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Arranger Liability under CERCLA after *Burlington Northern*

By Andrew J. Scholz and Matthew D. Cabral – March 21, 2012

In 2009, the U.S. Supreme Court decided the seminal case of *Burlington Northern & S.F. R. Co. v. United States*, 129 S. Ct. 1870 (2009), which fundamentally altered liability and damages analysis under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Two years of subsequent case law has now been decided addressing the scope of liability and divisibility of damages under CERCLA in light of the *Burlington Northern* decision.

CERCLA imposes strict liability for environmental contamination on four broad classes of potentially responsible parties (PRPs). Among the classes of PRPs is "any person who by contract, agreement, or otherwise *arranged* for disposal or treatment, or *arranged* with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances." CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). These PRPs are commonly referred to as "arrangers."

Prior to *Burlington Northern*, the standard to qualify as an arranger was low; plaintiffs could establish arranger liability through direct or circumstantial evidence showing that the defendant knew or should have known of the hazardous disposal. The Supreme Court's *Burlington Northern* decision was critically important to CERCLA litigants because it limited the criteria necessary for a defendant to qualify as an arranger under § 107(a)(3) of CERCLA. Critically, the plaintiff must now prove that the defendant specifically intended to dispose of hazardous materials at the Superfund site. A review of the post-*Burlington Northern* case law reveals how difficult it has become for plaintiffs to demonstrate the requisite intent necessary to establish arranger liability under CERCLA. Nevertheless, few courts summarily dismiss claims asserting arranger liability because they consider the determination of intent to be a fact-intensive inquiry.

The *Burlington Northern* Decision

The question for the Court in *Burlington Northern* was whether an owner or supplier can be found liable as an arranger absent a showing of specific intent to dispose of the hazardous waste at the Superfund site. The case involved two railroads—Burlington Northern and Union Pacific—that shared ownership of a one-acre parcel of land. The railroads leased this land to Brown & Bryant, Inc. (B&B), a chemical distributor that pooled the parcel with additional land in its possession to create an operating facility totaling approximately five acres of land. Shell Oil Co. supplied pesticides to B&B and, over the course of many years, chemical spills occurred throughout the facility. The facts showed that Shell possessed actual knowledge that some degree of chemical spillage occurred at the facility. Ultimately, B&B became insolvent, leaving Shell and the railroads as the only PRPs.

The government argued that Shell was an arranger under CERCLA because it delivered hazardous material to the site with actual knowledge that some amount of spillage occurred following its deliveries. The Ninth Circuit agreed with the government and held that Shell did qualify as an arranger. The court's decision was consistent with the pre-*Burlington Northern* case law, which generally permitted an inference of intent on the part of owners and suppliers who knew or should have known about hazardous releases.

The Supreme Court reversed the Ninth Circuit, thus reigning in the previously broad interpretation given to the intent requirement for arranger liability. The Court reasoned that "because CERCLA does not specifically define what it means to 'arrange' for disposal of a hazardous substance," the phrase should be given "its ordinary meaning." *Burlington Northern*, 129 S. Ct. at 1873 [internal citations omitted]. "In common parlance the word 'arrange' implies action directed to a specific purpose," noted the Court. Therefore, "under the plain language of the statute, an entity may qualify as an arranger . . . when its takes intentional steps to dispose of a hazardous substance." The Court made it abundantly clear that circumstantial or even direct evidence tending to show knowledge on the part of an alleged arranger, without more, is insufficient to establish liability. According to the Court, "While it is true that 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, knowledge alone is insufficient to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product." *Id*. at 1880.

Arranger-Liability Cases Since *Burlington Northern*

Two circuit court decisions interpret *Burlington Northern*'s arranger liability holding, as well as a number of district court decisions. In the first of the circuit court decisions, *Calanese v. Martin Eby Construction*, 620 F.3d 529 (5th Cir. 2010), the Fifth Circuit Court of Appeals held that a contractor that accidentally struck a methanol pipeline with its equipment was not liable as an arranger under CERCLA in the absence of evidence demonstrating requisite intent to dispose. The plaintiff argued that the defendant contractor "conscious[ly] disregarded" a duty to investigate the damage it caused, an omission "tantamount to intentionally taking steps to dispose of methanol." *Id*. at 533. There was no actual evidence that the construction company knew of, much less, intended, to puncture the pipeline. The Fifth Circuit, acknowledging that the Supreme Court in *Burlington Northern* "declined to impose arranger liability for a defendant with more culpable *mens rea*," found the evidence insufficient to establish the requisite intent for arranger liability.

In the second of the circuit court cases, *Team Enterprises, LLC v. Western Investment Real Estate Trus*t, 647 F.3d 901 (9th Cir. 2011), a dry cleaner disposed of contaminated wastewater containing the chemical perchlorethylene (perc) by pouring it down a sewer drain. The end result was contaminated soil, which the dry cleaner had to pay to remediate. In an effort to recoup its costs, the dry cleaner sued the manufacturer of the perc-distilling machinery it used at its facility. The dry cleaner argued that the manufacturer was liable as an arranger under CERCLA because

it knew that operation of its machinery required the disposal of perc. Accordingly, the dry cleaner argued, the manufacturer planned and controlled the disposal of perc at the facility. In affirming the district court's dismissal of the manufacturer, the Ninth Circuit, relying on *Burlington Northern*, noted that "while actions taken with the *intent* to dispose of a hazardous substance are sufficient for arranger liability, actions taken with the mere *knowledge* of such future disposal are not." *Id*. at 908. For the Ninth Circuit, the fact that the manufacturer purportedly understood that the design of its machinery necessitated the disposal of perc was insufficient to establish intent.

In the reported district court decisions post-*Burlington Northern*, intent for purposes of arranger liability has been similarly difficult to prove. For instance, in *Hobart Corp. v. Waste Mgmt. of Ohio*, Case No. 3:10CV195, 2011 U.S. Dist. LEXIS 148224 (S.D. Ohio Feb. 9, 2011), the court dismissed an arranger claim against a company that intentionally disposed of hazardous substances on its own site that then migrated onto adjacent land. The court found that there was no proof of intent to dispose on the adjacent land. Similarly, in *Schiavone v. Northeast Utilities Service Co.*, 41 E.L.R. 20132 (D. Conn. 2011), the court granted summary judgment holding that the defendant's sale of transformers containing oil laden with polychlorinated biphenyls (PCBs) did not make the defendant liable as an arranger under CERCLA. *Id*. at 15–16. According to the court, the mere fact that the defendant had a "specific purpose" to dispose of the transformers was insufficient to establish liability absent evidence of a "specific intent" to dispose of the "oil that was in the transformers or any PCBs that were in such oil." Without proof that the PCB-laden "oil in the transformers was a factor in the parties' thinking with respect to the transaction," there was no evidence of the requisite intent necessary for arranger liability.

Despite the grant of summary judgment in *Schiavone*, other post-*Burlington Northern* cases have not been summarily decided because intent is considered a fact-intensive inquiry. *See Appleton Papers Inc. v. George A Whiting Paper Co.*, 2009 U.S. Dist. LEXIS 117112 (E.D. Wis. 2009) (summary judgment denied); *Frontier Communications Corp. v. Barrett Paving Materials, Inc.*, 631 F. Supp. 2d 110 (D. Me. 2009) (denying motion to dismiss).

Notably, other post-*Burlington Northern* decisions still adhere to certain aspects of the pre-*Burlington Northern* arranger liability standard. For instance, in *Litgo New Jersey, Inc. v. Martin*, 2010 U.S. Dist. Lexis 57390 (D.N.J. 2010), the court found sufficient evidence to hold the United States liable as an arranger after hazardous chemicals were released during a failed cleanup of a site leased by the government. The Unites States argued that its intent was not to dispose of the hazardous waste but merely to store it. *Id*. at 84. The court rejected this argument, finding instead that the government had hired a third party "to permanently get rid of what they believed to be waste products," which made the government liable as an arranger under CERCLA. *Id*. at 85.

Similarly, in *United States v. Washington State Department of Transportation*, 716 F. Supp. 2d 1009 (W.D. Wash. 2010), the district court, ruling on a motion for partial summary judgment, found that the Washington State Department of Transportation (WSDOT) was liable as an

arranger where it had designed, operated, and owned storm drains that discharged storm water runoff containing hazardous substances to the Superfund site. While the court did not cite to any direct evidence supporting a finding of specific intent, the court determined that a series of circumstantial facts were sufficient to meet the *Burlington Northern* standard. The court's concise decision explained that because WTDOT had "control over how the collected runoff was disposed of" and had the "ability to redirect, contain, or treat its contaminated runoff," yet acted with "purpose . . . to discharge the highway runoff into the environment," summary judgment could not be granted. This case and *Litgo* are noteworthy for their failure to adopt the more restrictive interpretation of the intent requirement applied by other courts after *Burlington Northern*.

Conclusion

Most of the decisions addressing arranger liability post-*Burlington Northern* have emphasized a fact-intensive approach to the determination of the requisite intent to dispose of hazardous substances necessary for liability. This has meant that few arranger-liability cases are summarily decided, despite the fact that, to establish liability post-*Burlington Northern*, the plaintiff must prove that the defendant specifically intended to dispose of hazardous materials at the Superfund site. Nevertheless, although there has not been much increase in the number of arranger-liability cases summarily decided, it is certainly clear from the post-*Burlington Northern* case law that it is now much more difficult for plaintiffs to demonstrate the requisite intent necessary to establish arranger liability under CERCLA.

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