LLB&L Client Alert

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Supreme Court Narrows the Interpretation of CERCLA "Arranger" and Joint and Several Liability

On May 4, 2009, in *Burlington Northern & Santa Fe Railway Co., et al. v. U.S. et al.*, 556 U.S. ___ (May 4, 2009) ("Burlington Northern"), the United States Supreme Court issued a noteworthy decision impacting two significant areas under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"): the bounds of "arranger" liability, and when it is appropriate to impose joint and several liability. For "arranger" liability, the Court held that a party cannot be liable as an "arranger" for the disposal of hazardous substances, unless it had an *intention* that at least a portion of a product be disposed. For joint and several liability, the Court held that when there is a reasonable basis for determining the contribution of each cause to a single harm, joint and several liability should not be imposed, and that the "reasonable basis" need not be precise or exact.

Background

From 1960 to 1989, Brown & Bryant ("B&B") operated an agricultural chemical facility in Arvin, California (the "B&B facility"). In 1975, B&B expanded its facility by leasing a small, adjacent tract from Burlington Northern & Santa Fe Railway Company and Union Pacific Railroad Company (the "Railroads"). B&B stored and distributed hazardous chemicals, including pesticides. Shell Oil Company ("Shell") sold and delivered pesticides to the B&B facility via common carrier. During the delivery process, leaks and spills occurred. Shell was aware that spills and leakage occurred at facilities such as the B&B facility, and to reduce them, Shell provided manuals and later required facility inspections and certifications from distribution facilities of their compliance with applicable laws and regulations. Shell also mandated bulk storage of the pesticides.

Over the years of operation, hazardous chemicals (including pesticides sold to B&B by Shell) seeped into the soil and groundwater at the B&B facility, and the B&B facility was added to the National Priority List in 1989. Both the federal and state governments (the "Governments") participated in cleanup of the B&B facility, and *Burlington Northern* began as a CERCLA cost recovery case brought by the Governments in federal district court against Shell and the Railroads. By then, B&B was insolvent. The district court held that Shell and the Railroads were both liable under CERCLA – Shell as an "arranger" for the disposal of hazardous substances through the sale and delivery of the pesticides, and the Railroads as an owner of a portion of the B&B facility. On appeal, the Ninth Circuit Court of Appeals upheld Shell's "arranger" liability, but reversed the district court's apportionment of costs and held that the defendants should be jointly and severally liable for the cleanup of the B&B facility. In 2008, the U.S. Supreme Court granted *certiorari* to determine whether the parties were properly held liable, and if so, whether joint and several liability should be imposed.

"Arranger" Liability Requires Intent

CERCLA, the federal "Superfund" statute, imposes liability on four types of potentially responsible parties ("PRPs"), including any person who, by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances. See 42 U.S.C. §9607(a)(3). In *Burlington Northern*, the Governments argued that even though Shell was selling a useful product, it knew that some leaks and spills would occur, and therefore it "arranged" for disposal of the hazardous substance.

The Court analyzed the meaning of "arrange" in evaluating the Governments' argument against Shell. The Court ultimately held that "under the plain language of [CERCLA], an entity may qualify as an arranger under §9607(a)(3) when it takes *intentional* steps to dispose of a hazardous substance." (emphasis added.) For "arranger" liability to apply within the context of the sale of a useful product, a party "must have entered into the sale… with the intention that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in §6903(3) [the statutory definition of 'disposal']." The Court conceded that in some instances an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of intent to dispose. Nevertheless, in light of the steps taken by Shell to reduce the likelihood of releases, the Court found no indication that Shell intended spills and leakage to occur at the B&B facility, and therefore Shell could not be held liable as an "arranger."

Apportionment of Costs: "Reasonable" Means Reasonable

CERCLA also provides that owners of facilities, such as the Railroads, are liable as PRPs. See 42

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U.S.C. §9607(a)(1). CERCLA is a strict liability statute (meaning it can create liability without regard to fault), and can hold defendants with a small role in a contaminated property liable. In addition, in CERCLA cases courts have consistently applied the Restatement (Second) of Torts § 875, which says that if there is a single and indivisible harm, all defendants can be subject to joint and several liability for the entire harm. However, courts have also held that apportionment of liability, rather than joint and several liability, is proper when there is a reasonable basis for determining the contribution of each cause to a single harm. Defendants seeking to avoid joint and several liability bear the burden of proving that such reasonable basis for apportionment exists.

The Court in *Burlington Northern* provided significant insight into what may serve as a "reasonable basis" for determining the contribution of each defendant, allowing defendants to avoid joint and several liability to the EPA. The district court, Ninth Circuit, and Supreme Court all agreed that the harm at the B&B facility was divisible in concept, but the question was whether the Railroads had carried their burden of proof as to whether there was a reasonable basis to determine their contribution. The district court considered three relatively simple factors, along with a 50 percent allowance for "calculation errors," to determine that the Railroads were liable for only 9 percent of the cleanup costs. The three factors included: the proportion of the facility property owned by the Railroads, amount of time that the B&B facility included the Railroads' property, and the proportion of the total remediation costs associated with the type of contaminants present on the Railroads' property. Calling the district court's analysis a "meat axe approach," the Ninth Circuit held that the evidence was inadequate to apportion liability because none of these factors could provide sufficient evidence about the location and quantity of contamination. In reversing, the Court stated that the facts in the record reasonably supported the district court's apportionment of liability. The *Burlington Northern* opinion demonstrates that the Court will focus on what is actually "reasonable," rather than requiring a level of proof that is precise and exact, and often unattainable.

Commentary

The Court's holding in *Burlington Northern* represents a new, narrower interpretation of "arranger" liability, foreclosing future arguments that merely selling a product (without the intention that a portion of the product be disposed of) is a valid basis for holding a party liable. Although the Court did not describe what comprises "intent," it is apparent that mere knowledge of spills and leaks is insufficient grounds for concluding that a party "arranged" for disposal. Legitimate questions remain regarding what preventative measures to reduce releases, if any, are sufficient to rebut the argument that knowledge of incidental spills and releases may provide adequate evidence of intent to dispose. Moreover, *Burlington Northern*'s pragmatic and liberal approach to allowing apportionment may result in PRPs having an easier time convincing district courts or government agencies that harm in CERCLA cases is divisible. PRPs now stand a greater chance of avoiding joint and several liability.

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