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Divvying Up the Tab: Implications of *Burlington Northern* on Superfund Apportionment

by

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On May 4, 2009, in *Burlington Northern and Santa Fe Ry. Co. et al. v. United States*, No. 07-1601, 07-1607, 2009 WL 1174849 (May 4, 2009), the United States Supreme Court significantly limited the scope of "arranger" liability and, perhaps even more significantly, clarified the applicability of "joint and several" liability under the federal Superfund law. The Court ruled that apportionment is proper where (1) the harm (i.e., the contamination of environmental media) is divisible, and (2) there is a reasonable basis for determining the contribution of each party to such harm. The Court did not appear to delve deeply into the concept of divisibility, focusing instead on whether there is a reasonable basis for apportionment. The conflation of the two concepts by courts interpreting the decision in future cases seems likely. This could mean that joint and several liability -- the United States' big stick -- could become an endangered species. That, in turn, could mean that where defunct or insolvent parties are among the liable parties at a Superfund site, the government may have to pick up those parties' "orphan shares."

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Factual Background

This case concerns the United States' attempt to recover its costs of cleaning up contamination caused by chemicals that had leaked from a closed chemical distribution facility. In the 1970s, Brown & Bryant ("B&B") an agricultural chemical distribution company (now defunct), had purchased pesticide chemicals from Shell Oil Company ("Shell"), and stored them on property, which was adjacent to land owned by Burlington Northern Railroad and Union Pacific Railroad ("the Railroads"). B&B later expanded its operations onto the Railroads' property. Wastewater and chemical runoff from the Railroads' land as well as adjacent B&B land ran into an unlined drainage pond, which contaminated the underlying groundwater.

Shell delivered the chemical products to B&B by tanker truck, and transferred the products into on-site storage tanks. During these transfers, small leaks and spills occurred. Shell took steps to encourage the safer handling of its products, including instituting a self-certification of a compliance program. Even though B&B certified that it had made a number of improvements to its facility, it was still known to be a relatively sloppy operator; B&B released large amounts of chemicals onto its property when it washed out its equipment.

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In 1988, the California Department of Toxics Substances Control ordered B&B to clean up soil and groundwater contamination on the site. By 1989, when B&B became insolvent and ceased all operations, the U.S. Environmental Protection Agency ("EPA") had stepped in and the site was placed on the National Priorities List. EPA named both of the Railroads as potentially responsible parties ("PRPs") under CERCLA § 107(a)(1) as current owners of a facility from which hazardous substances have been released. EPA also named Shell a PRP under CERCLA § 107(a)(3), asserting that Shell had "arranged for disposal" of hazardous substances at the site. EPA's "arranger" theory was that Shell had delivered chemicals to the site which it knew, or should have foreseen, would be spilled by B&B, and thus in effect "arranged for disposal" of a portion of the delivered material. In 1996, the United States and the State of California filed a cost recovery action against the Railroads and Shell, seeking to recover over $8 million in response costs.

The Eastern District Court of California entered judgment in favor of California and the EPA, finding the Railroads liable as owners under Section 107 (a)(1) and (2) of CERCLA. *United States v. Atchison, Topeka & Santa Fe Ry. Co*., No. CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228 OWW, 2003 WL 25518047 (E.D. Cal. July 15, 2003). Shell was found liable as an entity that had arranged for disposal of hazardous substances under Section 107(a)(3). The trial court did not impose joint and several liability on the Railroads and Shell. Instead, the remediation costs were held to be divisible, and therefore, capable of apportionment. The district court allocated 9% of the total site remediation costs to the Railroads and 6% to Shell. On appeal, the Ninth Circuit upheld the district court's determination that Shell was liable under CERCLA as an "arranger" of the disposal of hazardous substances, even if it did not intend to dispose of those substances, on the ground that Shell "had sufficient control over, and knowledge of, the transfer process." *United States v. Burlington Northern & Santa Fe Ry. Co*., 502 F.3d 781 (9th Cir. 2007). The Ninth Circuit, however, reversed the district court's apportionment of liability between the railroads and Shell, holding that the record was insufficient to establish a reasonable basis for apportionment.

Arranger Liability

The Supreme Court affirmed that "arranger liability" has to be determined on a case-by-case basis, but reversed the Ninth Circuit's finding that the standard for liability was met in this case with respect to Shell. The Court held that because CERCLA does not specifically define what it means to "arrange for" the disposal of a hazardous substance, the phrase should be given its ordinary meaning. The Court found that "arrange" denotes a specifically directed action, such that an entity acts as an arranger "when it takes intentional steps to dispose of a hazardous substance." The simple instance is where an entity enters into a transaction "for the sole purpose of discarding a used and no longer useful hazardous substance." In such cases, there is a clear intent to discard the product, and there is liability under Section 9607(a)(3). Alternatively, "an entity could not be held liable as an arranger merely for selling a new and useful product in a way that led to contamination." The more difficult instances are the cases in the middle - the "many permutations of 'arrangements' that fall between these two extremes." In such circumstances, "liability may not extend beyond the limits of the statute itself."

Based on the facts in this case, the Court held that although Shell knew spills and leaks would result from the transfer of product to B&B, there was no evidence that Shell intended for B&B to dispose of its chemicals. Instead, the Court found that Shell took numerous steps to encourage the reduction of spills, even if such efforts were "less than successful." Shell's mere knowledge of the spills was insufficient to find "intent" of disposal. Accordingly, the Court reversed both the district court and the Ninth Circuit, and held that Shell was not liable under the Superfund law.

Apportionment

The second holding in *Burlington Northern* is of even greater practical significance. The Supreme Court reversed the Ninth Circuit's ruling that the Railroads were jointly and severally liable for cleanup of the site and reinstated the District Court's allocation of 9% of the cleanup costs to Burlington Northern Railroad. The Supreme Court ruled that the district court's liability calculation, relying principally on geography, time, and volume, was reasonable and supported by the evidence.

The Court noted that CERCLA does not contain language establishing the concept of joint and several liability. Rather, the notion that PRPs may be held jointly and severally liable is a judicial doctrine grounded in Section 433A of the Restatement (Second) of Torts, which states that:

> When two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.

The Court found that an examination of this language demonstrates that "apportionment is proper when 'there is a reasonable basis' for determining the contribution of each cause to a single harm." Understanding that "not all harms are capable of apportionment," the Court held that in cases where multiple parties cause a single harm, the burden of proving divisibility of the that harm is on the defendants: "CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable for apportionment exists."

Significantly, the Court found that the evidence supporting apportionment need not be precise. There need only be "facts contained in the record reasonably support[ing] the apportionment of liability." The district court used a formula consisting of the percentages of land leased, the period of ownership and the types of hazardous chemicals spilled on the leased land. This formula, labeled a "meat ax" by the Ninth Circuit, was reasonable in the eyes of the Supreme Court. It ruled that the evidence in the record reasonably supported the District Court's allocation findings, affirmed its decision and reversed the Circuit Court.

In so holding, the Court reaffirmed prior jurisprudence that liability may be apportioned under a "divisibility of harm" analysis and that joint and several liability is not required in every case. The Court highlighted *United States v. Chem-Dyne Corp*., 572 F. Supp. 802 (S.D. Ohio 1983), where the court held that joint and several liability was not required in every case brought under CERCLA, but could be apportioned on a "divisibility of harm" basis, relying on the Restatement (Second) of Torts, §433A. The Court concluded that apportionment was reasonable in this case simply because the record provided a reasonable basis for the District Court's conclusions. The Supreme Court rejected the government's argument that CERCLA required joint and several liability where uncertainties about how much different pollutants from different portions of the overall facility caused or contributed to contamination conditions.

Implications

From a practical and policy standpoint, the most significant implications arise out of the Court's holding on apportionment. Based on the Court's holding, a PRP that can demonstrate a "reasonable basis for apportionment" should only be held responsible for a share of the cost of cleaning up a site. This will be particularly important where defunct or insolvent companies are among the other PRPs for the site. By demonstrating a "reasonable basis for apportionment," a PRP can avoid being held jointly and severally liable for the entire cleanup cost. A determination of joint and several liability leaves a PRP in the position of having to seek contribution from other PRPs. If PRPs are defunct or insolvent their "orphan share" of the liability would be borne by the PRPs deemed jointly and severally liable. By convincing a court that there is a reasonable basis for apportionment, a PRP pays only its share of the liability, and the government gets stuck with the "orphan share."

Prior to the *Burlington Northern* decision, many courts had imposed a more rigorous burden on a defendant seeking apportionment, in particular, on the threshold question of whether harm was divisible. A defendant's liability would be considered divisible primarily where the defendant could establish that it had a discrete connection to the contamination, e.g., it contributed only to a geographically isolated area of contamination. This heightened standard led to the rejection of requests for apportionment of damages in many cases.

For example, in *United States v. Monsanto Company et al*., 858 F.2d 160 (4th Cir. 1988), the Fourth Circuit rejected divisibility based upon calculations of the volume of hazardous materials deposited by each entity. The court reasoned that in "light of commingling of hazardous substances, the district court could not have reasonably apportioned liability without some evidence

disclosing the individual and interactive qualities of the substance deposited." This application of the reasonableness standard requires significantly more evidence of divisibility than was required by the Court in *Burlington North*.

A divisibility of harm argument was rejected for similar reasons in *United States v. Agway, Inc*., 193 F. Supp. 2d 545 (N.D.N.Y. 2002). In this case, the PRP's barrels containing hazardous substances mixed with the chemicals in other barrels shipped to the site. Because of such commingling, the district court found that, despite evidence of respective volumes of hazardous substances attributable to each of the PRPs, "relative toxicity, migratory potential, degree of migration and 'synergistic capacities' of the hazardous substances at the Site" would be essential to any determination of divisibility.

By contrast, in *Burlington Northern*, the Court did not require such evidentiary precision, even though at least three different hazardous materials contributed to the contamination at the site. To the contrary, the Court noted that the "evidence adduced by the parties did not allow the court to calculate precisely the amount of hazardous chemicals contributed by the Railroad parcel to the total site contamination or the exact percentage of harm caused by each chemical." Yet the Court still held that the evidence provided was sufficient to find a divisible harm appropriate for allocation.

The *Burlington Northern* decision in effect sweeps aside prior jurisprudence that had limited the availability of apportionment to the rare case in which a defendant's wastes cause a discrete or isolated harm, which is clearly segregated from other harm. The Court articulated a significantly lower "reasonable basis" standard for apportioning liability in cost recovery cases. District courts likely will conclude that they have greater latitude to find that a defendant has met its burden of proving divisibility. It is therefore likely that divisibility findings in Superfund cost recovery cases will become much more commonplace than they are today. This will reduce the uncertainty PRPs currently face in understanding their exposure. Armed with the Court's reasoning, an entity with a minor or discrete connection to a site should have less concern over the possibility of a court imposing joint and several liability for the entire site cleanup. The decision should dispel the PRP's proverbial fear of facing joint and several liability for throwing a penny in a landfill.

The more difficult question in the wake of the *Burlington Northern* decision is how courts will handle "toxic soup" cases, e.g.., where many hazardous substances of varying toxicity are commingled. Will courts find it reasonable to apportion liability based simply on volumetric waste data, or will they require "relative toxicity, migratory potential, degree of migration and 'synergistic capacities' of the hazardous substances at the Site," as did the court in *Agway*? There is no answer to this question. Defendants that sent small volumes of relatively more toxic wastes will assert that it is reasonable to apportion on the basis of volume. And defendants that sent large volumes of very dilute or low toxicity wastes will disagree and urge the court to declare the harm indivisible and not reasonably capable of apportionment. Although predicting the outcome of such fights is perilous at this juncture, we can say that at a minimum *Burlington Northern* strengthens the hand of those arguing for apportionment. In general, fewer courts are likely to impose joint and several liability.

With the decline of joint and several liability, the government will increasingly be forced to assume responsibility for the "orphan share" of liability belonging to defunct or impecunious PRPs. With the government facing the possibility of picking up a larger portion of the tab, Congress will have even more impetus to pass legislation currently pending in committee to reauthorize the Superfund tax.

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