

## Legal Updates & News

### Bulletins

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## Ninth Circuit Decides CERCLA Case Regarding Defenses to Joint and Several Liability

April 2007

### LUEL Briefing, April 10, 2007

The Ninth Circuit Court of Appeals decided a case of first impression regarding the “divisibility” defense to joint and several liability under the federal Superfund, or “CERCLA.” In *Department of Toxic Substances Control v. Burlington Northern & Santa Fe Railway Co., et al.*, Case No. 03-17125 (9<sup>th</sup> Cir. 2007) (“*Burlington Northern*”), the Court examined the issue of how, in lieu of joint and several liability, the courts could apportion liability amongst the PRPs when they have been sued in a cost recovery action (as opposed to a contribution action). Such apportionment would avoid the transaction costs and potential unfairness encountered when PRPs are held liable for contamination they did not cause, and are forced to pursue contribution actions against other responsible parties.

In *Burlington Northern*, an agricultural products company used the contaminated site for years, engaging in the transportation, loading, unloading, and storage of large quantities of toxic chemicals including soil fumigants, weed killer, and insecticides. Over time, significant quantities of the toxic chemicals spilled and contaminated the site causing the government to incur substantial cleanup costs. The PRPs included (1) the agricultural products company; (2) Burlington Northern, the railway company used for transportation of the toxic chemicals to the site; and (3) Shell Oil Company (“Shell”), the manufacturer of certain toxic chemicals at issue. Burlington Northern owned only a relatively small portion of the contaminated site where the rail line used to transport the products crossed the property, and was not directly involved in the activities that resulted in the contamination. However, if joint and several liability were applied, Burlington Northern would be held responsible for all costs incurred cleaning up contamination at the entire site, not just the parcel that Burlington Northern owned.

The district court acknowledged the limited role of Burlington Northern in the facility’s operations and declined to apply joint and several liability. Instead, the district court apportioned liability based on (1) the limited size of the railway parcel relative to the rest of the site, (2) the limited period of time that Burlington Northern owned the land, and (3) its finding that only certain categories of hazardous products were present at the railway parcel. A similar analysis was applied to apportion liability for the agricultural products company and Shell.

The government challenged the decision and on appeal the Ninth Circuit confirmed that apportionment of liability is an available option under CERCLA and may be appropriate under certain circumstances. Relying heavily on a detailed analysis of common law tort doctrine and precedent from sister jurisdictions, the Court found that where “the PRPs’ responsibility under the statute derives solely from their status as landowner, the PRPs can establish divisibility by demonstrating that discrete portions of the contamination are in no respect traceable to land they owned at the time of the toxic disposal.” *Burlington Northern* at 3240. However, there must be a reasonable basis for calculating the connection between the PRPs’ status and the relevant harms. *Id.* at 3239. The court found that these requirements were not satisfied and ruled that apportionment could not be used in this case.

### Apportionment of Landowner Liability

Addressing the District Court’s ruling as to Burlington Northern, the Ninth Circuit first noted that the size of the parcel is somewhat irrelevant to apportionment of liability because the relevant issue is the amount of hazardous material that was released on that particular parcel. Here, there was no correlation between the size of the parcel and the amount released because the railway parcel, while small, is where numerous spills occurred during loading and unloading operations. *Burlington* at 3244.

Second, the Ninth Circuit rejected apportionment based on the limited time frame during which Burlington Northern owned the property. Again, the Court found that the proper issue to analyze is the amount released during the time frame of ownership. *Id.*

Finally, the Court found that the analysis of the categories of chemicals released at the railway parcel included such profound factual errors that it failed to support any limitation on liability. *Id.*

So while the Ninth Circuit approved of limiting a PRP's CERCLA liability through apportionment, its analysis indicates that apportionment will only lie where the owner has detailed evidence allowing the court to make very specific findings as to the quantity and nature of the chemicals released from the owner's property.

The problem with this standard is that owners are often uninvolved in the day-to-day operations of a facility and therefore are the least likely to keep and maintain the detailed records that would support apportionment. The court recognized the burden this standard imposes on owners but found it consistent with the policy objectives of CERCLA:

While the result may appear to fault a landowner PRP for failing to keep records proving the minor connection of its land to the contamination on the facility as a whole, CERCLA is not a statute concerned with allocation of fault.... Joint and several liability, even for PRPs with a minor connection to the contaminated facility, is the norm, designed to assure, as far as possible, that some entity with connection to the contamination picks up the tab.

*Burlington Northern* at 3244.

### **Apportionment of Arranger Liability**

Apportionment of Shell's liability raised slightly different issues. Shell was not a passive landowner but instead actively arranged for the transportation of the contaminants to the site. The issue as to Shell, therefore, was twofold: first, whether Shell was properly found liable as an "arranger" under CERCLA, and second, whether apportionment of Shell's liability was proper.

CERCLA liability extends to "any person 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." Shell challenged the application of arranger liability on the grounds that (1) Shell is not an arranger as defined under CERCLA, (2) Shell qualified for the "useful product" defense, and (3) Shell did not own or control the product at the time of release. The court rejected Shell's challenge and affirmed the finding of arranger liability.

Shell claimed that it should not be held liable as an arranger because it did not arrange for "disposal" of the contaminants. However, the definition of "disposal" under CERCLA includes "leaking." Therefore, the Court found that an entity can be an arranger even if it did not intend to dispose of the product. It is sufficient for CERCLA liability to arrange for "a transaction in which there necessarily would be leakage or some other form of disposal of hazardous substances." *Id.* at 3251.

The useful product defense did not apply because the sale of the product at issue "necessarily and immediately" resulted in the leakage of hazardous substances. *Id.* at 3252. CERCLA liability does not extend to the sale of useful products containing or generating hazardous substances that are later disposed of. But here, the leaked portions of the hazardous substances were never used for their intended purpose.

Finally, ownership and control of the chemicals at the time of disposal is not necessary for a finding of arranger liability. While ownership and control are factors to consider when determining whether a transaction includes an arrangement for disposal, neither is a dispositive element. Furthermore, Shell had, in fact, demonstrated indicia of ownership or control in the transfer of the chemicals.

- Shell arranged for delivery and chose the common carrier that transported its product to the site.
- Shell's delivery process required use of large storage tanks that were more prone to leakage from corrosion.
- Shell provided a rebate for improvements in the bulk handling and safety facilities and required an inspection of the facilities.
- Shell regularly reduced the purchase price of the product in an amount that reflected loss from leakage.
- Shell created and distributed guidance materials to ensure that the product storage tanks were being operated in accordance with Shell safety requirements.

Having affirmed Shell's liability as an arranger, the appellate court was also faced with determining whether Shell's liability was divisible from that of the other PRPs. On review, the Ninth Circuit rejected the district court's apportionment of Shell's liability to the extent that it was based only on volumetric calculations of leaked contaminants. Because contamination, not leakage, is the appropriate inquiry, Shell would need to prove that its leaked chemicals contaminated the soil in a "specific proportion as compared to other chemicals spilled at the site." *Id.* at 3246. Moreover, where there is disposal of multiple contaminants, Shell must demonstrate a relationship between the volume of contaminants released and the harm at the site. Factors that would be relevant to such a showing include: (1) relative toxicity of the leaked contaminants, (2) migratory potential, and (3) the synergistic capacity of the hazardous substances. *Id.* at 3245. None of these factors was evaluated by the district court and therefore apportionment was rejected.

The Court's decision is important in different ways. For owners or prospective purchasers of commercial property, the case confirms that CERCLA liability is both far-reaching and unforgiving, and reinforces the importance of environmental due diligence during the purchase of commercial real estate. If a prospective purchaser performs "all appropriate inquiry" into the property's environmental condition and satisfies certain other statutory requirements, it may qualify for CERCLA's bona fide purchaser or innocent landowner defense. The case also demonstrates the importance of negotiating indemnities, representations and warranties, and environmental insurance provisions that adequately insulate purchasers from CERCLA liability. Finally, the case provides an argument in favor of landowners taking a more active role in monitoring tenants' activities on their property. To satisfy the Ninth Circuit's evidentiary standards for apportionment, a landowner would need to maintain copies of detailed operational records from its tenants in order to achieve any limitation at the liability stage.

For manufacturers of products that include hazardous substances, the case demonstrates that insulation from arranger liability is difficult to achieve. There is reason for manufacturers to insure the proper handling of products upon delivery to preclude liability; however, those same efforts, if ineffective, can potentially be evidence to demonstrate the manufacturer's status as an arranger. Similar to landowners, manufacturers with significant involvement similar to Shell will want to craft adequate contractual controls into the arrangements with their customers to help insulate from CERCLA liability.