

A Potentially Game-Changing Ruling on CERCLA Liability

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In a nearly unanimous decision written by Justice John Paul Stevens, the Supreme Court in *Burlington Northern & Santa Fe Railway Company v. United States* has both sharpened and added powerful arrows to the quiver of defendants faced with Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) liability. No. 07-1601, 556 U.S. (2009). But in line with the Court’s recent CERCLA decisions, the true advantage to defendants in future skirmishes taking place in the district courts across the country is far from certain.

In *Burlington Northern*, the Court upheld a district court decision that apportioned the CERCLA liability of two Railroad companies based on approximate calculations of the defendant’s involvement at a CERCLA site and defined in sharp relief the contours of arranger liability under the statute. With regard to the apportionment ruling, the Court embraced guidance found in the Restatement (Second) of Torts. In line with the Restatement, the Court held apportionment to be proper when there exists a “reasonable basis” for doing so.

The Court accepted the district court’s findings that two absentee landowner railroads should not be held jointly and severally liable and that their liability may be apportioned based on three measures: the percentage of the facility on land owned by the Railroads, the percentage of time that land constituted part of the facility, and the fact that the two chemicals released on the Railroad parcel contributed to two-thirds of the overall site contamination. The Court also accepted the district court’s upward adjustment of the Railroads’ liability by 50% to provide for “calculation errors.”

The Court’s blessing of the Restatement and the district court’s apportionment ruling warrants a closer examination of both. The Restatement, and the comments therein, espouse a preference for rule-of-thumb type assumptions in dividing parties’ liability. By way of example, one illustration apportions harm caused to crops by trespassing cattle owned by different ranchers. There, the resulting damages are apportioned among the owners of the cattle “on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number.” Restatement, Â§ 433A comment d (emphases added). Similarly, another example apportions environmental pollution in proportion to the length of time two different defendants, who operated the same plant over successive periods of time, based on the “reasonable assumption” that total pollution is roughly the same over the two different periods of operation. Restatement, Â§ 433A comment c.

But the factual setting, including the multiplicity of owners and variability of operations, that resulted in contamination at CERCLA sites is often orders of magnitude more complicated than those examples. A more realistic spin on successive ownership of the polluting plant example would likely involve a plant that has had significantly variable levels of productivity (and, thus, likely releases into the environment) over the periods of ownership and several changes in its waste handling over that time. While a defendant who owned the facility for a short period may wish to point to *Burlington Northern* as support for a simplistic apportionment based on the length of time it operated such a plant, it may come up short.

The Court in *Burlington Northern* framed its approval of the district court’s 9% apportionment of liability to the Railroads with the finding that no more than 10% of the total site contamination resulted from the Railroads’ parcel. It is unclear whether the Court would have approved of the district court’s methodology and the resulting 9% figure had there not been this sort of corroborating finding.

Another aspect that simplified the picture in Burlington Northern is the undisputed fact that the Railroads were absentee landowners that had zero involvement in the operation of the facility. In its ruling on apportionment, the district court observed that “[t]he concept that a passive owner of a contiguous parcel, not representing more than 19% in area of a CERCLA site, operated less than 44% of the time ... should be strictly liable for the entire site remediation ... takes strict liability beyond any rational limit.” It is anyone’s guess how much this notion of fundamental fairness affected the district court’s analysis.

The Court’s decision also left unanswered many other questions relating to apportionment. The Court did not address whether a harm is capable of apportionment as the parties and the lower courts apparently agreed on this issue. The Court also needed not address whether the analysis would differ if a potentially responsible party (“PRP”) were the plaintiff instead of the government. It is worth noting that it is not yet settled whether a PRP, as opposed to the government, may impose joint and several liability on other PRPs in a CERCLA action.

The Court’s holding with regard to arranger liability is similarly significant. In one deft stroke, the Court circumscribed the scope of arranger liability through its construction of the statutory phrase “arranged for disposal.” The Court rejected the Ninth Circuit’s expansive interpretation of the term “disposal” beyond the traditional bounds of arranger liability and the Circuit’s resulting conclusion that Shell Oil Company in that case need not have “intend[ed] to dispose of the product.”

The Court focused on the plain meaning of the statute, particularly the term “arrange.” It held that an entity may qualify as an arranger only when it takes “intentional steps to dispose of a hazardous substance.” And that an entity’s “knowledge alone” that the product may be leaked, spilled or discarded is insufficient to prove the requisite intent, particularly when that activity occurs “as a peripheral result of the legitimate sale of an unused, useful product.” The Court found no evidence that Shell intended the disposal of any chemicals at the facility.

The Court’s particular focus on the term “arrange” calls into question other non-traditional interpretations of arranger liability that are arguably inconsistent with the statutory text. By way of example, another Ninth Circuit decision found that a party could arrange for liability with itself, or, in other words, “arrange[ment]” did not require the involvement of a third party. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006). But the statutory terms strongly imply the presence of a third party. The statute imposes liability on “any person who by contract, agreement, or otherwise arranged for disposal ... of hazardous substances owned or possessed by such person, by another party or entity, at any facility ... from which there is a release.”

A final observation on the Burlington Northern holdings is the combined effect they have on incentives to clean up sites. By narrowing the scope of CERCLA arranger liability and permitting defendants to apportion their liability in the absence of “specific and detailed records,” the Court has arguably raised the risk associated with shouldering initial cleanup costs. The likelihood that orphan shares will remain with the plaintiff is seemingly greater now than before. In the case of government plaintiffs, the costs of that increased risk can perhaps be offset by a renewal of the Superfund tax which is already percolating through Congress. But private parties voluntarily cleaning up sites have no such safety net. It remains to be seen whether this will translate into fewer voluntary private party CERCLA cleanups, and more CERCLA litigation to sort out legal responsibility before remedial activities are undertaken. While the importance of the Court’s holdings is beyond dispute, the lower courts’ application of the Court’s holdings will likely be cauldrons of controversy for years to come.

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