ENVIRONMENTAL LAW

CERCLA Arranger Liability and Apportioning Costs

The Supreme Court's Burlington Northern *Decision*

By Frederick Eisenbud and Lilia Factor

On May 4, 2009, in an 8 – 1 ruling, the United States Supreme Court decided *Burlington Northern and Santa Fe Railway Company v. United States*, 2009 WL 1174849 (U.S). The court clarified when a person is strictly liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as one that "arrange[s] for the disposal ... of hazardous substances," and greatly reduced the likelihood that manufacturers of products will be held liable for the actions of purchasers of those products. In addition, the court appears to have significantly reduced the burden on potentially responsible parties (PRPs) to establish that costs should be apportioned rather than applied to all PRPs jointly and severally.

The defendants included Shell Oil Company (Shell), which shipped pesticides and other chemicals to Brown & Bryant, Inc. (B&B), an agricultural chemical distribution business which operated since 1960 in Arvin, California on a 3.8 acre parcel. In 1975, B&B expanded its operations by leasing .9 acres of adjacent land owned by the defendant railroad companies ("Railroads"). Shell arranged for delivery of one of the pesticides used, D-D, by common carrier, and B&B assumed responsibility for the D-D as soon as the common carrier entered the Arvin facility. On arrival and during transfers, leaks and spills occurred, and continued even after Shell took steps to encourage the safe handling of its products. The delivery spills, equipment failures and the rinsing of tanks and trucks allowed the chemicals to seep into the soil and groundwater at the Arvin facility, placing an adjacent supply of potential drinking water at risk of contamination. California and the EPA spent over $8 million in response costs, which they sought to recover from Shell and the Railroads pursuant to CERCLA on a theory of joint and several liabilities.

The District Court, after a bench trial, held that both Shell and the Railroads were PRPs, the former, because it had "arranged for" the disposal of hazardous substances through its sale and delivery thereof to B&B, and the latter, as the property owners of the .9 acre parcel. With regard to the contamination at the site, the court concluded that it was divisible and therefore capable of apportionment. It calculated the Railroad defendants' relative liability at 9 percent based upon three factors, including the percentage of the total area of the site that was owned by the Railroads, the duration of B&B's operations on and off the Railroad property, and the portion of the contamination caused by the chemicals in question.

The Court of Appeals upheld the verdict against Shell. The rationale was that Shell could be liable as an 'arranger' under 42 U.S.C. § 9607(a)(3) under a "broader category of arranger liability" than is typical. Shell arranged for the delivery, set up the transfer arrangements of the product, knew that some leaking would occur during the exchange, and gave advice and supervision about safely transferring and storing the hazardous substance. The disposal of the hazardous waste that Shell was delivering to B&B was a "foreseeable byproduct" of, but not the purpose of, the transaction giving rise to the arranger liability. Thus, the Ninth Circuit concluded that an entity, such as Shell here, could arrange for disposal even if it did not intend to. With this rationale, the Court of Appeals found that all of the defendants were jointly and severally liable for all of the response costs and that there was no evidence presented on the record to establish a reasonable basis for apportionment.

The Supreme Court reversed. With regard to arranger liability, the court first looked at the easy cases at the extreme ends of the spectrum of arranger liability. A party that arranged for disposal of hazardous substances would be liable by the clear language of CERCLA. Likewise, an entity could not be held liable for merely selling a new and useful product if the purchaser of the product, unknown to the seller of the product, disposed of the product in a manner causing contamination.

Shell found itself in the gray area between these extremes. Shell sold a new and useful product but was also aware that minor, accidental spills occurred during the transfer (but after the purchaser assumed responsibility for the product). The court acknowledged that, in some cases, knowledge that a product leaks, spills, or is dumped may provide evidence of an intent to dispose of the hazardous waste. This knowledge alone, however, is insufficient to impose liability as an arranger of disposal. The Supreme Court required evidence that Shell intended that at least some of the product being transferred be disposed of in a manner set forth in CERCLA. This burden was not met by the Government's arguments. Shell provided safety manuals, required the recipients of the product to maintain adequate storage facilities, and encouraging these activities by providing financial incentives by reducing the price of the product for compliance. Thus Shell's efforts to encourage the buyer, B&B, to reduce the likelihood of spills once it accepted responsibility for the delivery helped establish that Shell did not intend to have any of the product disposed of. Accordingly, Shell was not liable as an arranger of disposal.

With regard to the Railroads, the Supreme Court upheld the District Court's apportionment of liability. Justice Steven's opinion stressed that equitable considerations play no role in the apportionment analysis as they do in traditional contribution lawsuits. Rather, apportionment is proper only when the evidence supports the divisibility of the damages jointly caused by the PRPs. This was such a case, the court held, and thus reinstated the analysis and holding of the District Court.

The *Burlington* case will help manufacturers of raw products to better understand when, if at all, they may be held liable for the sale of their products. More problematic is whether the case will help companies who transfer used products to other companies for recycling. Unless all of the hazardous materials shipped are recycled and reused, it would appear that, even under the *Burlington* analysis, the sending company will be liable under a theory of arranger liability for improper disposal of hazardous substances that are not recycled.

Burlington likely will have far reaching impacts on cost recovery litigation brought by the United States or State governments, because the formula used by the District court was not predicated on the precise level of proof generally required in the past of those who wished to avoid joint and several liability. The apportionment language of the court in *Burlington* may be applicable not only to hazardous waste lawsuits brought under CERCLA, but also to cost recovery lawsuits based on the investigation and remediation of petroleum spills under the NYS Navigation Law.

Frederick Eisenbud

Lilia Factor

Note: Fred Eisenbud is an environmental attorney in Commack. A past director of the SCBA and co-chair of its Environmental Law Committee on multiple occasions, Fred founded the Environmental Crime Unit at the Suffolk County District Attorney's Office in 1984, and served as counsel to the Suffolk County Board of Health before going into private practice in 1990.

Lilia Factor is an associate at the Law Office of Frederick Eisenbud in Commack, and has worked with Fred since 2004, focusing primarily on environmental and municipal law and litigation. She received her law degree in Israel, and practiced there before obtaining an LLM from the University of Pittsburgh (magna cum laude) in 2002.