

What Evidence Will Justify an Allocation of Liability Among Responsible Parties Under Superfund?

by Robert H. Abrams

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Robert Abrams is professor of law at Florida A&M University College of Law. Professor Abrams is a co-author of *Environmental Law & Policy: Nature Law and Society* and also *Legal Control of Water Rights*. He is a past chair and currently is a vice-chair of the ABA Water Resources Committee and is an elected member of the American Law Institute.

He can be reached at robert.abrams@famou.edu or (407) 254-4001.

Against a backdrop of environmental disasters at Love Canal in Niagara Falls, New York, and Times Beach, Missouri, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980 to address the problem of contamination resulting from the release of hazardous substances into the environment. The Act's structure includes a revolving-fund approach that allows the United States Environmental Protection Agency (EPA) to perform and pay for cleanups at contaminated sites and then recoup those expenses by suing the potentially responsible parties (PRPs).

The Supreme Court summed it up as follows: "CERCLA both provides a mechanism for cleaning up hazardous waste sites, and imposes the

costs of the cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989). Immediate short-term steps to stabilize the site are called "removal actions" and long-term cleanup efforts are called "remedial actions." Together, with the incidental costs surrounding the process, those items comprise "response" costs. See CERCLA § 101(25). Standards for cleanups and how they are to proceed are promulgated by EPA in the National Contingency Plan. Under § 107(a)(4)(A) of the statute, responsible parties "shall be liable for all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." Since the cleanups were costly and the size of the fund seemed very, very large at the time, the statute as a whole took on the popular moniker, "Superfund."

(Continued on Page 296)

BURLINGTON NO. & SANTA FE R.
CO. V. UNITED STATES
AND
SHELL OIL CO. V. UNITED STATES
DOCKET NOS. 07-1601
AND 07-1607

ARGUMENT DATE:
FEBRUARY 24, 2009
FROM: THE NINTH CIRCUIT

Case at a Glance

Over a 30-year period Shell Oil delivered bulk agricultural chemicals to a now-contaminated reseller's site in California. Part of the site was leased from Burlington Northern Railroad. When the site operator failed, the United States and California incurred costs in cleaning the parcel and successfully sought to impose joint and several liability on Shell and the railroad. Shell contends it is not liable under Superfund and both responsible parties contest the imposition of joint and several liability.





The terse nature of the quoted liability language of § 107(a) set out above invited a period of litigation to fully define the nature of the liability that would be imposed. Similarly, the definition of the four categories of responsible parties set forth in § 107(a)(1-4) also took on greater clarity through litigation. Those categories are (1) present owners or operators of the facility, (2) owners or operators of the facility at the time of the release of the hazardous substance(s), (3) persons who “arranged for disposal” (sometimes called generators), and (4) transporters who brought hazardous substances to the facility. In this case, Shell Oil is sued as an arranger and Burlington Northern is sued as both a present owner of the facility and an owner at the time of release.

Within a few years of Superfund’s passage, lower federal court decisions had cleared up most of the ambiguity and the basic parameters of the statute were well defined. Superfund, consistent with its remedial character, was construed very broadly and in a manner that strongly favors governmental claims. In fact, after the Superfund Amendment and Reauthorization Act of 1986 (SARA) confirmed those broad readings and added clarification in a few substantive and procedural areas, one commentator described the government’s case as proceeding in the following manner. “May it please the Court, I represent the government and therefore I win.” Roger Marzulla, “Superfund 1991: How Insurance Firms Can Help Clean Up the Nation’s Hazardous Waste,” 4 Toxics Law Reporter 685 (1989). Another saying repeated among experts in the area is that SARA was misnamed and her name should have been RACHEL, the Reauthorization Act Confirms How Everyone’s Liable. For a good summary, see Elizabeth

Glass, “Superfund and SARA, Are There Any Defenses Left?,” 12 Harv. Env’t. L. Rev 385 (1988).

Central among the key interpretive rulings regarding § 107 were the ones that imposed strict joint and several liability on all of the potentially responsible parties (PRPs) without regard to which of the four categories of PRP was involved. As detailed more fully below, the decisions require PRPs wishing to be held responsible for less than the full amount to prove that the harm caused at the site is divisible. See, e.g., *O’Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), cert. den., 493 U.S. 1071 (1990), which cited favorably the first of many such decisions, *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). The government’s burden of proof on causation of response costs is also somewhat more favorable than the norm for plaintiffs. The government must prove only that an arranger PRP had hazardous substances present at the facility that were of the type that caused the government to incur response costs. (See, e.g., *United States v. Wade*, 577 F. Supp. 1326 (E.D.Pa. 1983). Additionally, the last phrase of § 107(a)(4)(A), which referred to recovery of costs “not inconsistent with the national contingency plan,” has been construed to allocate to defendants the burden of proof on that issue, so they must disprove consistency by a preponderance of the evidence.

The underlying rationale behind these interpretations is that CERCLA is broadly remedial and should be viewed in that light. CERCLA was intended to implement the so-called “Polluter Pays Principle.” Giving effect to that intent is especially apt when the choice is between either internalizing the cost on the parties who either directly caused or contributed to

the problem or benefited monetarily from the activities that resulted in the contamination, or else placing the costs of cleanup on the government, which must expend funds on behalf of innocent victim taxpayers and persons living near the contamination. That logic also supports the imposition of strict liability. The statute has a retroactive effect in the sense that the conduct giving rise to the present contamination being remediated might have occurred years before CERCLA was enacted, as was the case for some of the contamination in the present lawsuit.

The basics of this case fit a common pattern in Superfund cases. A relatively small entity operates a business that deals with hazardous substances. A significant release of those hazardous substances occurs, and the small-entity operator cannot or in any event does not immediately remedy the situation. The contamination spreads, usually in the groundwater, and EPA and possibly the state undertake a costly cleanup effort. Subsequently, EPA and the state seek to recoup their response costs from the PRPs under CERCLA. In this case and many others, the small-entity operator, whose actions frequently appear to be the single most obvious causative factor in the case, is insolvent. As a result, the other PRPs end up paying that “orphan” share and all other response costs as a result of CERCLA’s imposition of joint and several liability. Their possible lines of defense are very limited—each PRP can try to show that it is not within one of the four §107(a)(1-4) categories, or a PRP may try to show that the harm is divisible and that it is responsible for only a distinct part of the harm, and therefore only a specific portion of the total response cost.

Historically, parties with a clear

relationship to the facility have had only limited success in avoiding liability as a PRP, and the divisibility defense has almost never succeeded in litigation (only two or three reported cases in almost 30 years). What has been possible is for defendants who pay joint and several liability judgments to obtain contribution from other PRPs. The Supreme Court has twice addressed how CERCLA §§ 107 and 113(f) interrelate and permit those contribution claims to be lodged. See, *United States v. Atlantic Research Corp.*, 127 U.S. 2331 (2007) and *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004). In these contribution situations, the court uses its equitable discretion to apportion the loss among the solvent PRPs. Frequently, the courts will refer to the “Gore factors,” which were proposed by then-Sen. Al Gore in an unenacted amendment. These factors look at such things as the volume of the waste, its toxicity in comparison to the toxicity of other contaminants, and a number of other parameters that tend to suggest how much of the cleanup effort might rationally be apportioned to the activities of various types of PRPs and among generators having wastes that were at the facility where the release occurred.

ISSUES

Can Shell Oil Company (Shell), whose involvement with operations at the contaminated site consisted primarily in the delivery of bulk commercial products, be held liable under the provision of the Superfund Law that holds parties who “arrange” for the disposal of hazardous substances liable?

Did the court of appeals err when it reversed the trial court’s apportionment of governmental response costs that limited the liability of defendants, and, instead, imposed joint and several liability on Shell as

an arranger and Burlington Northern Railroad as an owner of the facility from which the release of hazardous substances occurred?

FACTS

The case has a complicated history. In approximately 1983, after groundwater contamination traced to releases at the Brown & Bryant, Inc. (B&B) agricultural chemical facility in Arvin, California, threatened to contaminate a municipal supply aquifer, the EPA and State of California undertook actions at the site to address the soil and groundwater contamination. In 1991, the United States required Burlington Northern, which owned and leased a portion of the site to B&B, pursuant to a CERCLA § 106 administrative order, to install monitoring wells on its portion of the larger B&B site. In 1992, Burlington Northern sued B&B and others for contribution in relation to costs incurred pursuant to the EPA order. Four years later, the United States and the State of California each brought a separate and more comprehensive action seeking to recover their response costs at the site from all PRPs, which included both Burlington Northern and Shell. The three cases were then consolidated and District Judge Oliver Wagner of the U.S. District Court for the Eastern District of California heard a bench trial and numerous post-trial motions.

In July of 2003, Judge Wagner entered detailed Findings of Fact and Conclusions of Law (see, 2003 WL 25518047). The most salient rulings, for present purposes, are that (1) Burlington Northern was a responsible party due to its status as an owner of the facility both at the present time and at the time of release, per CERCLA § 107(a)(1-2); (2) Shell was a responsible party due to its status as an arranger per CERCLA § 107(a)(3); and (3)

although the parties defended solely on those issues and offered no basis for apportioning the loss, the court itself found a basis upon which to issue judgments based on a division of responsibility, and issued a judgment apportioning 9 percent of the total cost of cleanup to Burlington Northern and 6 percent of the cost to Shell. The effect of the apportionment ruling was highly important because the response costs at the site for the efforts of the United States and California exceeded \$8 million, roughly one-twentieth of which were costs incurred by California. Burlington Northern also spent an additional \$5.6 million under the federal administrative order. With apportionment, the governmental recoveries would be reduced to about \$1.2 million, with the other \$6.8 million being uncollectible since other responsible parties were insolvent or impossible to identify.

Both sides appealed Judge Wagner’s rulings. A panel of the Ninth Circuit affirmed the two findings of liability and, with a minor carve out of one portion of the cleanup cost, reversed the finding that there was a basis for division of the loss, resulting in a joint and several liability judgment against Burlington Northern and Shell for the vast majority of the \$8 million in governmental response costs at the site. The panel denied rehearing and the full Ninth Circuit, by a close vote, declined to grant a rehearing en banc. After that, certiorari was sought and granted.

CASE ANALYSIS

On the ground, this case began in 1960, when B&B opened an agricultural chemical distribution business on a 3.8-acre parcel located in Arvin, California. In 1975, B&B expanded its operations by leasing an adjacent 0.9-acre parcel from two railroads, whose interest in that

(Continued on Page 298)



land was later transferred to defendant Burlington Northern Railroad. B&B's operations on the combined parcel continued until 1989, when B&B ceased its activities. As noted above, B&B is now insolvent.

According to the record, the leased parcel became an "integral part" of the B&B agricultural chemical operations, and the two parcels were operated as one. The Burlington Northern portion of the combined parcel was leased for the purpose of parking "fertilizer rigs," which included any vehicle used for the application of the agricultural chemicals involved in this case. Those rigs were rinsed and cleansed on the Burlington part of the parcel. Drums and cans containing residues of the hazardous substances were left there too. This resulted in spillage and leakage of the hazardous substances on the Burlington Northern portion of the site. The grade on the leased parcel drained into a pond or sump located on the B&B parcel. The pond/sump was linked hydrologically to groundwater that served as a municipal supply. The district court found that Burlington Northern is the present owner of a facility from which there is a release, making them a PRP under CERCLA § 107(a)(1), and that they were the owner at the time of a release, making them a PRP under § 107(a)(2). These findings were upheld on appeal and are not before the Supreme Court.

Of the three agricultural chemicals that account for the contamination at the B&B facility, two were pesticides supplied exclusively by Shell. One is a soil fumigant called D-D and the other is a pesticide called "Nemagon," both of which attempt to control nematodes, which attack crop roots. The third contaminant at the site was dinoseb, a weed killer produced by numerous manufacturers, but not supplied to B&B

by Shell. All three of these chemicals are—or contain—federally listed hazardous (or extremely hazardous) substances. Most of the discussion in the case as it is now being litigated in the Supreme Court focuses on D-D, which is a highly corrosive and highly volatile liquid. The volatility allows D-D to vaporize after being injected into the soil, which is how it kills nematodes. D-D's corrosiveness and volatility, combined with the fact that it is a dense non-aqueous phase liquid (DNAPL) (heavier than water), create storage, handling, and contamination problems, the latter being particularly acute when water is used to cleanse D-D residues from equipment.

As with all elements of the factual record, Judge Oliver made extensive Findings of Fact in regard to the relationship of B&B to Shell as it affected B&B's D-D handling practices.

The district court accepted that the shipments were free on board (f.o.b.), such that the shipper was responsible for the D-D until it was delivered to the B&B facility and that title of the D-D changed hands at that time, and even that Shell "intended" that B&B should be responsible for the handling of the D-D after its arrival at B&B's Arvin facility. (§ 21.) The court also found facts relating to Shell's annual marketing agreements with B&B for D-D and requirements (inspections, equipment upgrades, procedures for receiving and handling D-D, etc.) that suggested Shell had a continuing relationship to the handling of D-D. Shell imposed requirements on its bulk resellers of D-D as a condition to be allowed to continue deliveries of D-D. Other fact findings explicitly noted that B&B, along with most resellers or distributors of D-D, was not in compliance with Shell's requirements and that Shell was fully aware of the spills that

were endemic with operations such as those of B&B and a major leak at B&B due to tank corrosion. The finding of facts also indicate that even in light of this, Shell still continued to provide B&B with as much D-D as B&B could resell. From these findings the district court concluded as follows:

The known, anticipated, and inevitable leakage of D-D during the delivery and unloading process is a "disposal" within the meaning of CERCLA Section 101(32). "Disposal" expressly includes any "leaking", "spilling" or "placing" of the hazardous substance such that it may enter the environment. The spilling and placing of D-D in drip buckets and pans under the tanker's spigot, from which spills and leakage resulted, is a "disposal" because it is the "spilling" or "placing" of a hazardous substance in a manner that causes it to enter the environment. The transfer process and unloading of D-D from tanker trucks to the B & B storage tanks inevitably entailed leakage and spillage. The process was effectively controlled and arranged for by Shell. § 397

This finding was a central element in ruling that Shell was a PRP as an "arranger" under CERCLA § 107(a)(3).

Shell appealed the imposition of liability to the court of appeals. Shell contended that the transfer of D-D to B&B was a completed sale of a useful "new product" at the time the chemicals arrived f.o.b. at the B&B location. According to Shell, all subsequent spills by B&B or others were beyond the scope of Shell's responsibility. The court of appeals panel affirmed the district court's rejection of that argument. Shell has renewed its argument that it should not be liable as an arranger.

Finally, there is the issue of apportionment of the response costs for which CERCLA holds PRPs liable. The general approach in Superfund cases is to apply joint and several liability. That view grows out of the application by the federal courts of the principles of § 433A of the Restatement (Second) of Torts. The Restatement indicates that when the harm is indivisible and a defendant's conduct is a substantial factor in causing the harm, joint and several liability will be imposed. In Superfund cases the damage, contamination of the environment, usually is viewed as indivisible.

Here the district court concluded, "In the present case, the harm is a single harm which consists of contaminated soil at various locations and depths around the Site and one mass (plume) of contaminated groundwater." § 472. Consistent with the statutory intent of Congress to apply the Polluter Pays Principle," cases under CERCLA place the burden of showing that the harm caused by the release of hazardous materials is divisible on the defendants. In the words of the district court, "Once liability has been established, the burden shifts to the defendant to demonstrate, by a preponderance of the evidence, that there exists a reasonable basis for divisibility." § 453.

In this case, applying that approach proved difficult for the district court. Both Burlington Northern and Shell relied on what the district judge described as a "scorched earth" line of defense, noting that neither defendant "acknowledged an iota of responsibility," and that, "Neither party offered helpful arguments to apportion liability," nor had any party documented the relative contributions to the contamination from the two separate portions of the overall parcel. (§§ 455, 477)

The district court nevertheless proceeded to consider whether it could provide a basis for equitable apportionment, which it did. In relation to Burlington Northern, the court found that the railroad parcel comprised 19.1 percent of the total surface area, and was in use for 13 of the 29 years total operation (45 percent). The district court assumed that no D-D contamination originated on the railroad portion of the site and that each of the three substances (D-D, Nemaqon, and dinoseb) was one third of the overall contamination. That further reduced the Burlington Northern share to 6 percent of the total, which the district court increased by allowing for errors of up to 50 percent, for a final allocation of 9 percent. For Shell, the district court, acknowledging no evidence on the matter provided by Shell, found that the spills related to the "Shell controlled" deliveries of D-D as a proportion of what it estimated to the total amount of D-D released, and calculated Shell's apportioned share as 6 percent.

The government appealed the district court ruling on apportionment. The court of appeals reversed that ruling and imposed joint and several liability. In regard to Burlington Northern, the court of appeals found that the trial court's division of liability based on land area and duration of ownership, the equal treatment of the three chemicals, and the exclusion of D-D was clear error (see Federal Rule of Civil Procedure 52) that lacked a reasonable basis in the record. The court of appeals found that the district court's calculation "bore insufficient logical connection to the pertinent question: What part of the contaminants found on the Arvin parcel was attributable to the presence of toxic substances or to activities on the Railroad parcel?"

With regard to Shell, the court of appeals also reversed the bulk of the ruling on apportionment, assigning joint and several liability for all response costs except an amount attributable to a dinoseb "hot spot" for which specific cleanup costs could be identified. As to that amount, the court of appeals found that no liability should attach to Shell, since Shell never provided any dinoseb at the facility. The court of appeals again found the evidence in the record insufficient to support even a rough approximation of Shell's proportional share of the site's contamination. The D-D leakage evidence was insufficient because the overall contamination involved several chemicals and Shell was responsible for more than just the D-D. Moreover, the court of appeals noted the total lack of evidence Shell had provided on that subject. In addition to saying that Shell had failed to meet the burden on a defendant seeking apportionment, the court of appeals indicated that Shell's failure to put in such evidence was most likely a litigation decision to "put its eggs in the no-liability basket."

SIGNIFICANCE

If the Supreme Court reverses the court of appeals, this case has the potential to be significant in regard to arranger liability, and even more significant in regard to apportionment of liability. Reversal of either of the Ninth Circuit's holdings would represent a major departure from settled principles of Superfund law as it has been consistently applied for over two and a half decades.

Shell's argument on arranger liability has a superficial attractiveness to it—it creates a bright-line test that the sale and transfer of title to a product ends the possibility of Superfund liability for the product's

(Continued on Page 300)



producer. Such a rule would be relatively easy to administer—it is easy to identify when a sale has occurred and transferred the goods to the buyer. Exceptions would be needed for things such as unavoidable releases during use of the product and in regard to sham transactions, or when the seller exercises continuing control despite delivery and the passage of title (which is apparently the case here). The questions relating to those exceptions are somewhat more complicated than might first appear, as has been seen under the Resource Conservation and Recovery Act in cases that struggle to decide whether disposal is taking place when materials are sold for recycling that is likely to result in a later disposal of hazardous wastes. The rule Shell seeks also has a patina of reasonableness. A commercial sale ends the seller's relationship to the product and whatever happens later is not the seller's problem. Again, there may be a need for exceptions when the seller retains control or influence over the buyer's subsequent actions, as the district court found was the case here. The government's position would continue the status quo, which is that the form of a transaction is not dispositive and that what matters is whether disposal occurs as a result of the relationship.

In a similar manner, an affirmation of the court of appeals apportionment ruling will do little to change well-established lower court precedent that the burden is on the defendant to prove there is a basis for apportionment. What would be new in that outcome is that the Supreme Court will have weighed in on the subject and adopted the prevailing approach that has made apportionment very rare in cases brought by the government to recover response costs. In this case, where there was no effort by the defendants at trial to show a basis

for apportionment, it would be relatively easy for the Supreme Court to affirm on that basis alone.

The thing that makes this case different from past precedents is the way in which the district court reached out and *sua sponte* established a basis for apportionment. The appropriateness of that approach is not necessarily going to be decided by the Supreme Court because of the way in which cases are usually reviewed. The decision of the court of appeals is actually the decision being reviewed by the Supreme Court, and that decision can be affirmed or reversed without answering the more general question of whether the lower courts should or should not follow the path blazed by the district court. For example, the court of appeals can be affirmed by simply agreeing with it that there was insufficient evidence in the record to support a finding of divisibility. Conversely, the Supreme Court could reverse and say the court of appeals erred in finding the decision below lacked a sufficient evidentiary basis. Neither of those rulings would require the Court to decide whether a district court should, or should not, take the initiative to impose an allocation that was not sought by the PRPs.

If it chooses to do so, the Supreme Court could address the burdens issue. It could, for example, affirm the court of appeals by saying that the issue of apportionment was not properly raised in the district court. Alternatively, the Supreme Court could reverse the court of appeals, which would, at a minimum, make it clear that district courts may make allocations of responsibility even when the parties have not sought one. In a less dramatic fashion, the Court could comment on the action of the district court in dicta, giving an indication of its

view regarding the degree of inventiveness the trial court should use in attempting to divide up responsibility. If the Supreme Court in any way indicates that the district court's approach is the proper one, that aspect of the decision would mark a huge sea change in CERCLA litigation. It seems more likely, however, that the Supreme Court will limit itself to reviewing the Ninth Circuit's review of the district court's review—and affirm or reverse on that basis.

As a closing caveat, it is vital to remember that the defendants on whom joint and several liability is imposed in cost-recovery actions are not totally stuck. They are entitled to bring contribution actions against their co-PRPs in which a court will have no choice but to apportion the loss among the PRPs. In the contribution cases, it is as if all parties have the burden of proof in trying to persuade the court what is a reasonable division of responsibility under the circumstances. There is a sense in which the contribution safety valve reduces pressure on the Supreme Court to modify existing Superfund jurisprudence on the apportionment issue in cost-recovery cases, which might otherwise seem unfair and oppressive.

ATTORNEYS FOR THE PARTIES

For Petitioner Burlington Northern and Santa Fe Railway Company et al. (Maureen E. Mahoney (202) 637-2200)

For Respondents California (Kenneth P. Alex (510) 622-2137)

For Respondents United States (Edwin S. Kneidler (202) 514-2217)



AMICUS BRIEFS

In Support of Petitioners Burlington Northern and Santa Fe Railway Company et al.

Association of American
Railroads (Carter G. Phillips (202)
736-8270)

Chamber of Commerce of the
United States et al. (Thomas C.
Jackson (202) 639-7700)

Civil Justice Association of
California (Fred J. Hiestand (916)
448-5100)

General Electric Company
(Laurence H. Tribe (617) 495-4621)

Newmont USA Limited, and
CanadianOxy Offshore Production
Co. (Joel W. Nomkin (602) 351-
8000)

Product Liability Advisory
Council, Inc. (Charles H.
Moellenberg Jr. (412) 391-3939)

Washington Legal Foundation
(Lawrence A. Salibra II (440) 336-
4129)