In Major Superfund Case, US Supreme Court Narrows "Arranger" Liability and Upholds Trial Court's Decision Finding "A Reasonable Basis" for Apportionment

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Nearly three decades ago, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[1] Congress designed CERCLA, which also has come to be known as the "Superfund" law, to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts are borne by those responsible for the contamination.

In its recent decision in *Burlington Northern & Santa Fe Railway Co. v. United States* (BNSF),[2] the US Supreme Court explored whether and to what extent a party associated with a contaminated site may be held responsible for the full costs of remediation. The ruling narrows the concept of "arranger" liability and upholds a trial court's ability to apportion liability among defendants under certain circumstances, rather than holding every defendant jointly and severally liable for full remediation costs. This case is significant for property owners, operators, users, lenders and other parties connected to a hazardous waste site and is likely to impact environmental cleanup litigation for years to come.

BACKGROUND

The *BNSF* case concerns the historical operations of a site in California. Brown & Bryant, Inc., (B&B), began operating an agricultural chemical distribution business at the site many decades ago. B&B purchased pesticides and other chemical products from suppliers such as the Shell Oil Company, which were delivered to and stored at the site. B&B used its own equipment to apply the farm chemicals and pesticides onto its customers' farms. B&B initially leased a 3.8 acre parcel of former farmland in Arvin, California at which it operated. It subsequently purchased this parcel. In 1975, B&B expanded its operations onto an adjacent 0.9 acre parcel of land owned jointly and leased to B&B by two railroads now known as the Burlington Northern and Santa Fe Railway Company and the Union Pacific Railroad Company (the Railroads). The two parcels sloped toward a sump and drainage pond located on the 3.8 acre parcel. The sump and drainage pond were unlined for the first 20 years of B&B's operations. The lack of a liner permitted waste water and chemical runoff from the facility to seep through the soil into the groundwater.

Throughout its tenure at the site, B&B stored and distributed farm chemicals, some of which were hazardous, including two pesticides, D–D and Nemagon. Both of these products were sold to B&B by Shell. B&B purchased the herbicide dinoseb from Dow Chemical. B&B stored dinoseb in 55 gallon drums and five gallon containers outside its warehouse on

the Railroads parcel, on top of a concrete slab. B&B stored Nemagon inside its warehouse in 30 gallon drums and five gallon containers. Originally, Shell sold D–D in 55 gallon drums. Approximately five years after B&B commenced its operations, Shell required distributors to purchase D-D in bulk, rather than in drums. From that time onward, B&B purchased D–D in bulk.[3]

Shell shipped D-D to the Arvin site via common carrier, "F.O.B. destination."[4] The D-D was shipped in tanker trucks and the product was transferred from the trucks into a bulk storage tank located on B&B's primary parcel. B&B would then transfer the D-D from its bulk storage tank into bobtail trucks, nurse tanks, and pull rigs.[5] During the transfer from the tanker trucks to the bulk storage tank and from the bulk storage tank to these mobile tanks, leaks and spills could—and apparently often did—occur. The common carrier and B&B tried to contain these spills by using buckets to catch spills from hoses and gaskets connecting the tanker trucks to the bulk storage tank. However, these efforts were not always successful as the buckets overflowed or were knocked over, causing D–D to spill onto the ground.

Shell was aware that the transfers of D-D from the tanker trucks to its distributors' bulk storage tanks often resulted in spills. Beginning in the late 1970s, Shell took steps to address and mitigate these spills. Shell distributed detailed safety manuals to its customers to help cut down on spills. It also provided discounts to those distributors that made improvements at their bulk storage facilities. The discount program was later expanded to include a component for self-certifications by distributors of their compliance. B&B participated in this program and underwent two inspections. In 1981, B&B self-certified to Shell that it had made several improvements to its facility. Even with these improvements, B&B's operations still were sloppy and there were continual spills during deliveries. The facility also had numerous equipment failures. Moreover, B&B would rinse out its tanks and trucks and allowed the rinseate containing Nemagon, D–D and dinoseb to be discharged into the soil and groundwater under the Arvin facility.

TARGETED FOR INVESTIGATION

In 1983, the California Department of Toxic Substances Control (DTSC) targeted the B&B facility for investigation. It found numerous violations of hazardous waste laws occurring at the site. The US Environmental Protection Agency (EPA) also investigated the B&B facility. EPA discovered significant contamination of soil and groundwater. In particular, a plume of contaminated groundwater was migrating from the facility toward a source of drinking water.

B&B conducted a limited amount of remediation but by 1989, B&B was insolvent. Also in 1989, the Arvin facility was added to the National Priority List, meaning that it was believed to present a serious risk to human health and the environment. The DTSC and the EPA (the Governments), acting under the authority under CERCLA, cleaned up the site. Nine years later, the clean up efforts were still on-going but had already cost in excess of $8 million.

In 1991, the EPA ordered the Railroads, as owners of a portion of the site, to perform certain remedial tasks. The Railroads spent more than $3 million in remediating the site. In 1992, the Railroads brought a cost recovery suit against B&B. In 1996, that lawsuit was consolidated with two cost recovery actions brought by the Governments against Shell and the Railroads.

DISTRICT COURT RULING

Following a lengthy trial and a lengthier post-trial period, the district court issued a decision finding that both the Railroads and Shell were potentially responsible parties (PRPs) under CERCLA. The Railroads were found to be PRPs because they were owners of a portion of the site.[6] Shell was found to be a PRP because it had "arranged for" the disposal of hazardous substances through its sale and delivery of D–D.[7]

The district court, however, refused to apply joint and several liability to Shell and the Railroads. Rather, they were found to be responsible for some but not all of the clean up costs incurred by the Governments. The district court found that the harm caused by the contamination was divisible and therefore capable of apportionment. The court relied upon the following factors to apportion the liability: (1) the percentage of the total area of the site that was owned by the Railroads; (2) the duration of B&B's business; and (3) the term of B&B's lease with the Railroads. The district court also determined that only two of the three chemicals that were discharged at the Railroads' parcel required remediation and that those two chemicals were responsible for roughly two-thirds of the overall site contamination that required clean up. Using these factors, the district court apportioned the Railroads' liability at nine percent and Shell's liability at six percent of the Governments' response cost.[8]

The Governments and Shell appealed the district court's decision. The U.S. Court of Appeals for the Ninth Circuit found that Shell was not a "traditional" arranger under

Section 9607(a)(3), as Shell had not directly contracted for the disposal of a hazardous waste product. Nevertheless, the circuit court found that Shell could still be held liable under a broader definition of arranger liability if the "disposal of hazardous wastes [wa]s a foreseeable byproduct of, but not the purpose of, the transaction giving rise" to arranger liability.[9] Relying on CERCLA's definition of "disposal," which covers acts such as "leaking" and "spilling,"[10] the Ninth Circuit concluded that an entity could arrange for "disposal" even if it did not intend to dispose of a hazardous substance. The appellate court then held that Shell had arranged for the disposal of a hazardous substance through its sale and delivery of D–D:

Shell arranged for delivery of the substances to the site by its subcontractors; was aware of, and to some degree dictated, the transfer arrangements; knew that some leakage was likely in the transfer process; and provided advice and supervision concerning safe transfer and storage. Disposal of a hazardous substance was thus a necessary part of the sale and delivery process.[11]

The Ninth Circuit rejected Shell's position that arranger liability is precluded if Shell's action involves the sale of a useful and previously unused product.

As to apportionment of liability, the court of appeals held that the district court erred in finding that the record established a reasonable basis for apportionment. The appellate court noted that the burden of proof on the question of apportionment rested with Shell and the Railroads, which burden they failed to carry. As a result, the appellate court held Shell and the Railroads jointly and severally liable for the Governments' cost of responding to the contamination of the site.[12] The dispute reached the Supreme Court, where it agreed to decide whether Shell had been properly held liable as an arranger within the meaning of Section 9607(a)(3), and whether Shell and the Railroads had been properly held liable for all response costs incurred by the Governments. The Supreme Court reversed the court of appeals on both points.

THE SUPREME COURT: ARRANGER LIABILITY

In its decision, the Supreme Court pointed out that CERCLA imposes strict liability for environmental contamination upon four broad classes of PRPs,[13] including any person[14] who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.[15] Being identified as a PRP can hold important practical significance because a court may compel a PRP to clean up a contaminated area or reimburse the government for its past and future response costs.[16]

The Supreme Court explained that the Railroads qualified as PRPs in the *BNSF* case because they owned the land at the time of disposal of the contamination. In addition, the Railroads are the current owners of the property. Thus, the Railroads qualified as PRPs under two different PRP categories. The Supreme Court stated that the "more difficult question" was whether Shell also qualified as a PRP as an "arranger" by virtue of the circumstances surrounding its sales to B&B.

To determine whether Shell could be held liable as an arranger, the Supreme Court first looked at the language found in CERCLA. It noted that Section 9607(a)(3) stated that it applied to an entity that "arrange[s] for disposal . . . of hazardous substances."[17] The Supreme Court stated that it was "plain from the language of the statute that CERCLA liability would attach under Section 9607(a)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance."[18] It continued that it was "similarly clear 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 to the seller, disposed of the product in a way that led to contamination."[19]

The Supreme Court further stated that there were a myriad of "arrangements" falling in between these two extremes. For example, in some cases, the seller knows of the buyers' planned disposal activities. The Supreme Court pointed out that other "courts have concluded that the determination whether an entity was an arranger required a fact-intensive inquiry that looked beyond the parties' characterization of the transaction as a "disposal" or a "sale" and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions."[20]

The Supreme Court agreed that Section 9607(a)(3) liability was fact-intensive and case-specific. It further noted that arranger liability was limited by the wording of the statute itself. It noted that because CERCLA did not specifically define the term "arranged for the disposal of a hazardous substance," the Supreme Court had to look to its "ordinary meaning."[21] The Supreme Court explained that the word "arrange" implied action directed to a specific purpose.

Consequently, it ruled, under the plain language of the statute, an entity could qualify as an arranger under Section 9607(a)(3) when it took intentional steps to dispose of a hazardous substance.

The Governments argued that Shell was an arranger within the meaning of Section 9607(a)(3) because it knew that its method of shipping D–D to B&B resulted in discharges of the D-D. They argued that despite the fact that Shell was selling a useful product, Shell's continuing use of a transportation mode that it knew involved discharges of the useful product, was sufficient to establish Shell's intent to dispose of hazardous substances.[22] Under the Governments' view, these factors were sufficient to establish Shell's liability as an arranger.

The Supreme Court agreed that an entity's knowledge that its product would be discharged at a site could be evidence of its intent to dispose of hazardous wastes. That knowledge alone, however, would not be sufficient to establish arranger liability, especially when the disposal is peripheral to the actual sales of useful products.[23] In the Supreme Court's view, Shell would have to enter into a sale of the D–D with the intention that some of it would be discharged at the site during the transfer process. In this case, the Court found that there was no evidence of Shell's intent to discharge D-D at the site.

The Supreme Court held that Shell's knowledge of minor, accidental spills occurring during the transfer of D–D from the common carrier to B&B's bulk storage tanks was insufficient to support an inference that Shell intended such spills to occur. Rather, the Supreme Court reasoned that the evidence adduced at the trial level supported the finding that Shell took numerous steps to encourage its distributors to *reduce* the likelihood of spills, provided detailed safety manuals, required its distributors to maintain their storage facilities, and provided discounts for incorporating safety precautions in their storage and handling activities. The Supreme Court noted that even if Shell's efforts were not fully successful, Shell's "mere knowledge" that spills and leaks routinely occurred was insufficient grounds for concluding that Shell "arranged for" the disposal of D–D within the meaning of Section 9607(a)(3). Accordingly, the Supreme Court concluded that Shell was not liable as an arranger for the contamination that occurred at the B&B site.[24]

THE SUPREME COURT: APPORTIONMENT

The Supreme Court then evaluated the Railroads' claim for apportionment of the liability. The Supreme Court noted the many precedents on joint and several liability. It distinguished between the statutorily-imposed "strict liability standard" and court-imposed "joint and several" liability.

The Supreme Court's assessment of the divisibility of harm in CERCLA cases started with an analysis of Section 433A of the Restatement (Second) of Torts.[25] The section provides "when two or more persons acting independently cause 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 each causes...but, where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm."[26] The Supreme Court concluded that "apportionment is proper when there is 'a reasonable basis for determining the contribution of each cause to a single harm.'"[27] The Court conceded "that the harm created by the contamination of the Arvin site, although singular, was theoretically capable of apportionment."[28] It then examined whether the trial court record contained support for its findings on apportionment.

As the Supreme Court noted, the district court concluded that this was "a classic 'divisible in terms of degree' case, both as to the time period in which defendants' conduct occurred, and ownership existed, and as to the estimated maximum contribution of each party's activities that released hazardous substances that caused Site contamination."[29] Using certain factors, the district court found the Railroads responsible for nine percent of the total remediation costs. As to the first factor—the size of the Railroads parcel versus the size of the entire site—the district court noted that the Railroad parcel constituted 19 percent of the surface area of the entire site. As to the second factor—the number of years in operation—the district court found the Railroads parcel had been leased to B&B for 13 years, which equated to 45 percent of the time B&B operated at the entire site. As to the third factor—the volume of hazardous substances released—the district court found that releases on the B&B parcel were at least 10 times greater than the releases that occurred on the Railroads parcel. It also factored in the finding that only two of the three chemicals of concern, Nemagon and dinoseb, were released at the Railroads parcel. The district court assigned a two-thirds factor for this differential with the main parcel. The district court then multiplied 19 percent (surface area factor) by 45 percent (years in operations factor) by 66 percent (two-thirds) (chemicals factor) and determined that the Railroads were responsible for approximately six percent of the remediation costs. It then applied a 50 percent markup, resulting in its determination

that the Railroads could be held responsible for nine percent of the total CERCLA response cost for the Arvin site.[30]

APPORTIONMENT SUPPORTED BY THE FACTS

The Supreme Court concluded that apportionment was supported by the facts adduced at the trial level. It cited to the district court's "detailed findings" about the discharges at the B&B site as an appropriate basis for apportionment. It identified the unlined sump and pond on the primary parcel as the main source of the contamination. These drainage structures were not located near the Railroads parcel. The district court also found that the Railroads parcel contributed no more than 10 percent of the total site contamination, much of it below levels requiring clean up.[31] Based on these findings by the trial court, the Supreme Court concluded that the district court was correct to use the size of the leased parcel and the duration of the lease as factors in its analysis. In addition, the Supreme Court noted that absence of evidence of any D–D spills on the Railroads parcel requiring remediation bolstered the district court's conclusion regarding remediation of the chemicals of concern to the Railroads parcel. Although the Supreme Court noted that the district court's finding that these two chemicals accounted for two-thirds of the contamination requiring remediation had less support in the record, the Supreme Court ruled that this was taken into account by the 50 percent differential applied to the calculations. Because the district court's ultimate allocation of liability was supported by the evidence and comported with the apportionment principles the Supreme Court highlighted, the Supreme Court reversed the court of appeals' application of joint and several liability to the Railroads.

CONCLUSION

The Supreme Court's decision in the *BNSF* case is one of the most important CERCLA rulings in recent years. Although the Supreme Court's determination seems to limit the applicability of "arranger" liability, its ruling is likely to lead to more litigation as the inquiry for arranger liability is fact-intensive and case-specific. Parties seeking to recover clean up costs will expand their search of PRPs to include entities that could fall into the arranger category. However, whether the pool of PRPs is increased or decreased by this ruling is uncertain.

It also seems probable that there will be increased litigation over apportionment of remediation costs among PRPs—in actions brought by the federal and state governments, in actions between and among PRPs and in coverage actions involving their insurance carriers. The Supreme Court's decision to expand the application of apportionment to CERCLA claims where there is a reasonable basis for doing so may impact the willingness of PRPs to clean up contaminated sites as they may not be able to be made whole because of apportionment.

NOTES

1. 42 U.S.C. §§ 9601-9675.
2. __U.S.__, 129 S. Ct. 1870 (May 4, 2009).
3. Because D–D is corrosive, bulk storage of the chemical led to numerous tank failures and spills as the chemical rusted tanks and eroded valves.
4. "F.O.B. destination" means "the seller must at his own expense and risk transport the goods to [the destination] and there tender delivery of them...." U. S. C. § 2–319(1)(b) (2001).
5. Bob-tail trucks are two-ton trucks with a 1,800 to 2,000 gallon tank mounted on it. A nurse truck is a four-wheeled mobile tank of either 2,000 or 2,600 gallons. A pull rig is a 500 or 600 gallon tank mounted on a two-wheeled trailer.
6. *See* 42 U.S.C. §§ 9607(a)(1)–(2).
7. *See* 42 U.S.C. § 9607(a)(3).
8. The Supreme Court noted that "[a]lthough the Railroads did not produce precise figures regarding the exact quantity of chemical spills on each parcel in each year of the facility's operation, the district court found it 'indisputable that the overwhelming majority of hazardous substances were released from the B&B parcel.' The district court explained that 'the predominant activities conducted on the Railroad parcel through the years were storage and some washing and rinsing of tanks, other receptacles, and chemical application vehicles. Mixing, formulating, loading, and unloading of ag-chemical hazardous substances, which contributed most of the liability causing releases, were predominantly carried out by B&B on the B&B parcel.'" 129 S. Ct. at 1877.
9. *USA v. DTSC*, 520 F.3d 918, 949 (9th Cir. 2008).
10. 42 U.S.C. § 6903(3).
11. 520 F.3d at 950.
12. 520 F.3d at 945-946.
13. 129 S. Ct. at 1878.
14. For purposes of the statute, a "person" is defined as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21).
15. 42 U.S.C. § 9607(a). The other three classes of PRPs are the owner and operator of a vessel or a facility, any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, and any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there was a release, or a threatened release that caused the incurrence of response costs, of a hazardous substance.
16. *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004). As noted by the Supreme Court in *BNSF*, under CERCLA, PRPs are liable for: "(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title." 129 S. Ct. at 1878.
17. 129 S. Ct. at 1878.
18. *Id.*
19. 192 S. Ct. at 1879.
20. 129 S. Ct. at 1879, *citing to, e.g., Pneumo Abex Corp. v. High Point, Thomasville & Denton R. Co.*, 142 F.3d 769 (4th Cir. 1998).
21. 129 S. Ct. at 1879.
22. 129 S. Ct. at 1880.
23. *Id.*
24. 129 S. Ct. at 1880. Since Shell was not an arranger, it was not liable to reimburse any of the clean up costs.
25. 129 S. Ct. at 1881.
26. Restatement (Second) of Torts §433A(1)(b), p. 434 (1963–1964).
27. 129 S. Ct. at 1881.
28. *Id.*
29. *Id.*
30. 129 S. Ct. at 1882.
31. 129 S. Ct. at 1883.