

Burlington Northern & Santa Fe Railway Co. v. United States: **The Supreme Court Provides Guidance on Arranger Liability and Apportionment**

On May 4, 2009, the U.S. Supreme Court issued its decision in *Burlington Northern & Santa Fe Railway Co. v. United States*.¹ In its 8-1 decision the Court clarified the elements of arranger liability and apportionment of remediation costs. The decision provides both opportunity and possible pitfalls for CERCLA litigants.

Background and Procedural History

The circumstances giving rise to this case are fairly typical for CERCLA cases. Starting in 1960, Brown and Bryant Inc. ("B&B") operated an agricultural chemical distribution business on a 3.8 acre parcel of land in Arvin, California. B&B purchased various chemicals and pesticides from suppliers such as Shell Oil Company and Dow Chemical. By 1975 B&B expanded its operations on to an adjacent 0.9 acre parcel of land owned by Burlington Northern and Santa Fe Railway Company and the Union Pacific Railroad Company (the "Railroads"). These parcels both were sloped towards an unlined drainage pond located on the main parcel, which allowed chemical runoff to seep into the groundwater.²

By the mid-1960s Shell began to require its distributors to store D-D, a highly corrosive chemical, in bulk storage facilities. Inevitably spills of the product occurred when being transferred from the tanker trucks to the bulk tanks or from the bulk tanks to smaller delivery vehicles.³ When Shell became aware that spills of D-D were a common event at its distributors, it took a number of steps to promote the safe handling of its products. As part of this effort Shell provided detailed safe handling manuals and a discount program for distributors that improved their bulk handling procedures, and required distributors to be inspected by qualified engineers.⁴

In spite of these improvements, B&B continued to suffer delivery spills and other failures that led to D-D and other chemicals seeping into the soil

and groundwater at the facility. B&B undertook some remediation efforts, but by 1989 it had become insolvent and ceased business operations. California and the EPA then stepped in to take over remediation efforts and spent \$8 million by mid-1998.⁵

In 1991 the EPA ordered the Railroads to participate in the remediation process, which they did, expending \$3 million. The Railroads in turn brought a cost recovery action against B&B, which was consolidated with two cost recovery actions brought by the state of California and the EPA against the Railroads and Shell Oil.

The District Court Action

The district court conducted a trial lasting a month-and-a-half and, after a lengthy delay, issued a detailed order supporting its judgment in favor of the EPA and the state of California. The district court held that both the railroads and Shell Oil were potentially responsible parties under CERCLA. The Railroads were held liable because they were the owners of at least a portion of the facility and Shell Oil was found liable as it had arranged for the disposal of hazardous substances through its sale and delivery of D-D.⁶

However, the district court did not impose joint and several liability on Shell and the Railroads for the entire amount of the response costs incurred by the government. The district court concluded that, although the site contamination created a single harm, it was divisible and on that basis capable of apportionment. After criticizing the Railroads for their scorched earth defense on liability and for not producing precise figures concerning the quantity of chemical spills on each parcel, the district court undertook its own analysis based upon various factors and concluded that the Railroads liability constituted 9 percent of the total response costs. Further, based upon its estimations of chemical spills for Shell's products, the district

court held Shell liable for 6 percent of the response costs.⁷

The Court of Appeals

The parties appealed the district court's decision.⁸ The court of appeals noted that because Shell did not directly contract with B&B to directly dispose of a hazardous waste product it did not qualify as a "traditional" arranger. Notwithstanding, the Court wrote that CERCLA's definition of disposal included such acts as "leaking" and "spilling" and that Shell could still be held responsible under a "'broader' category of arranger liability."⁹ In the court's view, if the disposal of hazardous wastes was a foreseeable result of the transaction that gave rise to arranger liability, then an entity could arrange for disposal even when "it did not intend to dispose of hazardous wastes."¹⁰

The court applied this reasoning to the facts at hand and held that Shell did arrange for the disposal of hazardous substances through its sale and delivery of D-D because Shell "was aware of and to some degree dictated, the transfer arrangements; knew that some leakage was likely in the transfer process; and provided advice and supervision concerning safe transfer and storage."¹¹ The court concluded "[t]he disposal of a hazardous substance was thus a necessary part of the sale and delivery process."¹²

Regarding apportionment, the appeals court determined there was "no dispute" that the harm caused by the defendants was capable of apportionment.¹³ But the court found that the district court committed error in finding that the record established a reasonable basis for apportionment. Quite simply, Shell and the Railroads presented little to no evidence on the question of apportionment and did not bear their burdens on the issue.¹⁴

U.S. Supreme Court Decision

The Supreme Court began its analysis of the arranger liability issue by examining the language of the statute. The Court noted that the statute did not define what it means to arrange for disposal of hazardous waste or substances.¹⁵ Therefore the Court gave the phrase its ordinary meaning, which in everyday usage the Court found to mean action directed to a specific purpose. On that basis, under the plain language of the statute, an entity may be an arranger under the statute when it takes intentional steps to dispose of a hazardous substance.¹⁶ However, the Court did note that in some instances an entity's knowledge that its products will be spilled or otherwise leaked may provide evidence that the entity intended to dispose of its hazardous waste. But knowledge alone, the Court found, is insufficient to prove that an entity "planned for" the disposal, particularly where the disposal is the result of a legitimate sale of a useful product. Here the Court concluded that the facts found by the district court did not support a finding of intent. Although the evidence did show that Shell had knowledge that there were accidental spills during the transfer of its products, that evidence did not support the inference that Shell intended those spills to take place. Rather the evidence showed that Shell took a number of steps which were intended to encourage the distributors to reduce the likelihood of those spills. Therefore, the Court concluded that Shell's mere knowledge that spills took place over a continuing time was insufficient grounds for concluding that Shell had arranged for the disposal of hazardous waste within the meaning of CERCLA.¹⁷

The Court next turned its attention to the issue of apportionment. Despite the conclusion of the appeals court that there was insufficient data to support the district court's finding on apportionment, the Supreme Court concluded that "the facts contained in the record reasonably supported the apportionment of liability."¹⁸ The Supreme Court noted that the district court had made detailed findings making it very clear that the primary pollution at the facility was contained in the unlined pond and sump located in an area most distant from the Railroads' property and any spills that had occurred on the Railroads' parcel. In short, the Supreme Court found that the district court's reliance on the percentages of land area, time

of ownership, and types of hazardous products involved in determining its allocation and apportionment was appropriate.¹⁹

Ramifications of the Decision

The Supreme Court's ruling may provide important tools to litigants facing Superfund liability issues. Defendants may now have a more clearly defined defense under arranger liability. Even though the Court left the door slightly ajar by noting that an entity's knowledge that its product will be leaked may provide evidence of that entity's intent to dispose of its hazardous-waste, the decision seems to make clear that for arranger liability to attach, an entity must "plan for" the disposal of a hazardous substance, where that substance is an unused, useful product. In essence, for arranger liability to attach there must be facts sufficient to show an entity intentionally arranged the disposal of its useful products.

More importantly, however, the Court's opinion confirms that apportionment can be used as a total defense to joint and several liability in CERCLA cases. The Court accepted the approach the district court employed in using percentages of land area owned, length of ownership, and types of hazardous substances involved to arrive at a suitable apportionment of liability. Creative litigants will be able to fashion arguments in favor of apportionment based on complex facts and a combination of these factors. Moreover, parties may be inclined to bargain more aggressively with governmental entities seeking cost recovery, because the decision increases the risk to governmental entities that joint and several liability will not be imposed on a potentially responsible party.

Parties involved in environmental litigation would do well to study this decision and determine where it provides potential advantages and disadvantages.

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¹ 556 U.S. _____, Slip Op. at 1. (2009).

² *Id.* at 2.

³ *Id.* at 3.

⁴ *Id.*

⁵ *Id.* at 4.

⁶ *Id.* at 5.

⁷ *Id.*

⁸ *Id.* at 6. Shell filed a cross-appeal.

⁹ 520 F.3d 918, 948 (9th Cir. 2008).

¹⁰ *Id.*

¹¹ *Id.* at 950.

¹² *Id.*

¹³ *Id.* at 942.

¹⁴ *Id.*

¹⁵ 556 U.S. _____, Slip Op. at 9-10.

¹⁶ *Id.* at 10-11.

¹⁷ *Id.* at 12-13.

¹⁸ *Id.* at 17.

¹⁹ *Id.*

