Supreme Court Decision Gives New Hope to Defendants in Superfund Cases

May 6, 2009

ENVIRONMENTAL ALERT - MAY 6, 2009

written by Seth D. Jaffe, Adam P. Kahn

Monday's Supreme Court's decision in *Burlington Northern v. United States* (.pdf) will significantly affect the outcome of many pending and future Superfund disputes. The opinion's two principal holdings narrow the scope and extent of many parties' liability at Superfund sites and breathe new life into defenses that had long been given little credence by the United States EPA and the courts. First, in a major departure from prior lower court decisions, the Court held that a defendant must actually intend that waste be disposed of before it can be found liable as an arranger under § 107(a)(3) of CERCLA. Second, it expanded the circumstances under which a party could show that the harm attributable to it is divisible from other harms at a site and thereby avoid joint and several liability. In this part of the decision, the Court held that imposition of joint and several liability was inappropriate because the District Court had permissibly and reasonably apportioned liability of the landowner based on the percentage of the site that it owned and the time period during which operations that led to contamination occurred on that parcel. Prior lower court decisions imposed a much higher burden on a party attempting to show why it should not be jointly and severally liable, which in turn frequently made minor contributors to site conditions responsible for the entire cost of cleanup.

The key facts in *Burlington Northern* are not uncommon in CERCLA cases. Beginning in the 1960s, Brown & Bryant, Inc. (B&B) operated an agricultural chemical distribution business on approximately 4 acres of land in California. It eventually expanded its operations to about an additional acre leased from the railroads. B&B purchased its pesticides from Shell Oil Company, among other suppliers. As part of the transfer of pesticides from Shell to B&B, there were some "minor, accidental spills" of chemicals on the property. Shell knew that these spills were a regular part of the transfer process, and "took numerous steps to encourage its distributors to *reduce* the likelihood of such spills." B&B became insolvent and ceased all operations by 1989. On those facts, the United States sought to hold Shell responsible as an entity that "arranged" for the disposal of contamination, and further asserted that Shell and the passive landowners should be jointly and severally liable for the contamination on the site, meaning that they would be responsible for the "orphan share" created by the insolvency of B&B. The Ninth Circuit Court of Appeals agreed.

Arranger Liability

Under CERCLA § 107(a)(3), a person who "arranged for disposal or treatment" of hazardous substances is strictly liable for environmental contamination. Both the District Court and Appeals Court concluded that Shell's knowledge of accidental

spills was enough to establish this arranger liability, but the Supreme Court disagreed. Noting that CERCLA does not define the term "arrange," the Court looked at its ordinary meaning. Doing so, the Court concluded that liability may attach only where the defendant "takes intentional steps to dispose of a hazardous substance." The government argued that, because the defendant knew that disposal was the inevitable result of its sale of product to the site owner, the defendant had "intended" disposal to occur. The Supreme Court rejected this argument, stating that the defendant "must have entered into the sale of [the product] with the intention that at least a portion of the product be disposed during the transfer process." The Court's holding rebukes the many lower court decisions which imposed liability based on evidence that the defendant merely knew that releases were an inherent part of some process. In short, knowledge that releases would occur does not equate to an intent to dispose of a hazardous substance.

Although the *Burlington Northern* may resolve many questions about "arranger" liability, one common fact pattern not addressed involves claims that a party is an "arranger" when waste destined for one location ends up in another, giving rise to transshipment liability. Under section 107(a)(3), a person is liable as an arranger if s/he:

"arranged for disposal or treatment … of hazardous substance owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party…"

Under this language, it is at least arguable that the defendant must have "arranged" for the disposal of the hazardous substances ***at the site where disposal occurred***. Where the site operator transshipped the waste without the generator's knowledge or consent, generators may have stronger defenses against liability at the location where the waste was ultimately disposed, given the Supreme Court's emphasis on what the generator ***intended***.

Apportionment

The second holding in *Burlington Northern* may be of even more practical significance. The Court reversed the Court of Appeals and upheld the District Court's original divisibility finding that Burlington Northern Railroad was liable for only 9% of the remediation costs at the site. The District Court used a simple formula based on three figures: 1) the Railroad's parcel constituted only 19% of the site; 2) the Railroad had leased the parcel to B&B for 13 years, which was only 45% of the time they had operated their facility on the site; and 3) only spills of two key chemicals on the Railroad parcel significantly contributed to the overall contamination at the site, and that those two chemicals contributed two-thirds of the overall contamination that required remediation. The District Court then multiplied .19 times .45 times .66 (two-thirds), and came up with a result of 6% of the liability at the Site attributable to the Railroad. After allowing for "calculation errors" of up to 50%, the District Court determined that the Railroad was liable for 9% of the site. The Supreme Court ultimately found that the conclusion that the two chemicals contributed only two-thirds of the contamination at the site was unsupported by the record, but the 50% "calculation error" correction allowed the District Court to come to the right result of 9% (.19 times .45 equals 9%).

What's most significant here is the simplicity of the opinion. Justice Stevens merely stated that there was evidence that contribution from the railroad parcel to the overall contribution was limited, so that, "[w]ith these background facts in mind, we are persuaded that it was reasonable for the court to use the size of the leased parcel and the duration of the lease as the starting point for its analysis."

Until now, lower courts had broadly held that the defendant's burden in a divisibility argument is almost overwhelming and that the burden will be satisfied in the rarest of cases and only upon almost perfect evidence of divisibility. The Supreme Court has made clear that this is not the right approach, and that harm at Superfund sites is divisible when there is a "reasonable basis for determining the contribution of each cause to a single harm." Superfund cases are no different than other cases, and there is no unstated higher burden of proof. This reasoning likely will give district court judges more latitude to conclude that a defendant has met its burden of proving divisibility, and divisibility findings should no longer be the rarity that they are today.

Both of these rulings are good news for potentially responsible parties. The Supreme Court has moderated the often tortured reading of CERCLA and the previous approach to liability in Superfund cases. Henceforth, arrangers are only liable if they *intended* to "arrange for" the disposal of hazardous waste, and it is possible to divide the harm at a site based upon reasonable evidence.