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Good Company

Post-Burlington Northern Decision.

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Businesses facing potential liability for environmental cleanup costs have struggled with the often draconian method for assessing the extent of that liability, especially where other contributors to contamination have gone out of business or are otherwise unable to meet their obligations for cleanup costs. The threat of joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") was simply a presumed fact of life.

Environmental lawyers and consultants are now grappling with how to advise clients about CERCLA liability since the Supreme Court of the United States issued its ruling in *Burlington Northern and Santa Fe Railway Company, et al. v. United States* in May 2009. The two-part decision addressed (1) whether CERCLA liability attached to a chemical manufacturer (Shell Oil Company) that sold new and useful products that were disposed of improperly, not by Shell, but by the purchaser, and (2) whether the owners of a portion of a contaminated site could be held jointly and severally liable for the cleanup costs of the entire site. The Supreme Court answered the questions, respectively, "no" and "not necessarily."

The first part of the decision regarding Shell's liability was relatively narrow, based upon the statutory language for liability pursuant to 42 U.S.C. § 9607(a)(3) under which liability might attach to a party that arranges for the disposal of hazardous substances. The Court found that Shell did not "arrange for disposal ... of hazardous substances" because it was selling new and useful products, even though there was evidence that Shell was aware of the purchaser's sloppy disposal practices.

The second part of the decision is the cause for the debate. Ever since its inception in 1980, the potential for joint and several liability under CERCLA, (i.e. the potential that a company can be held liable for the entire costs for cleanup of a site even if there were other sources of contamination) has created a substantial incentive for companies to settle with the Environmental Protection Agency (EPA) or state agencies rather than risk litigation. *Burlington Northern* has now given a roadmap for Potentially Responsible Parties (PRP's) to argue that the contamination they caused is divisible from the contamination caused by others, and therefore they should not be held jointly and severally liable for the entire costs of cleanup at a site.

The case involved Burlington Northern and Union Pacific (Railroads) as owners of a .9 acre parcel that was leased by Brown & Bryant (B&B), an agricultural chemical distributor. Over the years, spills of hazardous materials occurred at the site. Combined with B&B's own parcel, the Railroads parcel comprised 19% of the site. In 1989, B&B became

insolvent and ceased operations.

Although there has been case law over the years that indicated that, at least in theory, PRP's could argue for divisibility of harm and avoid joint and several liability, the practical effect of the burden on PRP's to prove a reasonable basis for apportionment has left most lawyers and consultants in this area advising clients on the basis of the full exposure of joint and several liability. Although *Burlington Northern* does not change that burden of proof, it lays out a path to meeting that burden that had previously been murkier.

In essence, the Supreme Court confirmed several factors that are appropriate to show divisibility of harm. Specifically, the Court noted the size of the Railroads' portion of the site (19%), the duration of the operation of the portion of the site (13 years or 45% of the duration of the operation of the entire site), and the fact that only two of three major contaminants at the site originated at the Railroads' parcel (.66%). Using a formula that would make high school algebra students cringe, the Court simply multiplied those three factors together (.19 x .45 x .66) to come up with a 6% liability for the Railroads to which it added a 50% margin of error, resulting in a 9% liability.

Oddly, the Court noted that the volume of chemicals emanating from the B&B portion of the site was ten times greater than that from the Railroads' parcel but did not include that factor in the formula.

Putting aside the substantial mathematical infirmities of this approach, the Court has condoned an analysis that can sustain the burden of proof and specifically allows that the factors considered are not exhaustive. The result provides PRP's with very substantial incentive to undertake forensic analysis of the historical activity at a multiparty Superfund site.

Although factors such as area of ownership relative to the entire site and duration of chemical usage are relative easy to ascertain, other factors require much more involved scientific analysis. Determinations as to types of contaminants discharged (and, thus, which PRP might be responsible), volumes of discharges, migration patterns of contaminants in subsurface and groundwater, and the impacts of contaminants on the costs of and scope of remedies require multiple investigatory tools.

The first step is to gather as much information as possible from the client's own operations at a site. This is frequently problematic, especially at facilities that have been in operation for many years or that have changed owners or operators multiple times. Records showing chemical usage, especially prior to the late 1970's, are frequently difficult to find and witnesses are likewise difficult to track down, especially where operations have changed hands. Public records showing installation of sewer systems or other infrastructure changes provide some guidance as to disposal practices.

Often a PRP is left to reconstruct the history of discharges through analysis of soil and groundwater data combined with chemical analysis or "fingerprinting" which requires an understanding of how hazardous chemicals behave over time and in different media. The use of multiple, collaborative data sets to manage uncertainty in environmental investigations is established in EPA's Triad Approach[1] and provides a roadmap to support forensic analysis of timing, location and magnitude of releases that provides PRP's with greater certainty in environmental decision making.

The current, advanced state of environmental investigation tools and analytical procedures allows for high-resolution characterization of subsurface impacts that support divisibility of harm. Experienced professionals using real or modified Triad-approaches in conjunction with advanced site investigation tools are able to produce more accurate understanding of the historical fate and transport mechanisms for contaminants in the subsurface. This high-resolution visualization of representative, present-day subsurface conditions allows for greater accuracy in both the location of contaminant sources as well as the historical timing of releases. Predictably, due to the variability of contaminant breakdown pathways, not all compounds benefit to the same degree from greater definition of sources and plumes.

Armed with high resolution site characterization data, PRP decision makers are now able to better manage uncertainty with respect to evaluating liabilities in the context of *Burlington Northern*. Advances in environmental investigation techniques and understanding of contaminant degradation pathways and rates allows for greater insight into source area and plume architecture and the monetization of these liabilities. This knowledge allows PRPs to minimize the factors considered by the Supreme Court in *Burlington Northern* (i.e., size, duration, number of contaminants). Additionally, as the Court has condoned a limited number of factors to be considered in the divisibility of harm, PRPs, in select situations, may strategically decide to engage the courts in introducing an additional factor for their specific situation. Alternatively, modification of the Courts established factors is now on the table, as size of the site could be further reduced to the size of the source area in question.

The environmental community must acknowledge that greater upfront planning and cost is a prerequisite for undertaking forensic analysis. The readily available high-end investigation tools use direct sensing technologies to develop multiple lines of evidence and experienced practitioners are best equipped to corroborate various data streams into defensible arguments. The tangible benefits of this approach are recognized in shorter investigation timeframes, maximized project control and reduced life-cycle costs. Following *Burlington Northern*, state-of-the-art forensic and investigation tools and techniques can be used to more accurately assess the source, nature and extent of potentially shared liability to provide additional allocation certainty. Therefore, PRPs are now better equipped to argue that the contamination they caused is divisible from the contamination caused by others and therefore, they should not be held jointly and severally liable for the entire costs of cleanup of a site.

The upfront investment in developing data for the applicable *Burlington Northern* factors, although substantial, is critical to proving divisibility of harm. The benefit of potentially avoiding joint and several liability under CERCLA and managing potential exposure to ongoing cleanup costs far outweighs those upfront costs.

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