LexisNexis® Emerging Issues Analysis

James Vroman, Patricia Boye-Williams and Michael Strong on

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

2009 Emerging Issues 3670

Click here for more Emerging Issues Analyses related to this Area of Law.

Supreme Court Issues Long-Awaited Decision in *Burlington Northern & Santa Fe Ry. Co. v. United States* on CERCLA Liability. On May 4, 2009, in an 8-1 decision, the United States Supreme Court expanded protection from CERCLA liability for sellers of "useful products" and addressed the threshold for establishing allocation of response costs among potentially responsible parties ("PRPs"). *Burlington Northern & Santa Fe Ry. Co. v. United States*, No. 07-1601, 556 U.S. [129 S. Ct. 1870, 173 L. Ed. 2d 812] (2009). With its opinion, the Supreme Court resolved a circuit split as to the extent of arranger liability and affirmed that allocation and divisibility-of-harm determinations in the post-*Atlantic Research Co. v. United States*, 551 U.S. 128, 168 L. Ed. 2d 827, 127 S. Ct. 2331 (2007) will be based on the principles set forth in the Restatement (Second) of Torts § 433A. The Court also accorded deference to the district court's conclusion that the evidence supported its allocation determination.

Background. Beginning in 1960, B&B operated a chemical distribution facility on a parcel next to land owned by predecessors to the Burlington Northern & Santa Fe and the Union Pacific railroads ("the Railroads"). In 1975, B&B leased part of the Railroads' property to expand its operations. B&B distributed chemicals which were also classified as hazardous substances: dinoseb, D-D and Nemagon, the latter two of which were manufactured by Shell. In the 1960s, Shell required its distributors to use bulk distribution for D-D. Shell would send the chemicals to B&B by common carrier, with the shipping term "free on board destination." During the transfer from the common carrier to B&B's bulk operation "leaks and spills could--and often did--occur." *Id.* slip. op. at 3. "Aware that spills of D-D were commonplace among its distributors … Shell took several steps to encourage safe handling of its products," including site inspections and a program that provided discounts for safety improvements. *Id.*

Over the course of B&B's operations, dinoseb, D-D and Nemagon were allowed "to seep into the soil and upper levels of ground water" at the B&B facility. *Id.* at 3-4. California's Department of Toxic Substances Control ("DTSC") and U.S. EPA both investigated the site. B&B "undertook some efforts at remediation," but it became insolvent in 1989. *Id.* at 4. The facility was added to the National Priorities List and U.S. EPA issued an administrative order forcing the Railroads, as the landlord of a portion of the B&B fa-

cility, to undertake certain remedial tasks at the facility. Two CERCLA actions ensued: the Railroads sought cost recovery from B&B; and U.S. EPA and DTSC sought cost recovery from the Railroads and Shell, who, the agencies contended, "arranged" to dispose of hazardous substances at the B&B facility. Shell, in response, argued that it was not an "arranger," as defined in CERCLA, 42 U.S.C. § 9607(a)(3), but instead was the seller of a useful product that B&B mishandled. Shell had never entered into a contract with B&B to dispose of any hazardous waste or substance.

The Lower Court Opinions. The district court held that Shell was liable at the facility as an arranger, and could not use the "useful products" defense. *See United States v. The Atchison, Topeka & Santa Fe Ry. Co.*, 2003 U.S. Dist. LEXIS 23130, *192-*208 (E.D. Cal. Jul 14, 2003). The district court also held that the harms were divisible and thus found the Railroads liable for a portion of the response costs. *Id.* at *250-61. The district court calculated a 9% allocation for the railroads after considering three factors. First, the district court considered the percentage of the land the Railroads leased to B&B relative to the total area of the B&B facility, 19.1%. Second, the district court noted the number of years B&B leased land from the Railroads relative to the total number of years B&B operated, and concluded that B&B leased the Railroads' property 45% of the period of time that it operated. Third, the district court found that only two of the three chemicals, D-D and Nemagon, were stored on the Railroads' property, or 66% of the chemicals that impacted the soil. Multiplying the three percentages together and rounding up, the district court arrived at a 6% allocation of liability for the Railroads, but increased the allocation by three additional percentage points to 9%, after allowing a 50% fudge factor for "calculation errors." *Id.* at *259-61.

The Ninth Circuit affirmed the district court as to Shell's liability as an "arranger," but reversed as to the divisibility-of-harm, or allocation, issue. *United States v. Burlington Northern & Santa Fe Ry.*, 479 F.3d 1113 (9th Cir. 2007) *amended by* 502 F.3d 781 (9th Cir. 2007) *amended by* 520 F.3d 918 (9th Cir. 2008). With regard to arranger liability, the Ninth Circuit held that Shell was liable under a "broader" concept of arranger liability than one that is based on intentional disposal. 520 F.3d at 948-49. The Ninth Circuit acknowledged that Shell may not have contracted, or arranged, for the disposal of hazardous substances. However, the Ninth Circuit also noted that Shell had knowledge that transfers of the chemicals it sold involved "disposals," *i.e.*, that spills and leaks that routinely occurred when such products were handled at B&B's facility. The Ninth Circuit was not persuaded by Shell's product stewardship efforts, instead holding that those efforts showed Shell's control of the product handling process. Furthermore, the court held, the "useful product" defense did not apply, because, in this case, "the sale of a

useful product necessarily and immediately result[ed] in the leakage of hazardous substances … the hazardous substances are *never* used for their intended purposes." *Id.* at 950. The Ninth Circuit concluded that because Shell controlled the delivery process and knew about the alleged leaks, it was liable for the releases, as an "arranger." *Id.*

With regard to cost apportionment, the Ninth Circuit acknowledged that CERCLA costs are divisible in some cases and should be divided according to Restatement (Second) of Torts, § 433A. However, the Ninth Circuit held that the evidence relied upon by the district court was insufficiently precise to support the actual percentage it reached, because (1) the B&B site was a single facility, (2) there was no supporting evidence that the operations at the facility were uniform over time to use a percentage of time as a proxy for chemicals released and (3) there was no evidence that the two of the three chemicals stored at the facility were responsible for two thirds of the response costs. *Id.* at 943-45.

The Supreme Court Ruling. On the appeal to the Supreme Court, Justice Stevens, writing for the majority of the Court, first held that Shell was not liable as an arranger within the ordinary meaning of the term. Analyzing the statutory language, the Court noted that CERCLA does not define "arranger," but under its common definition, "the word 'arrange' implies action directed to a specific purpose." 556 U.S. ___, slip. op. at 10. The Court concluded that, although "disposal" could be unintentional, the specific intent required by "arrange" showed that Congress sought to apply arranger liability only to entities that expressly intended to dispose of hazardous substances. *Id.* at 11-12. Thus, held the Court, knowledge that a disposal may occur may be evidence of the requisite intent, but it is not sufficient. *Id.* at 12. The Court noted that although Shell was aware of "minor, accidental spills … during the transfer of D-D," Shell's extensive product stewardship efforts showed that Shell did not intend for disposal of its product, regardless of the level of success of its stewardship efforts. *Id.* at 12.

Turning to the issue of the Railroads' apportionment of liability, the Supreme Court held that the evidence cited by the district court "reasonably supported" the 9% allocation of liability to the Railroads. The Supreme Court agreed with the Ninth Circuit that the Restatement (Second) of Torts § 433A is the proper beginning point for an allocation analysis, and that the standard under that section was whether the evidence "reasonably supported" apportionment. *Id.* at 14. Although the Court noted that the district court's decision to adjust the allocation because only two of the three chemicals sold by B&B were found on the Railroads' property had "less support in the record," the Court ruled that the 50% margin of error factor the District Court used to raise the allocation from

6% to 9% rendered "any miscalculation on that point … harmless," observing that had district court omitted the two-thirds factor and the margin-of-error adjustment, it would have arrived at 9% anyway. *Id.* at 18. The Supreme Court thus concluded that the district court's decision to allocate 9% of the liability to the Railroads was reasonably supported by the evidence before it.

Analysis and Practice Pointers. The Supreme Court's treatment of "arranger" liability shows that § 9607(a)(3) liability remains a fact-intensive inquiry in which a CERCLA plaintiff will have to show that the seller of a hazardous substance that is a useful product actually intended its product, or some portion of it, to be disposed pursuant to the normal course of dealing. At the same time, the seller of a useful product can mitigate its potential liability as a potential "arranger" with a good product stewardship program. The Supreme Court also affirmed the standard approach to the allocation of liability under CERCLA, which is based on the Restatement (Second) of Torts § 433A, and which lower courts have used for over 25 years.

Some pointers to assist in CERCLA practice:

- After the Supreme Court's opinion, an involved product stewardship program becomes evidence negating intent to dispose, rather than evidence of control of the transfer process (and the accompanying liability).

- The Supreme Court opinion appears to give very wide discretion to district courts to allocate liability even when parties present a limited factual record. The Court's decision to hold that of the district court's use of a 50% fudge factor was harmless error suggests that parties who do not present evidence on allocation take the risk that the district court can allocate liability with some imprecision and still be sustained on appeal.

- The Supreme Court also affirmed that, post-*Atlantic Research*, allocation determinations in CERCLA § 107 cost-recovery suits will continue to rely on the principles of the Restatement (Second) of Torts § 433A and that district courts should be accorded deference when the evidence provides a reasonable basis to support the divisibility-of-harm allocations.

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

Click here for more Emerging Issues Analyses related to this Area of Law.

About the Authors. James A. Vroman is a partner in Jenner & Block's Chicago office. Mr. Vroman has been practicing law since 1977 and since 1986 has concentrated his practice on environmental law and toxic tort defense.

Mr. Vroman has extensive experience in a wide variety of environmental matters and toxic tort matters. For example, he has represented litigation clients in CERCLA cost-recovery actions, both as plaintiffs and defendants. In these matters he has encountered issues ranging from environmental "stigma" to technical impracticability to human health and environmental exposure risks. He has defended clients in RCRA, Clean Water Act and TSCA enforcement actions and in Superfund proceedings initiated by the EPA under 106, 107 and 122 of CERCLA.

Mr. Vroman also has represented clients in dispute resolution proceedings involving allocation issues before mediators and arbitrators. He has counseled transactional clients on environmental considerations in corporate and real estate matters and has supervised environmental due diligence efforts for significant acquisitions and divestitures. Mr. Vroman also has extensive experience in counseling clients remediating or marketing "brownfield" properties.

Mr. Vroman graduated from the University of Illinois in 1970. After service in the United States Marine Corps, Mr. Vroman obtained his J.D., *magna cum laude*, from the University of Illinois College of Law. He is a member of the Order of the Coif and was articles editor of the University of Illinois *Law Forum* (law review). He is a member of the bar of Illinois, the Seventh Circuit Court of Appeals and several federal district courts. He is a member of the American Bar Association and a member of the ABA's sections of environment, energy and resources and tort and insurance practice. He is also a member of the Chicago Bar Association and the Illinois State Bar Association.

Patricia L. Boye-Williams is an associate in Jenner & Block's Chicago office. She is a member of the Firm's Environmental, Energy and Natural Resources Law, Climate and Clean Technology Law and the Insurance Litigation and Counseling Practice Groups.

Ms. Boye-Williams practices primarily in the area of environmental law. In her litigation practice, Ms. Boye-Williams has defended potentially responsible parties in cost recovery and remedial actions brought under CERCLA, RCRA, and comparable state environmental statutes; represented parties seeking to remediate distressed brownfields; and represented policyholders in environmental insurance coverage disputes. Her recent insurance coverage work includes counseling clients on insurance coverage issues, such as notifying insurers of environmental claims; researching, locating, and analyzing insurance policies; and developing strategies for obtaining insurance recovery. Her regulatory experience includes counseling clients on environmental permitting issues, voluntary clean up programs and other remediation issues, and various federal and state regulations affecting disposal of hazardous wastes, including electronics equipment. Ms. Boye-Williams' transactional experience includes assisting clients with environmental due diligence matters.

Ms. Boye-Williams has written articles regarding the effects of bankruptcy on environmental claims. In particular, she co-authored the *2004 Supplement to Environmental Law in Illinois*, Chapter 12: “Managing Environmental Claims in Bankruptcy,” published by Illinois Institute for Continuing Legal Education. While in law school, she authored “Commercial Speech: Trying to Find a New Definition in Light of Modern Day Image Advertising by Commercial Speakers.”

Ms. Boye-Williams is a member of the Chicago Bar Association and the Illinois State Bar Association, as well as the American Bar Association Section of Environment, Energy, & Resources Law. Ms. Boye-Williams also serves on the Chicago-Kent College of Law Alumni Council of the Program for Environmental and Energy Law. While a law student, Ms. Boye-Williams was an extern to the Honorable Blanche Manning, United States District Court for the Northern District of Illinois. She also served as Vice President of the Chicago-Kent College of Law Environmental Law Society and the Executive Notes and Comments Editor of *Chicago-Kent Law Review*.

Ms. Boye-Williams graduated from Cornell University in 1998 with a bachelors of science in Natural Resources. In 2003, Ms. Boye-Williams graduated with high honors from Illinois Institute of Technology Chicago-Kent College of Law with a certificate from the college's Program of Environmental and Energy Law and is a

member of the Order of the Coif. She is a member of the Illinois Bar and admitted to practice in the United States District Courts for the Northern District of Illinois and the Western District of Michigan.

Michael R. Strong is an associate in Jenner & Block's Chicago office. Mr. Strong is a member of the firm's Environmental, Energy, and Natural Resources Department and Climate and Clean Technology Practices.

Mr. Strong earned his Juris Doctor from the University of Michigan Law School in 2007. During law school, Mr. Strong served as an associate editor for the Michigan Telecommunications and Technology Law Review and as a student attorney in the general clinic. Mr. Strong graduated cum laude from Dartmouth College in 2004, receiving a dual degree in Government (with Honors) and Mathematics.

Mr. Strong is a member of the Illinois bar.