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MUSINGS ON THE IMPACT OF BURLINGTON NORTHERN

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On May 4, 2009, the Supreme Court issued its landmark ruling in *Burlington Northern & Santa Fe Railway v. U.S.*. This decision could have sweeping implications for pending and future cost recovery or contribution actions under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as well as brownfield development. Moreover, the decision will have a particular impact in states like New York that rely almost exclusively on CERCLA to recover their response costs.

This paper will focus on unanswered questions and predictions as to what the decision might mean for environmental litigation over the next few years.

Supreme Court Decision

The Court reviewed §433A of the Restatement (Second) of Torts, which sets forth the principle that "apportionment is proper when 'there is a reasonable basis for determining the contribution

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of each cause to a single harm.'"[2] The Court noted that CERCLA defendants bear the burden of proving that a reasonable basis for apportionment exists. Applying this principle, the Court determined that the district court was reasonable in using the size of the leased parcel and the duration of the lease to apportion liability. Accordingly, the Court reversed the Ninth Circuit's holding and found that the district court reasonably apportioned the Railroads' share of the site remediation costs at 9%.

A. IMPLICATIONS FOR ARRANGER LIABILITY

The Supreme Court reversed the Ninth Circuit's decision regarding arranger liability and held that Shell was not liable as an arranger under CERCLA §9607(a)(3) for releases that occurred at the Site. One of the first questions that seasoned Superfund lawyers ask when they read the *Burlington* decision is whether the Court overruled the line of cases that began with *U.S. v. Aceto Agricultural Chemicals Corp*.[3] These cases involved tolling agreements where manufacturers sent intermediate products or chemicals to a formulator who processed them according to specifications by the manufacturer. Because a certain amount of spillage is contemplated in the formulating process and the manufacturer retains title to the chemicals and final product, courts have held the manufacturers liable as CERCLA arrangers.

The *Burlington* decision does not address liability under the *Aceto* cases, but the issue was briefed and addressed in oral argument. Counsel for Shell, Kathleen M. Sullivan, argued that the *Aceto* cases involved disposal of wastes—in contrast to the sale of a product—and since the shipment in *Burlington* was FOB Destination, Shell relinquished ownership of the product. Justice Ginsburg expressed concern that parties could transfer liability under CERCLA through a

[2] *Id.* at 14 (internal citations omitted).

[3] 872 F.2d 1373 (8th Cir. 1989); *See also Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688 (9th Cir. 1992); *United States v. Vertac Chem. Corp.*, 966 F.Supp. 1491 (E.D. Ark. 1997); *Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517 (D. Colo. 1996); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F. Supp. 1448, 1451 (N.D. Cal. 1991).

UCC mechanism, but apparently the rest of the Court was satisfied, since the issue was not even addressed in the opinion.

The oral argument then shifted to the scope of the Useful Product exclusion for arranger liability. The justices asked a series of questions trying to determine when a spilled useful product becomes a waste. Shell's counsel responded that at the time of the transaction, Shell's intent was to sell a useful product. Sullivan went on to tell the Court that this was the first and only case in the country where arranger liability had been applied to a "mere sale of a useful product because a third-party purchaser after acquiring possession and control spilled the product."[4] To affirm the Ninth Circuit decision, she continued, would disrupt commerce across a wide range of industries. Unlike the disposal cases, she continued, there was no economic benefit to Shell from the subsequent leakage at the B&B facility.

While the Court seemed to agree with this analysis, its decision did not simply clarify the contours of the Useful Product exemption but instead struck a dagger at the heart of nearly 30 years of CERCLA arranger jurisprudence.

The Court reasoned that because CERCLA does not specifically define what it means to "arrange for" disposal of a hazardous substance, the phrase should be given its ordinary meaning, which implies action directed to a specific purpose. The Court stated that an entity may qualify as an arranger "when it takes intentional steps to dispose of a hazardous substance."[5] The Court then discussed the spectrum of arranger liability, ranging from companies selling a new, useful product which is disposed of by the purchaser without knowledge of the seller to situations where an entity enters into a transaction for the sole purpose of discarding a used and no longer useful substance. In the former fact pattern, the Court indicated that there would be no liability, whereas in the later, liability is clear. Although the two examples the court set forth provide for

[4] Transcript of Oral Argument, Burlington, No. 07-1601.

[5] *Id.* at 11.

clear cases of liability and no liability, the court recognized that the facts of *Burlington* demonstrate the gray areas of liability that require a fact-intensive inquiry into whether a PRP is liable. Moreover, the Court said intent can be inferred from the totality of circumstances and the inquiry may rest on circumstantial evidence.[6]

The Court rejected the governments' argument that Shell's knowledge of continuing spills and leaks was sufficient to qualify it as an arranger. Instead, the Court said there was insufficient evidence to show that Shell entered into the sale of the pesticide with the intention that at least a portion of the product be disposed of during the transfer process. Indeed, the Court found it significant that Shell took steps to encourage its distributors to reduce the likelihood of spills in the process, including providing them with detailed safety manuals, requiring them to maintain adequate storage facilities, and providing discounts for those that took safety precautions. Based on this factual analysis, the Court found that Shell was not liable as an "arranger for disposal" at the Arvin facility.

In short, it is hard to argue that Shell "intended" to dispose of anything, since it took extensive steps (even if unsuccessful) to prevent or mitigate such disposal. One could argue, in fact that *Burlington* means only that knowledge, if accompanied by attempts to address the problem, cannot establish the requisite intent to dispose. Indeed, at oral argument, Shell's counsel argued that "it would be terribly impractical and terribly perverse" to penalize a manufacturer for telling third party purchasers how to handle products more safely.[7]

At least one case decided after *Burlington Northern* lends some support to that thesis. In *Frontier Communications v. Barett Paving Materials*, 2009WL1941920 (D.Me. July 7, 2009) the Court denied a motion to dismiss where an environmental report indicated that the PRP was guilty of "negligence, apathy and inappropriate testing of equipment". The PRP, Main Central

[6] 129 S.Ct. at 1879-1880

[7] *Id.*

Railroad, clearly had knowledge of the disposal; the Court inferred intent from its negligence and failure to do anything to address the issue. Therefore, although *Burlington* stands for the proposition that knowledge without intent is insufficient for arranger liability, practitioners will need to wait and see how courts interpret this phrase and what types of factual scenarios allow courts to infer intent to dispose.

Burlington's arranger holding also has implications regarding discovery. It is no longer sufficient simply to show that defendants' wastes ended up at a site to prove an intent to dispose. Plaintiffs will need to focus their discovery, and defendants their internal investigations, on such issues as:

- The level of knowledge of the existence of hazardous substances in the materials to be disposed;
- The goal of the transaction;
- Was the material a waste or a useful product'
- Is there a market for the material that is the subject of the transaction
- The level of knowledge of the site owner's practices;
- Whether any attempt was made to find out about the site owner's practices and if so, any attempt to ameliorate them?

So there will be significant new discovery required. These matters were arguably relevant even in the pre-*Burlington* era in connection with equitable allocation of liability. But, typically, by the time Superfund cases get to the allocation phase, parties are sufficiently exhausted by the process that they are prepared to divvy up the liability by volume as a form of "rough justice".

By contrast, intent now goes to liability, which is typically decided at an earlier stage of the litigation. By pushing these inquiries further forward chronologically in the litigation process, it increases their significance and urgency. This is especially so if discovery or trial is bifurcated or trifurcated, as it often is in Superfund matters.

The net result is that litigation will likely become more complicated, expensive and fact-intensive. It will make multi-party litigation, already often a logistical nightmare, even more difficult. It will make early resolution of cases more challenging.

Many of us has seen the latter result already, in cases where settlement agreements were about to be signed but parties are now backing out in light of the defenses afforded them under *Burlington*. We have already seen several advanced cases where parties are now briefing the intent issue. For example, in *U.S. v. General Electric Corp.*, No. 06-CV-00354 (D.N.H), the defendant has filed a motion arguing that a prior opinion of the court holding the company liable as an arranger, even though it lacked specific purpose to dispose of scrap pyranol, should be a basis for dismissing it from the case. The government appears to be arguing that the court should find that GE's knowledge that spills would occur during unloading of its materials created a "constructive" intent to dispose.

There will be at least one positive impact of *Burlington's* focus on intent: it will increase the emphases on environmental stewardship with respect to disposal of hazardous wastes. The government tried to argue that Shell retained control over the product and thus should be responsible for the spillage at the site by requiring its customer to implement certain storage practices. Indeed, it was argued that these changes allowed Shell to increase the volume of materials and therefore the amount of spillage. The government came close to asserting that Shell's influence over its customer's chemical and waste management operations rendered it liable as an operator.

However, the Court recognized the perverse incentives of such a holding. The opinion stressed the measures that Shell required of its customer to minimize spillage.[8] It is now clear that

[8] One could argue that even if the Court found Shell liable as an arranger, it could have used the measures it required of its customer as evidence of the exercise of due care under the CERCLA third-party defense. Of course, the fact that Shell had a contractual relationship with B&B would

(continued...)

anything a party disposing of materials can do to negative the implication of intending improper disposal will be helpful to a liability defense. As a result, forward thinking companies will do inspections of intended recipients of their hazardous materials, will provide guidance regarding handling of those materials, and will want to create contemporaneous records documenting those efforts.

B. IMPLICATIONS OF DIVISIBILITY HOLDING

The other prong of the *Burlington* decision is the newly-annunciated standards on divisibility. For better or worse, the case sets a remarkably low threshold for establishing divisibility.

Neither the plaintiff nor the defendants in *Burlington* put in evidence to establish an appropriate share of liability, so the Court was left to its own devises. It engaged in its own form of rough justice, using what appears to be almost a back-of-the-envelope calculation. Instead of remanding for a fuller development of the record, as Justice Ginsberg argued in her dissent should have been done, the Court simply approved the District Court's rudimentary calculus.

In its briefs, the petitioners argued that the law on apportionment had evolved since CERCLA was enacted, as evidenced by Section 26 of the Restatement (Third) of Torts.[9] Comment a to this section states "No party should be liable for harm it did not cause, and an injury caused by two or more persons should be apportioned according to their respective shares of comparative responsibility." Section 17 of the Third Restatement also explains that "joint and several liability has been substantially modified in most jurisdictions both as a result of the adoption of

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have prevented if from successfully asserting this defense. Query if the third-party defense would have been available if Shell or another manufacturer used a jobber or otherwise out-sourced the sales of its product to a third party, thereby eliminating the contractual relationship.

[9] Division of damages by causation had been addressed in section 433A of the Restatement (Second) of Torts. Section 26 replaced that section, along with sections 433B (Burden of Proof), 879 (Concurring and Consecutive Independent Acts) and 881 (Distinct or Divisible Harms).

comparative fault and tort reform during the 1980s and 1990s."[10] The petitioners went on to assert that courts have increasingly permitted fact finders to assess comparative fault in cases where different defendants are liable for reasons that are not commensurate with the degree of fault and causation, such as strict liability, and that the Third Restatement had embraced this trend.[11]

The petitioners also pointed out that even under § 433A of the Second Restatement of Torts, pollution was the "paradigmatic" divisible harm (see comment d). The governments' response to this argument was to assert that the Second Restatement should apply because it was contemporaneous with CERCLA and pointed to comment "i" of § 433A, referring to harms that are theoretically incapable of apportionment. As is evident from the decision, the petitioners successfully argued that the geographic distribution of the contamination, the timing of the disposal and the different types of contaminants made the harm at the site capable of apportionment.

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[10] Restatement (Third) of Torts, § 17 cmt. a. In § 10, cmt, a, the authors state:

> the primary consequence of what form of joint and several or several liability is imposed is the allocation of the risk of insolvency of one or more responsible tortfeasors. Joint and several liability imposes the risk that one or more tortfeasors liable for the plaintiff's damages is insolvent on the remaining solvent defendants, while several liability imposes this insolvency risk on the plaintiff. The adoption of comparative responsibility, which permits plaintiffs to recover from defendants even though plaintiffs are partially responsible for their own damages, has had a significant impact on the near-universal rule of joint and several liability. The rationale for employing joint and several liability and thereby imposing the risk of insolvency on defendants-that as between innocent plaintiffs and culpable defendants the latter should bear this risk-does not coexist comfortably with comparative responsibility. Joint and several liability has also been justified on the ground that each defendant's tortious conduct is a legal cause of the entirety of the plaintiff's damages. Of course, with the adoption of comparative fault, the plaintiff who is comparatively negligent is also a legal cause of the entirety of the damages.

[11] Indeed, the petitioners brief argued that the § 881 of the First Restatement of Torts mandated apportionment of nuisances like pollution and that the illustrations following this section adopted the view expressed by William Prosser that courts were required "to attempt some rough apportionment of the damages" in pollution cases. William L. Prosser, Joint Torts and Several Liability, 25 Cal. L. Rev. 413, 442-43 (1937)

That low threshold has been picked up in at least one case decided since *Burlington*. *Reichhold v. U.S. Metals Refinery Company*, 2009 WL1806668 (D.N.J., June 27, 2009) concerned allocation of liability at a site where two successive actions by different parties necessitated the placement of a cap. U. S. Metal Refinery Company ("USMRC") disposed of significant amount of slag at the site, and a subsequent owner added contaminated fill. The Court found that either disposal would have independently required a cap to be constructed. But rather than engaging in any kind of relative measurement of responsibility, the Court simply split the cost 50/50, even though it acknowledged that USMRC contributed the majority of contamination.

The approach of relying on thin factual records to establish divisibility is a problem that will likely solve itself over time. Courts may be more reluctant to routinely dismiss motions for summary judgment on divisibility grounds. Now that parties know that courts will take divisibility arguments seriously, they will diligently seek discovery on such topics as:

- how much waste each party sent to the site;
- over what time period;
- the geographic area where wastes were deposited or come to be located;
- media that are impacted (e.g., soil vs. groundwater);
- its toxicity; and
- to what extent did that specific waste drive response costs?

Prior to *Burlington*, many environmental lawyers used the terms "apportionment" and "allocation" interchangeably. Post-*Burlington*, these terms have much more concrete meanings. It is now clear that apportionment is an affirmative defense to joint liability, while allocation refers to determining how such liability is to be calculated among the jointly liable parties. What is confusing is that some of the so-called "Gore factors" that courts have used to *allocate* liability in 113(f) contribution actions may also be used to establish *apportionment* for divisibility

purposes. Now, though, some of these issues go to liability, not merely equitable allocation, which increases their importance and focuses it at an earlier point in the case. This shift will be even more pronounced in cases which are bifurcated or trifurcated for discovery or trial. Because divisibility is a question of fact, we will likely see less summary judgment decisions on joint liability.

Volume used to be the touchstone for *allocating* liability. Now, other factors such as toxicity and type of hazardous substances will play an increasingly important role. The importance of ownership to allocation may also be downgraded. Simply owning land that is contaminated by a tenant or arranger may no longer result in significant liability, especially in the case of absentee landlords with triple net leases.

Increased likelihood of finding the harm divisible means that governmental and private plaintiffs will have to be more inclusive in their selection of defendants.. If a court finds a basis for divisibility, plaintiffs will not reap the benefit of joint and several liability, such that the entire cost will be split among the existing defendants. They will only obtain judgments for each named defendant's individual share. The effect, again, will be to complicate litigation and make it more expensive.

D. OTHER POSSIBLE IMPLICATIONS

One issue that practitioners will have to address in future cases is what exactly are the "damages" for which divisibility is being sought: Is it the contamination or the response costs? When Chief Justice Roberts raised this issue during the oral argument, Shell's counsel suggested that the cost of a remedy is driven by the mass of the contamination, but the Chief Justice did not seem convinced, and the opinion does not directly resolve the issue.

Even in the wake of *Burlington*, it may be the traditional landfill, co-disposal or commingled site will still considered quintessential indivisible harm situations that satisfy even the Third

Restatement of Torts. Based on the New York State Bar Association teleconference program on July 21, 2009, it is the view of New York State Department of Environmental Conservation (DEC) that most of these sites have already been identified and that there are not many more in the pipeline.

Burlington will likely have significant impact on recycling facilities, drum reconditioning operations, transformer refurbishing sites, battery cracking locations and other scrap metal sites that do not otherwise qualify for the SREA[12] exemption for arranger liability. It will also have an impact on defendants whose operations fall within the liability net cast by the *Aceto* cases, although it is not clear that those cases have been completely overruled.

Another issue for practitioners to follow is the impact *Burlington* will have on states as compared to the federal government. The U.S. Environmental Protection Agency has more enforcement levers in its toolbox than the DEC to compensate for any limitations imposed by *Burlington*. They range from issuing unilateral administrative orders (UAOs) under §106 of CERCLA (42 U.S.C. §9606) to imposing liens on contaminated property under §§107(l) or (r) of CERCLA (42 U.S.C. §§9607(l), 9607(r)) in lieu of filing cost recovery. Of course, this raises the question of whether potential for divisible harm is "sufficient cause" to refuse to comply with a §106 UAO. EPA can also seek injunctive relief under §7003 of RCRA (42 U.S.C. §6973) by showing that the defendants "contributed to" the past or present disposal of hazardous waste that may present an imminent or substantial endangerment.

DEC, on the other hand, may find itself having to resort to common law nuisance actions, with all of their attendant causation issues, or perhaps using citizen suit provisions of RCRA §7002

[12] The Superfund Recycling Equity Act (SREA) § 127, 42 U.S.C. § 9627.

(42 U.S.C. §6972). Insofar as RCRA provides only for injunctive relief and not cost recovery,[13] DEC may find itself pursuing PRPs to perform cleanups, rather than performing cleanups itself, more frequently than it has in the past.

Our final comment relates to the issue of transaction costs and resource constraints. By making intent relevant and increasing the number of facts courts must consider in ruling on apportionment questions, *Burlington* has the potential to increase the cost and complexity of Superfund litigation. This impact, if realized, will affect all litigants. But it may have its greatest impact on governmental plaintiffs like DEC, which already are resource-constrained because of budget cuts at the state level. The holding in *Burlington* will clearly force all plaintiffs, but perhaps especially governmental ones, to choose their cases and defendants more carefully and, where possible, do significant factual investigation prior to initiating litigation rather than waiting for post-complaint discovery.

CONCLUSION

Some may suggest that *Burlington Northern & Santa Fe Railway v. U.S.* was simply an extension of the useful products cases or nothing more than reluctance to overturn the exhaustive analysis of the district court. However, we believe it stands for much more and marks a watershed in federal Superfund litigation. It enunciates new standards for determining arranger liability and apportionment among PRPs. Perhaps even more importantly, in combination with the Supreme Court decisions in *Twombly* and *Iqbal*, it may fundamentally change the way Superfund cases are litigated. We can expect more motions to dismiss, more searching discovery, a greater difficulty in settling earlier, and greater transaction costs generally.

[13] *See Meghrig v. KFC Western, Inc.*, 516 U.S. 4790 484 (1996) (finding that "RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts.")

While these impacts will affect all litigants, they will likely affect plaintiffs more adversely. They will particularly impinge on governmental plaintiffs, who are often resource-constrained and have come to rely on settlements as a key to their enforcement efforts. And they will have special impact in states like New York, where both governmental and private plaintiffs have used CERCLA to a greater extent in cost recovery litigation than in other states with more robust state superfund statutes.

It would not be unexpected of responsible parties are less likely to organize themselves to implement a remedy and even the State's representatives at the teleconference suggested that they anticipate less unsolicited settlement offers. With the focus of arranger liability now on intent to dispose, it is possible that some parties may prefer to settle rather than risk the possibility that evidence of intent could be produced that could possibly subject them to criminal liability.

It remains to be seen, of course, how great a sea change this case represents. Much depends on how the lower courts interpret the Supreme Court's language. But what is clear is that we are in for several years of upheaval in the way Superfund cases are litigated, as both courts and litigants struggle to adapt to the new dynamic set in motion by the *Burlington* decision.