CERCLA After Burlington Northern

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Just over a year ago, the U.S. Supreme Court decided *Burlington Northern and Santa Fe Railway Company v. United States*, 129 S. Ct. 1870 (2009), in which it addressed the scope of arranger liability under CERCLA, and affirmed the right of CERCLA defendants to avoid joint and several liability where a "reasonable basis" to apportion liability exists. This article reviews how the lower courts have addressed the issues of arranger liability and apportionment since *Burlington*.

Burlington Facts & Procedural History

Brown & Bryant, Inc. (B&B) operated an agricultural chemical distribution facility on a 3.8-acre parcel, a portion of which was leased from predecessors to Burlington Northern & Santa Fe Railway Co. and Union Pacific Transportation Co. Shell Oil Company (Shell) supplied pesticides and other agricultural chemicals to B&B. The transfer of these products from tanker trucks to the storage tanks on the property often resulted in leaks and spills of hazardous substances. B&B undertook some efforts to clean up the contamination resulting from these leaks and spills, however, by 1989, the company had become insolvent and ceased all operations on the property. The United States Environmental Protection Agency ("EPA") ordered the railroads to clean up the entire site. Shell was also named as a potentially responsible party 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.

The district court held that both Shell and the railroads were "potentially responsible parties" under CERCLA, and apportioned 9% of the liability for the site remediation costs to the railroads and 6% to Shell. On appeal, the Ninth Circuit upheld the district court's determination that Shell was liable under CERCLA finding Shell liable as an "arranger" of the disposal of hazardous substances. The Ninth Circuit reversed the district court's apportionment of liability between the railroads and Shell, holding that the record was insufficient to establish a reasonable basis for apportionment, and imposing joint and several liability on the railroads and Shell for the entire amount of the site remediation costs.

The Supreme Court's Decision

In *Burlington*, the Supreme Court, in an 8-1 decision written by Justice Stevens, reversed on both points. The Supreme Court emphasized that determination of whether an entity is an arranger requires a fact-intensive inquiry. The Supreme Court then examined the meaning of "arrange for" and concluded that it should be given its ordinary meaning so that for a party to arrange for disposal it must have taken intentional steps to dispose of a hazardous substance. The Supreme Court found that Shell's mere knowledge that spills and leaks occurred on B&B's property was insufficient to hold Shell liable as an arranger.

The Supreme Court then addressed whether the railroads were properly held jointly and severally liable for the response costs totaling $8 million. The Supreme Court concluded that the district court had reasonably apportioned the railroads' share of the response costs. Applying the Restatement (Second) of Torts, the Supreme Court held that "apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm." The Supreme Court further held that while the defendant seeking to avoid joint and several liability bears the burden of providing that a reasonable basis for apportionment exists, the evidence supporting apportionment need not be precise.

Lower Court Decisions

"Arranger" Liability

While a number of lower courts have been faced with the issue of arranger liability after *Burlington*, very few lower have specifically applied *Burlington's* arranger liability test. In *Bonnieview Homeowners Ass'n v. Woodmont Builders*, 655 F.Supp.2d 473 (D.N.J. 2009), the plaintiffs, homeowners in a residential subdivision, alleged that the developer of the residential subdivision was liable under CERCLA as an arranger because the developer had moved soil that was contaminated with pesticides during the development of the subdivision. The district court, citing *Burlington*, held that because the developer had no knowledge that the soil was contaminated--a fact that was undisputed--there was no evidence that the developer took intentional steps to dispose of a hazardous substance, and the developer could not be liable as an arranger.

In *Hinds Inv. v. Team Enter.,* 2010 WL 922416 (E.D. Cal. Mar. 12, 2010), the plaintiffs, former and current owners of properties leased to dry cleaners, sued the manufacturers of a dry cleaning machine to recover remediation costs at their properties, which had been contaminated by perchloroethylene ("PCE"). The plaintiffs argued that the defendants were liable as an "arranger" because the operating instructions for the dry cleaning machine prepared by the manufacturers directed that PCE-contaminated wastewater "must flow into an open drain" and such instructions evidenced the manufacturers' intent to dispose of a hazardous substance. The defendants moved to dismiss the complaint for failure to state a claim. The district court granted the defendants' motion.

In dismissing the plaintiffs' claims, the Eastern District of California--the district court where *Burlington* originated--quoted portions of the *Burlington* decision on the question of intent, highlighting the Supreme Court's statements that "…knowledge alone is insufficient to prove that an entity 'planned for' the disposal" and "…[a manufacturer] must have entered into the sale of [its product] with the intention that at least a portion of the product be disposed of…." The district court found that at best the plaintiffs had alleged that the manufacturers had knowledge of the possible waste disposal, but failed to substantiate that the defendants knew how a machine operator would dispose of the PCE to rise to the level of intentional disposal required by *Burlington*.

In *Appleton Papers Inc. v. George A. Whiting Paper Co.*, 2009 WL 393036 (E.D. Wis. Nov. 18, 2009), the plaintiffs, manufacturers of carbonless paper, brought a contribution claim

under CERCLA § 113 against recyclers of the carbonless paper and municipal wastewater utilities. The district court had previously dismissed the plaintiffs' cost recovery claim under CERCLA § 107 against the recyclers and municipalities. In light of the *Burlington* decision raising both the issues of arranger liability and apportionment, the plaintiffs asked the district court to revisit its summary judgment decision dismissing the plaintiff's cost recovery claims. On the issue of arranger liability, the plaintiffs argued that *Burlington* changed the standards for arranger liability and the case could not move forward without a threshold determination as to whether plaintiffs are arrangers. The district court acknowledged that the standards for arranger liability changed, but rejected the plaintiffs' argument that *Burlington* required some sort of threshold determination regarding arranger liability in CERCLA § 113 cases.

In *Halliburton Energy Services, Inc. v. NL Industries*, 648 F. Supp.2d 840 (S.D. Tex. 2009), the plaintiff mining company brought cost-recovery and contribution claims under CERCLA against the former mining operator. The defendant argued that under *Burlington* it lacked the requisite intent to be found liable as an arranger. The district court rejected that argument, finding the analysis in *Burlington* regarding arranger liability irrelevant because the defendant had admitted it was liable under CERCLA § 107(a).

Other lower court decisions addressing the issue of arranger liability after *Burlington* have focused on the Supreme Court's directive to make a fact-intensive inquiry of a party's intent. *See e.g., Frontier Communications Corp. v. Barrett Paving Materials*, 631 F.Supp.2d 110 (D. Me. 2009) (the court noted the Supreme Court's directive to make a fact-intensive inquiry, but concluded that the plaintiffs had alleged sufficient facts to raise a material issue as to whether the defendants intended to dispose of waste through a sewer into the river); *United States v. Wash. State Dep't of Transp.*, 2009 WL 2985474 (W.D. Wa. Sept. 15, 2009) (citing the Supreme Court's directive to make a fact-intensive, court concluded summary judgment was not proper because the facts had not yet been sufficiently developed to determine the Army Corps of Engineers' liability).

Apportionment

The first district court to address the apportionment issue after *Burlington* declined to commit to a particular interpretation of the decision. In *Evansville Greenway and Remediation Trust v. Southern IN Gas and Elec. Co., Inc.*, 661 F.Supp.2d 989 (S.D. Ind. 2009), the plaintiff moved for summary judgment arguing that the defendant was jointly and severally liable for all the clean-up costs for two contaminated sites. The *Burlington* decision was issued while the plaintiff's summary judgment motion was being briefed. While the defendants argued that *Burlington* "effected a dramatic change that will make it much easier for PRPs to avoid the burden of joint and several liability," the plaintiffs claimed that "*Burlington* amounts to nothing new." The district court noted that the Supreme Court's decision presented "genuine questions of material law," but concluded that the best way to address the issue was to let the case go to trial so that the parties could present evidence related to their differing interpretations of *Burlington*.

The district court in *Appleton Papers*, discussed above, found *Burlington* to merely re-affirm existing principles related to apportionment and rejected the plaintiffs' argument that

Burlington requires courts to make a threshold determination regarding joint and several liability or allows plaintiffs to make an apportionment argument in a contribution action.

At least two district courts have applied *Burlington* to determine when apportionment is appropriate. In *Reichhold, Inc. v. United States Metal Refining Co.*, 655 F.Supp.2d 400 (D. N.J. 2009), the plaintiff had purchased a parcel of land contaminated with hazardous substances and filed suit against a former owner who had operated a copper smelter and refinery and also a lead refinery on the parcel to recover remediation costs. The district court, citing *Burlington*, concluded that apportionment was appropriate to address one of the plaintiff's claims because there had been two distinct causes of contamination, only one of which was caused by the defendant. Therefore, the district court ruled that the plaintiff could recover only half of its remediation costs from the defendant.

In *United States v. Saporito*, 2010 WL 489703 (N.D. Ill. Feb. 9, 2010), the United States brought an action against the owners of a metal plating company, seeking reimbursement of clean up costs related to the company's hazardous waste contamination that resulted from the plating process. The United States settled with one of the owners and sought to hold the remaining defendant jointly and severally liable for all costs associated with the clean up. The defendant argued that liability should be apportioned. The court found that apportionment was not appropriate because, unlike in *Burlington*, where the contamination of a total site could be divided among separate parcels of land owned by different parties, the defendant's co-ownership of components that made up the plating process made him comparable to a joint venturer, and the court concluded that "apportionment is not appropriate for joint venturers."

Finally, in *In re MTBE Products Liability Litigation*, 643 F.Supp.2d 461 (S.D.N.Y. 2009) the district court considered how much proof is necessary to establish a reasonable basis for apportionment after *Burlington*. The district court concluded that *Burlington* had adopted the approach of the Third Restatement of Torts regarding proof of apportionment, which provides that a fact finder may rely on "available evidence" to apportion liability and the burden of production necessary to support a showing of divisibility is "low." However, this was a non-CERCLA case involving environmental torts. The only district court to address this question in the CERCLA context did so in *United States v. Saporito*, discussed above. Although the court in that case concluded that apportionment was not appropriate, it went on to note that even if apportionment was possible, the defendant had not carried his burden of proving an apportionment theory by a preponderance of the evidence.

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