BNA, INC.

TOXICS LAW REPORTER

BNA Employee-Owned Since 1947

In this Analysis & Perspective article, attorney Albert M. Cohen discusses the U.S. Supreme Court's recent decision in *Burlington Northern & Santa Fe Railway v. U.S.* with regard to arranger liability, and joint and several liability. The decision, Cohen says, will likely make it harder to prove arranger liability, and may make it easier for parties to obtain apportionment of liability, which would have a ''major impact on superfund enforcement.''

Burlington Northern & Santa Fe Railway Co. et al. v. United States

BY ALBERT M. COHEN

On May 4, 2009, the United States Supreme Court issued a landmark decision in *Burlington Northern & Santa Fe Railway Co. et al. v. United States et al.*[1] The purpose of this article is to discuss the basic holdings of the case and their rationale and to explore some of the significant impacts that the case is likely to have on liability and litigation under the Comprehensive Environmental Response, Compensation, and Liability Act.

The decision first addressed the question of what a party must prove to establish that a potentially responsible party (PRP) is liable as an ''arranger'' for disposal under § 107(a)(3) of CERCLA. The Supreme Court held that the plain meaning of ''arrange'' implies ''action directed to a specific purpose.''[2] Therefore, it held that to be liable as an arranger, a person must ''take intentional steps to dispose of hazardous substances.''[3] Because there was no evidence of intent, the Court held that Shell Oil Co. was not liable as an arranger. The Court rejected the governments'[4] argument that a party that sold a useful product could be liable merely because it knew that disposals were likely to occur.[5]

[1] *Burlington Northern & Santa Fe Railway Co. et al. v. United States et al.*, 556 U.S. ___ (2009).

Albert M. Cohen is a partner at Loeb & Loeb LLP in Los Angeles, Calif., where he specializes in environmental law. He can be reached at acohen@loeb.com.

[2] *Id.* at ____ (*slip op.*, at 10-11). In arriving at such a conclusion, the Court first noted that CERCLA does not specifically define what it means to ''arrange for'' disposal of a hazardous substance; therefore, the Court reasoned, in the absence of such a definition within the statute, the term ''arrange'' should be construed by its plain language meaning, or via its understanding in ''common parlance.'' *Id.* at __ (*slip op.*, at 10).

[3] *Id.* at ___ (*slip op.*, at 11).

[4] ''Governments'' in the context of this case referred to the California Department of Toxic Substances Control and the federal Environmental Protection Agency.

[5] The United States had used evidence that Shell took steps to reduce spills to show that it was aware of such spills and, therefore, should be liable. The Court held that, ''to the contrary, the evidence revealed that Shell took numerous steps to

 ISSN 0887-7394

The Supreme Court then turned its attention to the issue of joint and several liability. Despite the common mantra that CERCLA imposes joint and several liability, the Court correctly noted that virtually every court that has addressed the issue has agreed that:

1. CERCLA does not mandate joint and several liability[6];

2. Congress intended Courts to look at evolving standards of common law to determine whether joint and several liability should be imposed;

3. The starting point for an analysis of the common law is § 433A of the Restatement (Second) of Torts which provides that ''where two or more persons acting independently caus[e] 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 he himself has caused . . . but where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm''[7];

4. Therefore, apportionment is proper when there is a single harm if ''there is a reasonable basis for determining the contribution of each cause to a single harm.''[8]

The Supreme Court held that CERCLA defendants bear the burden of proving that a reasonable basis for apportionment exists.[9] However, despite the fact that the Defendants argued that they were not liable at all, rather than trying to prove a basis for apportionment, it held the District Court's conclusion that the Railroad Defendants were liable for only 9 percent of the harm should be upheld as long as it was reasonable.[10] It then held that the record reasonably supported the apportionment and held that apportionment could be based on relatively simple factors such as volume, chronology or other types of evidence.[11] The Supreme Court also held that where there was uncertainty regarding one of these factors, it was appropriate for the District Court to apply a margin of error to account for the uncertainty.

The Impact of the Case on Arranger Liability.

At first glance, the Supreme Court's holding that a showing of intent is required to establish arranger liability appears to severely cut back on when parties will be found liable as arrangers. Direct evidence of intent to dispose will likely be difficult, if not impossible to prove.

A closer reading of the case, however, indicates that the Supreme Court did not hold that direct evidence of intent is required in every case. The Supreme Court held that what is required to prove intent may vary depending on the circumstances.

It specifically stated that while knowledge that its product will be leaked or spilled alone ''is insufficient to prove that an entity 'planned for' the disposal, particularly when [as in *BNSF*] the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product,'' in some instances, ''an entity's knowledge that its product will be leaked, spilled, dumped or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes.''[12]

Thus, while the Supreme Court indicated that direct evidence of intent is required where a party is selling an unused, useful product; in cases where a party is not selling a new, useful product, indirect evidence of intent, such as evidence that the party knew that releases would occur, may be sufficient to prove intent and, therefore arranger liability.

Thus, chemical manufacturers, such as the defendants in *United States v. Aceto Agricultural Chemicals Corp.*, 872 F. 2d 1373 (8th Cir. 1989), may still be liable despite the Supreme Court's holding that evidence of intent is required. That case involved manufacturers of industrial grade pesticides that arranged with formulators to process the material into commercial grade pesticides.

The United States alleged that the manufacturers were liable as arrangers and the manufacturers argued, among other things that they could not be held liable because there was no intent to dispose. The Eighth Circuit held that there was no requirement to prove intent. It then held that pesticide manufacturers were liable because they retained ownership of the product throughout the process and knew that releases were inherent in the manufacturing process.

As noted above, although the Supreme Court held that it was necessary to prove intent, it held that knowledge that releases would occur may be sufficient to prove intent in cases where a manufacturer is not selling a useful product. Because the pesticide manufacturers retained ownership of the product and, therefore, were not selling a useful product, and it was alleged that they knew that releases were inherent in the formulation product, a court applying the Supreme Court's standard in *BNSF* could hold that the pesticide manufacturers were liable as ''arrangers.''

Still, the *BNSF* decision does make it more difficult to establish ''arranger'' liability, particularly where a party is selling an unused, useful product. In such cases, the complaining party will need to find evidence of actual

---

encourage its distributors to *reduce* the likelihood of such spills . . .'' and, therefore was not liable.

[6] Curiously, the United States did not argue, at least not forcefully, that CERCLA mandates imposition of joint and several liability. The United States itself noted in its brief, PRPs are liable for ''*all* costs of removal or remedial action incurred by the United States Government . . . 42 U.S.C. 9607(a)(4)(A) (emphasis added).'' However, rather than arguing that the imposition of liability for ''all costs'' imposed joint and several liability, it conceded that apportionment should be guided by common-law principles.

[7] *Id.* at ___ (*slip op.*, at 14).

[8] *Id.*

[9] Most courts that have addressed the issue in the past have found that the defendants did not meet their burden to prove that the harm was divisible and, as a result, imposed joint and several liability.

[10] This holding is curious given that the governments argued that because Defendants did not attempt to prove divisibility, they never had a chance to rebut their evidence or to prove that the harm was not divisible. Justice Ginsburg noted this in her dissent and argued that the case should be remanded to ''give all parties a fair opportunity to address the court's endeavor to allocate costs.''

[11] Under the facts of the subject case, the apportionment upheld by the Court was arrived at by the District Court using the following considerations: percentage of land area of the entire site owned by the responsible party, time of ownership, and types of hazardous products contributing to the contamination requiring remediation (and relatedly, the percent contribution of the offending products to the overall contamination). The Court found that it was reasonable for the District Court to use the size of the leased parcel and the duration of the lease as the starting point for its analysis.

[12] *Id.* at ___ (*slip op*., at 12).

  TXLR ISSN 0887-7394

intent to dispose. In cases where a party is not selling a useful product, parties may still be able to establish arranger liability particularly if they can show that the alleged arranger retained title to the product and knew that releases were likely to occur.

Commonly, parties have tended to bring ''arranger liability'' cases in situations where, as in *BNSF* and *Aceto,* the parties that actually released the chemicals were either insolvent or without significant resources. Therefore, the decision is likely to have its most significant impact in cases where there are large orphans shares. The effect of the Supreme Court's *BNSF* opinion will likely have its most significant impact on governmental entities that incur cleanup costs, and on the remaining solvent parties that are left to bear the arranger share. The impact may also be particularly significant on landowners who leased property to now insolvent lessees. The decision emphasizes the importance of making sure that tenants do not engage in activities that could cause contamination or, at least, that they take appropriate steps to address contamination before they become insolvent.

The Impact on Joint and Several Liability.

The *BNSF* decision will likely embolden defendants to attempt to defeat claims of joint and several liability and thereby complicate Superfund litigation. At the same time, it is not clear that courts will be significantly more likely to find that harms are divisible and, therefore, that joint and several liability should not be imposed.

First, *BNSF* may be an example of a case where ''bad facts make . . . . law.'' Although the railroads were merely landowners that did not cause any of the contamination, and the contamination was primarily associated with a parcel that they did not own, the governments attempted to hold them jointly and severally liable. Just as the District Court was troubled by this, the Supreme Court may also have been concerned with the unfairness of this situation, thereby leading them to find that the harm was divisible.

Other courts, with less compelling facts, may not feel as compelled to find a way to avoid imposing joint and several liability. As noted above, the Supreme Court did not change the standard for imposing joint and several liability, noting that virtually every court that had addressed the issue previously applied the same standard. And, in most of those cases, the lower courts held that there was no reasonable basis for apportionment and, therefore, imposed joint and several liability.

Still, the Supreme Court made it clear that district courts have significant discretion to apportion liability based on a variety of factors such as the volume of wastes contributed, the amount of time a party was involved with a site and the area impacted; the court opined that decisions apportioning liability would not be overturned as long as there is a reasonable basis for such determinations. Some factual information regarding each of these types of factors is available in almost every case, and district courts may take the decision as a signal that they should attempt, or at least feel free, to divide the harm based on such factors. Only time will tell which way district courts will go on this issue.

Regardless, the decision will likely reduce the power that governments have to force parties to conduct cleanups and enter into settlements. This is particularly true if over time, district courts take the *BNSF* opinion as a signal that they should find that the harm is divisible.

One of the primary strategies used by governments at large multi-party Superfund sites is to attempt to force a relatively small group of the largest volume generators to undertake the cleanup. The governments threaten these parties with the imposition of joint and several liability and § 106 orders.

The PRPs typically decide that there is value in cooperation with the governments and that the risks of joint and several liability or non-compliance with a § 106 order are not worth taking. Therefore, such parties often cooperate with the governments, undertake a portion of the work in excess of their allocable share, and then seek to recover any excess from third parties through contribution actions. The *BNSF* decision may call all of this into question.

First, given that proving divisibility may now be easier than previously thought, parties may decide to risk litigation in the hope that they can convince the court that their shares should be apportioned and that they should not be held jointly and severally liable. Parties will now have to weigh the risk of settling and then seeking contribution against the likelihood that they can convince the court that they should only be allocated their share of the harm.[13]

Parties are likely to have the most interest in challenging joint and several liability claims in situations where they have particularly good facts establishing a basis for divisibility, they perceive that their shares are relatively small compared to the amount of liability they are being asked to bear, the plaintiffs are reaching, as they arguably were in *BNSF,* and where there is a risk that they would have to bear a significant orphan's share if they are held jointly and severally liable.[14]

Second, as noted above, governments often threaten parties with § 106 orders noting that if the PRPs do not comply, they could be held liable for up to $25,000 per day in penalties for non-compliance and treble damages. The decision raises some interesting issues with regard to § 106 orders.

First, there is an issue as to whether the government can issue a § 106 order requiring a party to perform more than its divisible share. At least one court previously called this into question. (See e.g., *United States v. Stringfellow* 1984 WL 3206, 5 (C.D. Cal., 1984), noting that ''the Court sees no role under section 106(a) of CERCLA for what plaintiffs describe as 'joint and several liability to abate.' '').

Second, the primary threat associated with a § 106 order is that a party will be subject to penalties or treble damages. The statute, however, provides that a party is only subject to these if it fails to comply ''without sufficient cause'' (See §§ 106(b)(1) and 107(c)(3) of CER-

[13] If a party prevails on its divisibility claim it does not have a contribution claim because contribution is only available where a party is found jointly and severally liable. See *BNSF*, fn. 9 (*slip op.*, at 15).

[14] As the Supreme Court noted in fn. 9, ''Equitable considerations play no role in the apportionment analysis; rather, apportionment is proper only when the evidence supports the divisibility of the damages jointly caused by the PRPs.'' But see, *Matter of Bell Petroleum Services Inc.*, 3 F. 3d 889 (5th Cir. 1993), ''There may be exceptional cases in which it would be unjust to impose several liability, such as when one of the defendants is so hopelessly insolvent that the plaintiff will be unable to recover any damages from it.''

CLA). It could be argued that a party's contention that the harm is divisible constitutes ''sufficient cause'' to avoid penalties and treble damages for non-compliance.[15] Given that district courts may now be less likely to impose joint and several liability and defendants may have arguments that joint and several orders are invalid or, at least, that they should not be subject to penalties for non-compliance, governments may have less power to force parties to perform work at Superfund sites and PRPs may have additional leverage in Superfund negotiations.

Despite the fact that *BNSF* increases the likelihood that parties will be able to defeat joint and several liability claims, parties must consider whether it is in their best interest to argue in favor of divisibility, where equitable factors are irrelevant, or whether they should accept a finding of joint and several liability and then pursue contribution claims where such factors are relevant.

For example, a party that sent a large volume of wastes to a site relative to other parties, but which cooperated with the government, may be better off in a contribution action where it may be allocated a lower share in light of its cooperation than under a divisibility analysis where it might be allocated a share based on its volume.

It order to prove that they should not be held jointly and severally liable, defendants will need to develop and present theories for divisibility. However, individual defendants are likely to have conflicting interests with regard to how the harm is divided. Take for example, a hazardous waste landfill where many parties disposed of many kinds of wastes but the primary groundwater contaminants are chlorinated solvents.

The defendants that did not send solvents will want to argue that the harm should be attributed to those that sent solvents. Therefore, it will probably be in their interest to present a theory of divisibility based on the nature of contaminants sent to the site and which contaminants are driving the costs to address groundwater.

Those that did send solvents may want to argue that the harm should be divided based on other factors such as volume. Still other defendants may find it in their interest to argue for other theories of divisibility. This would put the defendants at odds with each other. And, to the extent that each is attempting to prove an alternate theory of divisibility, a court may be more likely to find that the harm is not divisible and, therefore, that all of the defendants are jointly and severally liable.

In cases where most of the PRPs are participants in the litigation and there is a relatively small orphan's share, this may not be a significant problem because even if the defendants are found jointly and severally liable, response costs can be allocated through contribution claims based on equitable factors. However, where most of the PRPs are not participants, and particularly where there is a significant orphan's share, this could have a very significant impact.

Take for example, the typical case where a governmental entity pursues a relatively small group of PRPs at a large multi-generator landfill site. Assume that the group of PRPs sent 25 percent of the wastes to the site and that there is a significant orphan's share. The government seeks to impose joint and several liability on the members of the group so that it only has to deal with a manageable sized group of PRPs, does not have to be bothered pursuing the other PRPs, and does not have to worry about any orphan's shares.

Those generators have a significant interest in avoiding joint and several liability because, if they are held jointly and severally liable they will have to pursue all of the other responsible parties and could end up bearing a significant portion of the orphan's share. As noted above, however, such defendants may have conflicting interests with regard to how the harm should be divided, and the more conflicting theories that are presented, the more likely the court will find that the harm is not divisible. In such cases it may be in the interests of all of the defendants to resolve any disputes they have regarding divisibility amongst themselves outside of the courtroom and to present a uniform approach to divisibility at trial.

Moreover, it will likely be in the interests of the PRPs to reach agreement regarding these types of issues relatively early in the litigation. The PRPs will need to engage in increased discovery to attempt to find facts which would help prove that the harm is divisible and that their liability should be limited. In addition, they will have to retain experts and present expert testimony on divisibility.

Conducting such discovery and presenting expert testimony, without having developed a common approach to divisibility, may put defendants at odds with each other. Each defendant might end up attempting to develop evidence which shows that other parties should be held responsible for more of the harm and attacking the other defendants' experts on their divisibility approaches. This would likely enhance the plaintiff's case and make defeating a claim of joint and several liability more difficult.

At the same time, in order to prove that the harm is not divisible, plaintiffs will want to present evidence and expert testimony to show that the site is complex, that wastes are intermingled, and that response costs would have been incurred regardless of what wastes were disposed of at the site. They will also want to seek ways to exploit any disagreements amongst the defendants in order to demonstrate how hard it is to establish divisibility. Despite the fact that equitable factors are technically irrelevant, Plaintiffs should be careful to avoid seeking joint and several liability in situations like *BNSF* which call out for some sort of apportionment in order to avoid gross unfairness. The decision creates a potential disincentive for private parties to engage in voluntary cleanups. A private party that voluntarily incurs response costs has a right to seek recovery of its response costs under § 107, but does not have a right to seek contribution under § 113. *U.S. v. Atlantic Research Corp.*, 551 U.S. 128 (2007). If there is a significant orphans share, the party must consider the likelihood of the defendants proving divisibility. If they cannot prove divisibility, they will be held jointly and severally liable and the costs will ultimately be apportioned based on

[15] Varying standards have been applied to determining whether a party had sufficient cause for non-compliance. See e.g. *U.S. v. Capital Tax Corp.*, 545 F.3d 525, 537 (7th Cir. 2008) (A ''sufficient cause'' for failing to comply is a reasonable belief that one is not liable under CERCLA); *Solid State Circuits Inc. v. U.S.E.P.A.*, 812 F.2d 383, 392 (8th Cir. 1987) (''sufficient cause'' includes a defense that ''the applicable provisions of CERCLA, EPA regulations and policy statements, and any formal or informal hearings or guidance the EPA may provide, give rise to an objectively reasonable belief in the invalidity or inapplicability of the clean-up order.'') .

  TXLR ISSN 0887-7394

equitable factors. *Id.* at ____(''[A] defendant PRP in such a § 107 (a) suit could blunt any inequitable distribution of costs by filing a § 113(f) counterclaim.''). On the other hand, if they prove divisibility, then they will only be liable for the share of the harm they caused and the PRP that voluntarily cleaned up the site would be left paying the orphans share. Private parties must take this into account in deciding whether to engage in voluntary cleanups.

Moreover, until now, defendants in private cost recovery actions typically responded to the complaint by filing counter-claims and cross-claims for contribution under § 113. In light of *BNSF*, it may be in their interest to not file contribution claims initially and attempt to prove divisibility in order to limit their liability to the harm that they caused, thereby avoiding responsibility for orphans shares or liability based on other equitable factors. As the Supreme Court noted in *Atlantic Research*, filing contribution claims ''would necessitate the equitable apportionment of costs among the liable parties, including the PRP that filed the § 107(a) action.'' If the court finds that the harm is divisible, they limit their liability. If the court finds them jointly and severally liable, they can then file contribution claims to obtain an equitable apportionment.

An interesting issue raised by the Court's decision is whether a passive landowner can argue that it should not bear any share of liability because it did not contribute to the harm. 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' ''[16] (emphasis added). A passive landowner, particularly one that acquired the property after the contamination occurred, may be able to argue that although technically liable as a landowner under CERCLA, it did not contribute to the harm and, therefore, should not bear any share of the liability. See e.g. *Redwing Carriers Inc. v. Saraland Apartments Ltd.*, 875 F. Supp. 1545 (S.D. Alabama, 1995), Affirmed in Part, Reversed in Part by *Redwing Carriers Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996) (holding that harm at site was divisible and apportioning zero percent to landowner). But, see, e.g. *United States v. 175 Inwood Associates LLP et al.*, 330 F. Supp. 2d 213 (E.D.N.Y. 2004) (declining to hold that mere landowners were not liable under an apportionment theory).

[16] *BNSF*, 556 U.S. at ___ (*slip op.*, at 14).

Conclusion.

It is clear that the *BNSF* case will have a significant impact on CERCLA litigation. With regard to ''arranger'' liability, parties will now have to prove intent. This will undoubtedly make proving arranger liability more difficult. At the same time, the nature of evidence necessary to prove intent may vary depending on the circumstances and there still may be cases, such as existed in *Aceto*, where direct evidence of intent may not necessary to prove arranger liability.

With regard to joint and several liability, the decision, at minimum, creates considerable uncertainty. Only time will tell whether district courts will be emboldened by the decision to find more instances where the harm is divisible, or whether they will continue, as they have in the past, to find that harms are not divisible. To the extent that courts are so emboldened, it will become easier for parties to defeat claims of joint and several liability and, conversely, more difficult for governmental agencies to threaten parties with joint and several liability. This would have a major impact on Superfund enforcement. In the meantime, parties will have to carefully weigh the potential impacts of the case and their specific facts in order to make judgments as to how to proceed in the face of threats of joint and several liability.