of during

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the transfer process. The Court turned to its own evaluation of the evidence, and found that while Shell was aware of regular, minor spills, it had nonetheless taken affirmative steps to require the purchaser to reduce the likelihood of spills. On that evidence, the Court held, no "arrangement" for "disposal" had occurred, and Shell was not liable at all.

In dissent, while agreeing it was a close case against Shell, Justice Ruth Bader Ginsburg sided with the Ninth Circuit and the trial court and quickly spun the facts to qualify Shell as an arranger. Shell chose the manner of delivery. It chose the fact that ownership of the chemicals transferred upon arrival at the destination, a factor which Justice Ginsburg called "eminently shipper-fixable." While "mere knowledge" may not suffice, useful product sales, Justice Ginsburg held, did not immunize Shell from CERCLA liability given the control rein Shell held over the mode of delivery and transfer.

After *Burlington Northern*, counsel seeking to successfully impose arranger liability must carefully probe all aspects of intent, developing evidence of the reasons for certain commercial transactions and how those transactions demonstrate intent to enter into an arrangement to dispose of at least some of the sold chemicals. Previously this was taken far more for granted. In the Long Island Mattiace Superfund case, hundreds of companies had arranged for the disposal of wastes because they sent almost-empty chemical drums back to the site with knowledge that, in re-using the drums, the chemical distributor would rinse out the drums and spill the residues on the ground.[3] Eighty-four companies settled to avoid an arranger trial. Query whether such settlements will be fewer under the new regime.

Apportioning Liability

The courts reviewing CERCLA liability decided early on, based on the legislative history, that the broad liability mandate required that under common law principles joint and several liability must be imposed, unless the PRP can meet the difficult burden of proving that its contamination is divisible from the rest.[6] In the second major holding in *Burlington Northern*, the Supreme Court leap-frogged over the Ninth Circuit and back to the trial court's decision to do rough justice by using uncertain facts to apportion liability, finding divisibility where it might not have been found before.

Two railroads had leased a portion of the facility property to B&B at the time that disposal of the chemicals took place, placing them squarely under CERCLA's landowner liability. The Ninth Circuit recognized that joint and several liability may result in unfairness, particularly where the property owner party did not itself create the contamination and may have few or no records of what was disposed of where and when, meaning its burden of proving divisibility is difficult to meet. But Congress mandated this structure, and the circuit court emphasized that any statutorily responsible party who gained some benefit from the pollution must bear the mantle of joint and several liability (subject to a hearing on apportionment in a contribution phase) to keep the bill from being foisted on the totally innocent U.S. taxpayer.[7]

Without real proof of divisibility having been presented, the trial court apportioned based on loose and uncertain figures: the railroad portion of the property was 19 percent of the overall site; the railroad lease to B&B was for 45 percent of the time that B&B operated; and, only two out of three of the chemicals driving the remediation were disposed of on the railroad portion. Hence, using a multiplier, the trial court found it was possible to apportion liability and it relieved the railroads from the normal burden of joint and several liability. The Ninth Circuit, reversing, found the evidence to be insufficiently exact to answer whether the contamination from the railroad portion of the site was connected to the presence of contamination across the site and hence not really "divisible."

Taking three pages to reject the Ninth Circuit's long, scholarly discussion, the Supreme Court acknowledged the weaknesses in the evidence to allow apportionment but affirmed the denial of joint and several liability anyway, holding the apportionment evidence to be sufficient.

The Court may have been reaching to do fairness to the railroad defendants whose role as lessors in the contamination was relatively minor. But again, a critical view of the Court's decision finds the evidentiary standards tightened for proving liability, as an arranger, and loosened when another party seeks the partial exoneration of a divisibility finding. Justice Ginsburg would have remanded for a full hearing on whether divisibility was really possible, as the governments contended that the trial court's decision to make an apportionment calculation had come without warning and without the opportunity to present evidence.

The lesson here is as with the arranger issue: practitioners must dedicate increased energy to developing the liability facts to meet the heightened evidentiary challenges posed now by the Supreme Court.

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1. __S.Ct.__, 2009 WL 1174849 (May 4, 2009).
2. 42 U.S.C. §9607(a) (emphasis supplied).
3. *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989).
4. *Generdl Electric v. AAMCO Transmissions*, 962 F.2d 281 (2d Cir 1992). Common law product liability may, however, be a different matter, in terms of liability for leaks at independent service stations, as the oil industry has found in the MTBE products liability multi-district litigation before Judge Shira Scheindlin in New York. *In re MTBE Litigation*, 379 F.Supp.2d 348 (S.D.N.Y. 2005).
5. See http://www.constantinecannon.com/pdf_etc/alpertartchemicalwaste.pdf.
6. *United States v. Chem Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).
7. 520 F.3d 918, 940-41 (9th Cir. 2008).