

Operator Liability and Apportionment following the Supreme Court's Decision in BNSF v. United States

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Why Devote a Half Hour to a Case?

“While Burlington Northern is an important case, and it will be cited often, it clearly is not the death knell of Superfund enforcement...[I]t is a decision that arose from an unusual fact pattern. It also is a decision that reaffirms the law of joint and several liability.”

- Speech by John C. Cruden
Acting Assistant Attorney General
Environment and Natural Resources Division
Before the Environmental Law Institute, May 29, 2009

Why Devote a Half Hour to a Case?

“The Supreme Court has signaled that government agencies enforcing the federal Superfund law (and, arguably, comparable state laws which do not expressly provide for joint and several liability), may no longer be able to pursue parties on a joint and several liability basis where such parties can meet their burden of showing a reasonable basis for apportionment. EPA will also have to rethink its current settlement policy.”

*O’Melveny & Meyers Newsletter
May 14, 2009*

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BNSF v. United States

Facts:

- Brown & Bryant, Inc. (B&B), facility repackaged agricultural chemicals, on 4.7-acre parcel,
- 0.9-acre parcel leased from BNSF and UPRR
- Railroads played no role in B&B’s operations
- Only basis for liability was status as “owner”

Background Facts (cont'd)

- Shell Oil sold a soil fumigant to B&B
 - Buyer was responsible for the product once it arrived at the facility
 - Minor spills took place upon delivery
 - Was some evidence Shell made efforts to help B&B avoid spills
 - Most of releases resulted when B&B washed the fumigant out of its equipment, onto the ground.



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Background Facts (cont'd)

- California DTSC ordered B&B to clean up the site
- B&B went out of business
- EPA listed the Site on the NPL
- EPA named the Railroads and Shell PRPs and ordered them to clean up site
- Railroads and Shell refused
- EPA and California cleaned up itself, at a cost of nearly \$10 million, and then filed a cost recovery action for their response costs



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District Court Opinion

- At District Court level, Railroads held liable as owners
- Shell also held liable as having “arranged for disposal”
- But, District Court held that the Railroads and Shell were not jointly and severally liable, because there was reasonable basis to apportion liability and did so – gave 9% to Railroads, 6% to Shell
- Remaining 85% “orphan” share, attributable to B&B, could not be recovered by – EPA/California.



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Basis for Finding on Joint and Several Liability Found in Restatement (Second) of Torts

- ...when two or more persons acting independently cause 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 caused.”

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Result - EPA Left Holding the Bag for 85% of Costs – the Orphan Share



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Simple Apportionment Formula Used by District Court



For Railroads:

- Court multiplied percentage of property leased by Railroads (20%) times percentage of time they leased relative to time B&B operated, times percentage of chemicals spilled on leased land versus total site – 9%

For Shell:

- Court multiplied percentage of chemical's spilled that had been purchased by Shell vs. total volume of chemicals spilled – 6%



Ninth Circuit Decision

- Ninth Circuit reversed District Court
- Held Railroads and Shell jointly and severally liable
- Held District Court did not have a basis to reasonably apportion liability as between PRPs; facts too complex, analysis too simple
- Likened District Court's formula to using a "meat ax"
- Awarded EPA/California 100% of their costs



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Result - 9th Circuit Left Railroads, Shell Holding the Bag for 100% of Costs



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On Certiorari to Supreme Court



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Worth a Read

- Briefs
- Oral Argument
- Transcript
- Court's Decision

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Supreme Court Holding

1. Arranger Liability (Shell) – Not liable, because
 - A party is only liable under CERCLA if it intended to dispose of hazardous substances
2. Joint and Several Liability – Did not apply, because
 - There was a “reasonable basis” for allocating each PRPs liability, per the Restatement
 - Burden remains on defendants to show reasonable basis for allocation
 - But Court agreed the Defendants met that burden, and Court accepted district court’s formula for allocating liability in this case (“meat ax” good enough for eight Justices)

Shell Pays Nothing; Railroad’s Share of 9% Reaffirmed; EPA’s Share Goes Up to 91%



Big Deal or No Big Deal?

- Government's Position – This Case is No Big Deal
 - Arranger liability – Law left largely unchanged except for a few marginal factual situations
 - Joint and Several Liability – was affirmed in principle, unless defendants prove harm is divisible, and it is the defendant's burden to show harm is divisible
 - Orphan Share – Isn't directly addressed by the decision. Moreover, the Restatement allows Court to allocate to defendants in order to avoid an injustice to innocent plaintiffs, even if district court didn't in this case

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Big Deal or No Big Deal?

- PRPs Position
 - Arranger liability – “Intent to dispose” standard will bar enforcement in many cases EPA has prosecuted
 - Catellus, Aceto
 - Joint and Several Liability – Threshold for meeting divisibility standard relatively low – e.g. years of ownership, amount spilled. There will almost always be a way to allocate liability – “meat ax” good enough
 - Orphan Share – was left to government by Supreme Court and fairness doesn't dictate it be shifted to PRPs who have paid their fair share.

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Some Observations

- There is some merit to both side's positions
- Some of Government's/Enforcement tools are clearly weaker now
 - Special Notice Letters
 - 106 Orders
- There will undoubtedly be more litigation by parties alleged to be liable as "arrangers"
- There will very likely be fewer settlements with the Government. PRPs will argue their allocation case in settlement, but perhaps unsuccessfully, because EPA simply lacks the to pick up the orphan share. They may be forced to litigate

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Some Observations

- Even "good faith" efforts by both sides to settle will be more difficult, due to lack of data to support (and defend) allocation against challenge by non-sttlers
- Multi-party sites, especially where those without volumetric records will be particularly difficult to settle, and voluntary action may slow or stop, while everyone sorts out their position

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Some Observations

- EPA may feel it has to threaten or use other weapons
 - RCRA 7003 orders
 - Co-operative agreements with States where mini-superfund statutes expressly provide for joint and several liability
- The government may seek a legislative fix to the liability standard, revive Superfund tax or turn the program into a stimulus package

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Some Observations

- There will be unintended consequences
 - Conflicts
 - Contribution Actions
 - Brownfields and Redevelopment
 - Natural Resource Damages

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Some Observations

- This will be uncomfortable for everyone. Well-established ways of doing business between EPA and the PRP community – and among PRPs – will change
- No early or easy answers are likely –emerging caselaw will be critical
- Read your Marten Law Group Newsletters

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Thank You

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