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CERCLA Liability After Burlington Northern and Santa Fe Railway Co. v. U.S.

Reducing Cleanup Liability and Recovering Remediation Costs

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Brian D. Israel, Partner, **Arnold & Porter**, Washington, D.C.

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Tuesday, February 2, 2010

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CERCLA Liability After *Burlington Northern & Santa Fe Railway Co. v. United States*: Implications for Arranger Liability



Brian D. Israel
February 2, 2010

Brown & Bryant Site — Arvin, California



2/01/2010

Sean D. Israel

Site History

- Operations began in 1960
- B&B purchased pesticides, chemicals from suppliers (e.g., Shell Oil) and applied to customers' farms
 - Products included pesticides D-D and Nemagon
- 3.8 acre parcel of former farmland; operations expanded onto adjacent 0.9 acre parcel owned by railroads
- Customers arranged for delivery to Site
 - Upon arrival, product transferred from trucks to containers
 - Leaks, spills occurred often
- B&B insolvent by 1989

Procedural History

- Site added to NPL in 1989 – 54 Fed. Reg. 41,027
 - DTSC and EPA commenced cleanup that year – \$8 million
- Administrative Order issued to Railroads in 1991
 - Railroads commenced cleanup – \$3 million
 - Railroads brought cost recovery suit against B&B in the Eastern District of California
 - Case consolidated with cost recovery actions by DTSC and EPA against Railroads

District Court Opinion – Arranger Liability

- 2003 WL 25518047 (July 15, 2003)
- Found parties liable but did not impose joint & several liability for entire response cost
- Held that contamination created a single harm but that the harm was divisible and, therefore, capable of apportionment
- Apportioned Shell's and Railroads' liability

Appeal to the Ninth Circuit

- Shell appealed finding of liability – 520 F.3d 918 (Mar. 25, 2008)
- Ninth Circuit reversed; found Shell liable because
 - Spills and leaks occurred whenever Shell delivered the product
 - Shell arranged for delivery by common carrier (f.o.b.)
 - Shell required use of larger storage tanks that were more likely to leak
 - Shell incentivized B&B to improve its handling of the product
 - Shell reduced the purchase price due to product losses from leakage
 - Shell distributed a manual for safe operation of the tanks B&B used to hold the product
- Court held that, under these circumstances, arranger liability was not precluded by the fact that the purpose of Shell's action was to transport a new, useful product to B&B for sale

U.S. Supreme Court Granted Certiorari

- 129 S. Ct. 1870 (May 4, 2009)
- 8-1 opinion (lone dissent by Justice Ginsberg)
- Reversed Ninth Circuit
- 2 components to holding:
 - Arranger liability
 - Joint & several liability/apportionment

Arranger Liability

- Narrowed scope of arranger liability under CERCLA by requiring an element of intent
- Held that to qualify as an arranger liable under CERCLA, a PRP must have entered into the sale of a contaminant with the intention that at least a portion would be disposed of
- While a party's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide *evidence* of intent to dispose, "*knowledge alone is insufficient* to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product"

Impact of the Decision on Arranger Liability

- Limits the ability of the Government to apply arranger liability to cases in which the PRP contracts for the actual purpose of disposal
- Absent actual intent proved by the Government, the seller of a “useful product” should not be liable as an arranger, even if Seller has actual knowledge that the product may be improperly disposed of by the ultimate purchaser

How are courts interpreting *BNSF*? – Recent Cases re Arranger Liability

- *Frontier Communications Corp. v. Barrett Paving Materials*
- *Halliburton Energy Services v. NL Industries*
- *United States v. Washington State Department of Transportation*

Frontier Communications Corp. v. Barrett Paving Materials

- 631 F. Supp. 2d 110 (D. Maine July 7, 2009)
- Frontier brought CERCLA cost recovery claims against purported prior owners of property, alleged tar and PAH contamination of Penobscot River
- Defendants moved to dismiss
- Citing *BNSF*, argued that Frontier failed to allege that defendants had “more than mere knowledge” that spills continued to occur
- Court denied motion; held that allegations of “negligent disposal via spills” and “disposal via [municipal] sewer lines” by defendants amounted to more than “mere knowledge”
- Held that defendants’ “disposal of tar and other PAH-containing materials via the sewer would fall well within the confines of arranger liability even after Burlington”

Frontier Communications Corp. v. Barrett Paving Materials (continued)

- Court denied motion
- Held that allegations of “negligent disposal via spills” and “disposal via [municipal] sewer lines” by defendants amounted to more than “mere knowledge”
- Held that defendants’ “disposal of tar and other PAH-containing materials via the sewer would fall well within the confines of arranger liability even after Burlington”

Halliburton Energy Services v. NL Industries

- 648 F. Supp. 2d 840 (S.D. Tex. Aug. 18, 2009)
- Mining company brought CERCLA contribution claim against former site operator
- Citing *BNSF*, former operator argued that it lacked the requisite intent to be found liable as an “arranger”
- Court rejected the argument, finding that former operator’s admission that it was a responsible party under CERCLA § 107(a) prevented application of *BNSF* to dispose of liability

United States v. Washington State Department of Transportation

- 2009 WL 2985474 (W.D. Wash. Sept. 15, 2009)
- CERCLA cost recovery claim against Washington DOT arising out of Commencement Bay-Nearshore Tidalflats Superfund Site in Tacoma
- WSDOT counterclaimed, seeking contribution from the Army Corps of Engineers
 - Argued that Corps' granting of dredge permits and disposal of dredge materials rendered Corps liable
- Corps argued that after *BNSF*, a “grant of a permit allowing another entity to dredge can hardly be considered an ‘intentional step[] to dispose of a hazardous substance’”

United States v. Washington State Department of Transportation (continued)

- Court denied Corps' motion for judgment on the pleadings
- Distinguished *BNSF*, finding that arranger liability in the context of manufacturing, sale and eventual disposal did not entail the same analysis
- Held that the “determinative issue” in the case “will not be based on actual possession of the waste, but rather on what level of involvement” the Corps had

Practical Considerations Going Forward

- Useful Product Defense
- Further Application in Arranger Context
- Beyond Arranger
- Implications for Strict Liability
- Impact on Factual and Expert Discovery of CERCLA Cases
- Impact on Contribution Actions
- How DOJ and EPA are Responding



BURLINGTON NORTHERN'S IMPACT ON THE SUPERFUND LIABILITY SCHEME

Steve Leifer, Baker Botts LLP

February 2, 2010

LIABILITY UNDER CERCLA AFTER *BURLINGTON NORTHERN*

- Supreme Court's May 2009 decision in *United States v. Burlington Northern & Santa Fe Railway Co.* (129 S.Ct. 1870) shook the foundations of CERCLA liability
- Ruling pointed the way towards escaping the harsh effects of joint and several liability
- Both the Government and private parties now must significantly alter their approach to CERCLA enforcement and litigation

DIVISIBILITY/JOINT AND SEVERAL LIABILITY AFTER *BURLINGTON NORTHERN*

- **Evolution of Joint and Several Liability Under CERCLA**
 - Congress chose not to expressly provide for joint and several liability in the Act, concerned about the harsh effects of imposing large cleanup costs on small contributors
 - Seminal 1983 *Chem-Dyne* opinion held that courts must look to traditional principles of common law as reflected in the Restatement of Torts (2d)
 - Restatement: Damages apportioned among multiple causes when there is either distinct harms or reasonable basis for determining contribution of each cause to a single harm.

DIVISIBILITY/J & S LIABILITY AFTER *BURLINGTON NORTHERN* (continued)

- **Evolution of J & S (continued)**
 - 5th, 6th and 8th Circuits had agreed to apportion liability based on reasonable estimates and assumptions (e.g., 5th Cir. ruling in *Bell Petroleum*)
 - Certainty not required, nor is fingerprinting of wastes
 - Difficulty of dividing harm should not be a bar to apportionment
 - Expert testimony can be used to make reasonable estimates
 - Other courts had refused to apportion because wastes constituted an indivisible "toxic soup" and because of synergistic effects of various hazardous substances

DIVISIBILITY/J & S LIABILITY AFTER *BURLINGTON NORTHERN* (continued)

- **The *Burlington Northern* Opinion**
 - Brown & Bryant operated facility in Arvin, CA from 1960-1985; mixed and loaded pesticides and other chemicals onto application rigs
 - In 1975, B&B leased one-acre adjacent parcel from Railroads, used for storing equipment and a modest amount of pesticide loading
 - Soil and groundwater became contaminated, primarily from lagoons located away from Railroads' parcel

DIVISIBILITY/J & S LIABILITY AFTER *BURLINGTON NORTHERN* (continued)

- District Court apportioned liability based on area owned by Railroads and time of ownership
- Number of acres leased by Railroads versus total size of facility (19%)
- Duration of lease versus total time facility operated (45%)
- Contribution of a chemicals used on Railroads portion to total cleanup costs (66%)
- Multiplying percentages = 6%; increased 50% to 9% because of "error factor"

DIVISIBILITY/J & S LIABILITY AFTER *BURLINGTON NORTHERN* (continued)

- **The *Burlington Northern* Opinion (continued)**
 - Ninth Circuit reversed
 - Facility more of a dynamic, unitary operation not subject to apportionment
 - Equipment and containers stored in one area but rinsed or crushed in other areas
 - Without the Railroads' parcel, there would have been fewer rigs on site
 - District Court should not have used a "meat axe" approach
 - Strong dissent as part of denial of rehearing *en banc*

DIVISIBILITY/J & S LIABILITY AFTER *BURLINGTON NORTHERN* (continued)

- **The *Burlington Northern* Opinion (continued)**
 - Supreme Court reversed Circuit 8-1
 - CERCLA imposes strict liability but not J & S in every case
 - Restatement is appropriate starting point - 433A, comment h - "pollution of stream from different sources"; two factories, apportion by quantity
 - Not all harms are capable of apportionment, so it is defendant's burden to show otherwise
 - District Court's reasoning was sound; evidence showed that Railroads' parcel contributed no more than 10% to contamination, thus using area and time was appropriate

POST *BNSF* JURISPRUDENCE RE DIVISIBILITY AND APPORTIONMENT

- **Reichhold v. US Metals Refining Co., D.N.J., 6-22-09 (2009 WL 1806668)**
 - USMRC and third party both contributed contaminants to a parcel; USMRC contributed clear majority
 - Each party held 50% responsible
 - Court noted that each contributed enough to trigger the need for the remedy

POST *BNSF* JURISPRUDENCE RE DIVISIBILITY AND APPORTIONMENT (continued)

- **ITT v. Borgwarner, W.D. Mich., 7-29-09 (2009 WL 2356263)**
 - Defendant contributed metals and TPH, but not solvents
 - Court noted there was a plausible case for divisibility, but wanted an evidentiary record to be developed
 - Court did not address argument that 107 liability determination must precede divisibility determination

POST *BNSF* JURISPRUDENCE RE DIVISIBILITY AND APPORTIONMENT (continued)

- **Appleton Papers v. George Whiting Paper, E.D. Wisc., 11-18-09 (2009 WL 3931036)**
 - *BNSF* does not require divisibility phase to permit party to pursue a section 107 action
 - Plaintiff had contended that if it was not subject to a portion of damages, Plaintiff may recover that portion under section 107
 - Court held Plaintiff limited to section 113 contribution action

POST *BNSF* JURISPRUDENCE RE DIVISIBILITY AND APPORTIONMENT (continued)

- **Evansville Greenway and Remediation Trust v. Southern Indiana Gas to Electric, S.D. Ind., 9-29-09, (2009 WL 3163180)**
 - PRP sent lead-containing batteries to a two parcel site operating as a single entity
 - Before *BNSF*, easy call that PRP jointly and severally liable for both parcels
 - After *BNSF*, court decided issue would be addressed at trial

POST *BNSF* JURISPRUDENCE RE DIVISIBILITY AND APPORTIONMENT (continued)

- **In Re MTBE Products Liability Litigation, S.D. NY, 7-14-09 (643 F. Supp. 2d 461)**
 - Burden on defendants to show basis for apportionment since they are culpable and more knowledgeable as to relevant facts
 - Burden of production is low, citing to restatement of Torts Third: Apportionment of Liability
 - Market share is reasonable basis for apportionment

LESSONS LEARNED AND PRACTICE TIPS

- **PRPs may be more aggressive in asserting divisibility defenses; bases may include:**
 - Temporal
 - Volumetric
 - Spatial/geographic
 - District harms
 - No causal connection

LESSONS LEARNED AND PRACTICE TIPS (continued)

- **Restatement of heightened importance**
 - Restatement of Torts 2d, §433A
 - §912 as to evidentiary standard
 - §840E cites many cases applying common law principles of divisibility in the context of pollution
 - Restatement of Torts Third: Apportionment of Liability may be looked to for guidance

LESSONS LEARNED AND PRACTICE TIPS

(continued)

- Expert testimony not a prerequisite, but still important in showing basis for apportionment
- EPA may need to target broader range of PRPs rather than a few deep pockets
- Equitable considerations arguably not relevant but may still influence courts
- Note that state analogues to CERCLA may be unaffected by *BNSF*
- Question how orphan shares will be treated after *BNSF*; see 433A comment e for potential guidance

