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Burlington Northern & Santa Fe Railway Co. v. United States

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U.S. Supreme Court Holds That Superfund Liability Is Not Joint and Several Where A Reasonable Basis for Apportionment Exists; Court Also Narrows Arranger Liability

In *Burlington Northern & Santa Fe Railway Co. v. United States* (*BNSF*),[1] a momentous 8-1 decision with broad implications for cleanups at the nation's hazardous waste sites, the United States Supreme Court held on May 4, 2009: (1) that EPA cannot hold parties liable under CERCLA as "arrangers" for disposal unless they "intended" their wastes to be disposed of; and, (2) that liable parties at a multi-party Superfund site are not jointly and severally liable if a "reasonable basis" exists to apportion their liability. The decision, authored by Justice Stevens, holds that where a portion of the liability at a Superfund rests with defunct or insolvent parties, the government will have to pick up those parties' "orphan" shares — in this case 91% of the liability, which was attributed to a defunct chemical distributor.

Although the implications of the *BNSF* decision will take time to sort out, some are already clear:

- There will be fewer Potentially Responsible Parties (PRPs) for EPA and the Justice Department to pursue as "arrangers;"
- Fewer available "arrangers" could translate into more liability for owners of contaminated land;
- Litigation regarding whether "arrangers" actually "intended" to dispose of hazardous substances is likely to increase;
- There may be fewer parties willing to take on a greater share of liability than they "owe," or to conduct "independent" cleanups of Brownfield sites,

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1. 2009 U.S. LEXIS 3306 (U.S. May 4, 2009). The case was consolidated with the case of *Shell Oil Co. v. United States*, No. 07-1607.

because it will be more difficult for them to recover any "orphan" share they voluntarily paid;

- There will be more litigation in lower courts as to what constitutes a "reasonable basis" for apportionment;
- There will be more time spent on gathering the facts establishing "causation," and less time spent arguing about equities;
- The decision may add urgency to reinstating the Superfund tax;
- There could be greater reliance on state governments to pursue cleanups, especially states whose cleanup laws expressly provide for joint and several liability.

Factual Background

The *BNSF* case arose out of a fairly common fact pattern for CERCLA cases. A small chemical distributor in California, Brown & Bryant, Inc. (B&B) owned and operated a facility that repackaged agricultural chemicals. Its operations were located on a 3.8-acre parcel, of which about a 0.9-acre piece was leased from predecessors to BNSF and the Union Pacific Railroad (collectively, the "Railroads").[2] The Railroads played no role in B&B's operations and all parties agreed that the only basis for imposing liability on them was their status as "owners" under 42 U.S.C. § 9607(a).[3]

Shell Oil sold a soil fumigant to B&B which was used to kill microscopic worms that attack root crops. The chemical was shipped via commercial carrier FOB destination, meaning that the buyer was responsible for the product once it arrived at the facility.[4] In deciding the case, the district court found that minor spills took place upon the de-

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2. 2009 U.S. LEXIS 3306, at *6.

3. 2009 U.S. LEXIS 3306, at *17.

4. *United States v. Atchison, Topeka & Santa Fe Ry. Co., E.D.* California Case Nos. CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228 OWW. The District Court's opinion can be viewed at 2003 U.S. Dist. LEXIS 23130 (E.D. Cal. July 14, 2003). The opinion was delivered by U.S. District Court Judge Oliver W. Wagner. See 2003 U.S. Dist. LEXIS 23130, at *4.

livery of the chemical, though much larger releases resulted when B&B washed out its equipment.

In 1988, California's Department of Toxics Substances Control ordered B&B to cleanup soil and groundwater contamination on the site. Soon thereafter, B&B went out of business and EPA listed the site on the National Priorities List in 1989. The Railroads and Shell were both named PRPs. The Railroads were ordered to clean up the entire site, even though they owned only a small portion of it, and the portion that they owned did not require remediation. Shell was named a PRP for having delivered chemicals to the site which it knew or should have foreseen would be spilled by B&B. In 1996, the United States and the State of California filed a cost recovery action against the Railroads and Shell, seeking to recover over $8 million in response costs.

District Court Opinion

After a six-week bench trail in 1999, the district court held in a 185-page opinion that the Railroads were liable as owners and agreed with the government that Shell was liable for "arranging" for the disposal of hazardous substances. However, when it came to the issue of damages, the court determined that liability could be apportioned among Shell, the Railroads and the defunct operator, B&B. While it agreed with the governments that the defendants' burden to show an appropriate basis for apportionment "is heavy," and that "[t]he evidence supporting divisibility must be concrete and specific,"[5] the district court concluded that a reasonable basis for apportionment existed. Even more significantly, it declined to apportion the "orphan share" attributable to the defunct B&B– some 85% of the liability — to the PRPs, leaving it instead as an unrecovered cost for the government plaintiffs to absorb.

With respect to the Railroad's liability, the district court apportioned liability using three factors — the percentage of the facility that the Railroads owned, the duration of B&B's business as a percentage of the Railroad's lease, and the percentage of contaminants requiring cleanup that were found on the Railroad's land (two-thirds). It came up with a allocation of 9% for the Railroads. In determining Shell's liability, the district court estimated the amount of material resulting from leaks that occurred during product delivery, and then compared that with the total amount of chemicals spilled. Based on various assumptions, it determined that Shell was liable for 6% of the total cleanup costs.[6]

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5. *United States v. Atchison, Topeka & Santa Fe Ry.*, 2003 U.S. Dist. LEXIS 23130, at *237.

Ninth Circuit Opinion

Reviewing the district court's decision, the Ninth Circuit began by affirming, at least in concept, the validity of the divisibility doctrine, acknowledging that "apportionment is available at the liability stage in CERCLA cases."[7] Nevertheless, the Ninth Circuit held that, in this case, the evidence was not "sufficiently clear" to justify apportionment.[8] The Ninth Circuit found that the factors the district court used (percentages of land area, time of ownership and types of hazardous products) did not demonstrate what part of the contaminants found at the site were attributable to the Railroads' parcel. The Ninth Circuit rejected the district court's apportionment calculations, and held that the Railroads had failed to prove a "reasonable basis" for apportioning liability.[9]

Turning to Shell, the Ninth Circuit found that Shell had failed to prove whether its chemicals had contaminated the soil in any specific proportion, when compared with other chemicals spilled at the site. Similar to its conclusion with respect to the Railroads, the Ninth Circuit held that Shell's evidence of leakage was insufficient to provide a "reasonable basis" for apportionment.[10]

With respect arranger liability, the Ninth Circuit agreed with the district court that an entity can be an "arranger" even if it did not intend to dispose of the product, because "spillage" is "disposal" and disposal of Shell's chemicals by B&B was foreseeable."[11]

The Supreme Court's Decision

a. Arranger Liability. The Supreme Court affirmed that "arranger liability" has to be determined on a case-by-case basis, but reversed the Ninth Circuit's finding that the standard for liability had been met in this case. The Court posited two ends of a continuum. On one end are cases where an entity entered into a transaction "for the sole purpose of

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6. *United States v. Burlington Northern & Santa Fe Ry. Co*., 502 F.3d 781, 792 (9th Cir. 2007).
7. *United States v. Burlington Northern & Santa Fe Ry. Co*., 502 F.3d at 793-95.
8. 502 F.3d at 804.
9. 502 F.3d at 801-04.
10. 502 F.3d at 805-06.
11. 502 F.3d at 806-08.

discarding a used and no longer useful hazardous substance." In such cases, there is a clear intent to discard the product, and there is liability under Section 9607(a)(3). On the other end of the continuum, "[i]t is similarly clear," the Court said that "an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst the seller, disposed of the product in a way that led to contamination."[12] Less clear, said the Court, are the cases in the middle — the "many permutations of 'arrangements' that fall between these two extremes." In these cases, the Court said, "liability may not extend beyond the limits of the statute itself." Based on a "plain reading" of the CERCLA statute, the Court held that "an entity may qualify as an arranger under § 9607(a)(3) *when it takes intentional steps to dispose of a hazardous substance*."[13]

Based on the facts in this case, the Court held that there was no evidence that Shell intended for B&B to dispose of its chemicals. To the contrary, "Shell took numerous steps to encourage its distributors to *reduce* the likelihood of such spills, providing them with detailed safety manuals, requiring them to maintain adequate storage facilities, and providing discounts for those that took safety precautions."[14] Even if Shell's efforts were "less than successful," the Court found that Shell's mere knowledge of the spills did not amount to an "intent" that they be spilled or otherwise disposed of. Accordingly, the Court reversed both the district court and the Ninth Circuit, and held that Shell was not liable under the Superfund law.

b. Apportionment. The CERCLA statute does not contain joint and several liability language. The notion that PRPs should be held jointly and severally liable is a judicial doctrine grounded in Section 433A of the *Restatement (Second) of Torts*, which states that "when two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm."

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12. *Burlington Northern & Santa Fe Railway Co. v. United States*, 2009 U.S. LEXIS 3306, at *18.

13. 2009 U.S. LEXIS 3306, at *20 (emphasis supplied).

14. 2009 U.S. LEXIS 3306, at *23.

Seizing on this language, the Supreme Court held — as have several circuit courts — that "apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm."[15] *See In re Bell Petroleum Services, Inc.*,[16] *United States v. Alcan Aluminum Corp.*,[17] *O'Neil v. Picillo*,[18] and *United States v. Monsanto Co.*[19]

In a case in which multiple parties cause a single harm, the burden of proving divisibility of that harm is on the defendants: "CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists."[20] In this case, both the district court and the Ninth Circuit had found that apportionment of the harm was possible. The district court, using a relatively simple formula, came up with a 9 percent allocation to the Railroads. The Ninth Circuit, while agreeing that apportionment was "theoretically possible," criticized the evidence on which the district court had relied, finding that it was insufficient to establish the "precise proportion" of the Railroads' responsibility.

In reversing the Ninth Circuit, the Supreme Court held that the evidence supporting apportionment need not be precise. There must simply be "facts contained in the record reasonably support[ing] the apportionment of liability."[21] The district court, as noted above, had used a formula consisting of the percentages of land leased, the period of ownership and the types of hazardous chemicals spilled on the leased land." This approach — which the Ninth Circuit had characterized as a "meat ax"[22] — was good enough for the Supreme Court. It found that the evidence in the record reasonably supported the district court's allocation findings, affirmed its decision and reversed the cir-

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15. 2009 U.S. LEXIS 3306, at *26.
16. 3 F.3d 889 (5th Cir. 1993).
17. 964 F.2d 252 (3rd Cir. 1992).
18. 883 F.2d 17 (1st Cir. 1989).
19. 858 F.2d 160 (4th Cir. 1988).
20. *Burlington Northern & Santa Fe Railway Co. v. United States*, 2009 U.S. LEXIS 3306, at *26.
21. 2009 U.S. LEXIS 3306, at *30-31.
22. *United States v. Burlington Northern & Santa Fe Ry. Co*., 502 F.3d 781, 803 (9th Cir. 2007).

cuit court. It was the third time in as many tries that the Supreme Court has reversed the Ninth Circuit in an environmental case this year.

Implications of the Supreme Court's Decision

Arranger Liability. Shell successfully made the argument to the Court that "arranger" liability requires evidence of intent. Among the questions lower courts will have to grapple with are "how much" and "what kind" of intent. An entity which sent drummed waste to a landfill probably can be said to have intended that it be disposed of. But the concept of arranger liability has, over the years, become much more elastic.[23] Whether the theories relied on in these pre-*BNSF* cases will survive under the Court's "intent" standard is much more likely to be tested by Superfund attorneys in the next few years. And if some of those "arranger" parties cannot be held liable, more responsibility for cleanup will likely fall on other categories of PRPs, including land owners and transporters. Such a result may affect those parties' willingness to take on a cleanup, including the redevelopment of brownfield sites.

Apportionment. From a practical and policy standpoint, even greater implications flow from the Court's holding on apportionment. Those parties, such as "traditional" arrangers and landowners, who are still liable after the "Shell portion" of the Court's decision, will have a new and powerful argument to make in negotiations and/or litigation with EPA – namely, that they can only be held responsible for the contamination they caused, and not that which was caused by other parties, assuming a "reasonable basis for apportionment exists." If some of those parties are defunct — many tend to be at Superfund sites– then the government will have to pick up their share, shifting the cost of cleaning up many sites to the public.

That result, in turn, will not sit well with the public, and may lead to calls for legislation to change the liability standard, or to reinstate the Superfund tax, which lapsed in the 1990s.[24]

Another area likely to be impacted by the decision are private "contribution" actions, in which one party who believes it has paid more than its fair share seeks to recover its costs from

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23. *See, e.g.*, *Dedham Water Co. v. Cumberland Farms, Inc.*, 889 F.2d 1146, 1153-54 (1st Cir. 1989); *A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998). *Westfarm Assocs. Ltd. P'ship v. Int'l Fabricare Inst.*, 846 F. Supp. 422, 430 (D. Md. 1993) (citing 42 U.S.C. § 9601(22); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844-46 (4th Cir. 1992).

24. *See* M. MacCurdy, Reinstatement of Superfund Tax Proposed in Congress, Presumed in President Obama's Budget, Marten Law Group, Environmental News (April 22, 2008).

others. Contribution actions premised on "joint and several" liability will have to be reexamined, and insurers who have been picking up "orphan" shares may be less willing to do so.

One thing that is for sure is that, overnight, Superfund practice has changed.

For a complete discussion of liability under CERCLA for clean up of hazardous waste, *see* The Law of Hazardous Waste Ch. 14.

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About the Author. Bradley Marten, the founder and Managing Partner of Marten Law Group, is consistently ranked by his peers as one of the nation's top environmental lawyers. During his 25 year career, Brad has represented both corporate and public clients in environmental matters touching on most of the major environmental laws. He has gained particular notoriety as a creative problem solver of matters involving real estate development, environmental enforcement including climate change law, corporate acquisitions, environmental insurance and criminal proceedings.

Brad has guided the expansion of Marten Law Group since its founding in 2002. During that time, the firm has more than doubled its staff and has added an office in Portland to better serve its clients. The firm is planning continued growth, particularly in the areas of climate change, water quality and quantity, property development and permitting while improving on traditional areas of environmental practice including waste cleanup and management, land use and enforcement.

Areas of Practice

- Climate Change/Sustainability
- Property Development & Acquisition
- Permitting & Environmental Review
- Waste Cleanup
- Waste Management

History

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About Marten Law Group. Marten Law Group, PLLC is an environmental law firm advising companies and public agencies on some of the most challenging aspects of environmental, land use and natural resource legal matters. With experience in nearly every aspect of environmental law, the group strives to help clients navigate the maze of federal, state, and local regulations in order to resolve disputes and grow their business. The Marten Law Group is a leading legal expert on climate change policy, lending content and ongoing commentary to LexisNexis' *Environmental Law and Climate Change Center*.