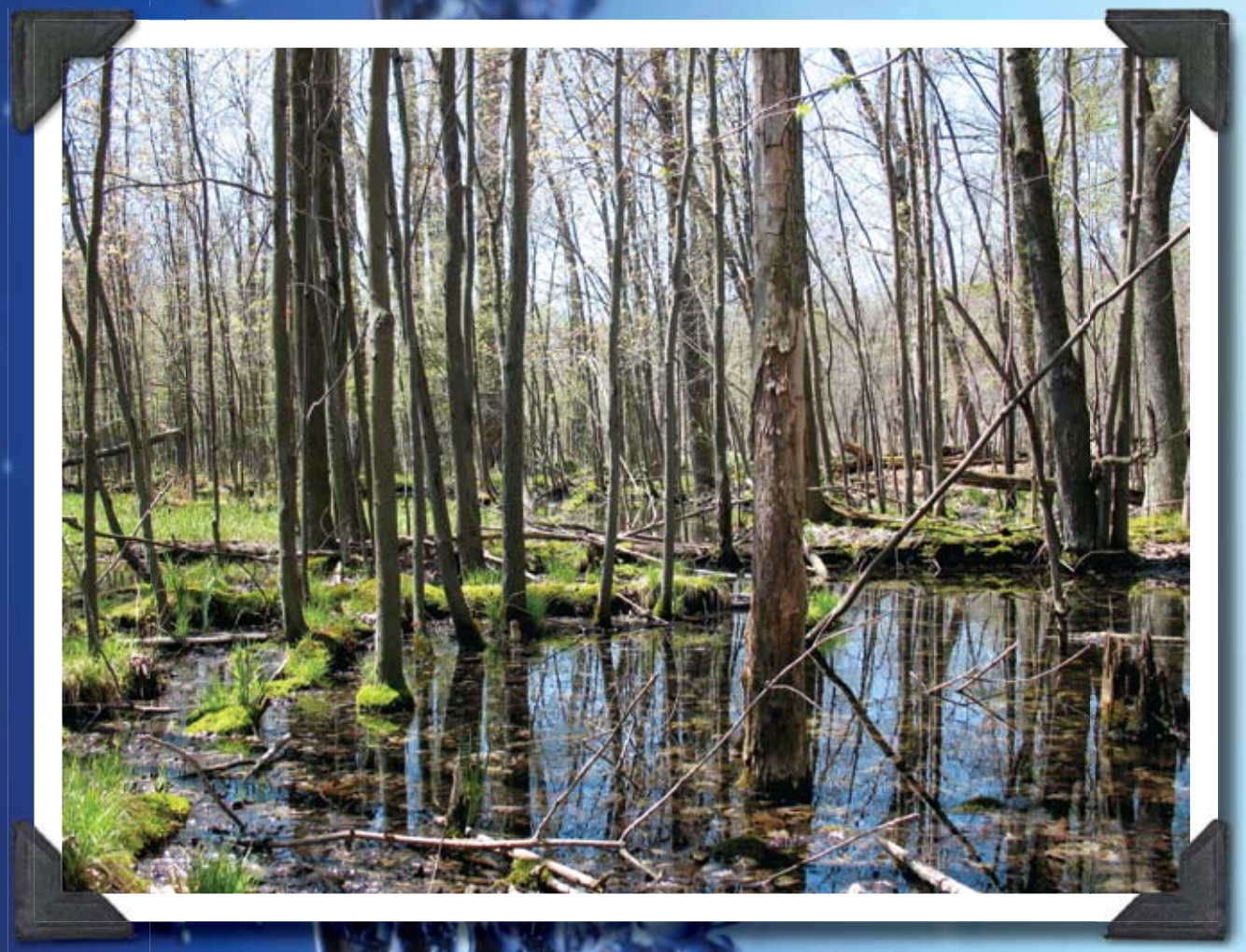
To Arrange OR NOT TO ARRANGE: Intent is the Question

United States Supreme Court Finds "Intent" Requirement for CERCLA Arranger Liability

By Marc P. Lawrence



Vernal Pond in the Flint River Headwaters at Six Rivers' Springbrook Farm Project in Metamora Township.
Photo by Susanne Greenlee

Introduction

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] in response to the Love Canal tragedy[2] and other serious environmental incidents.[3] The enactment of CERCLA permanently changed the dynamic field of environmental law. On May 4, 2009, the United States Supreme Court decided the consolidated cases of *Burlington Northern & Santa Fe Ry Co v United States* (Case No. 07-1601) and *Shell Oil Co v United States* (Case No. 07-1607) (collectively, *Burlington Northern*).[4] The Supreme Court's opinion has far-reaching effects for many different types of businesses and property owners and significantly alters CERCLA liability for persons who allegedly arrange for the disposal or treatment of hazardous substances.[5]

CERCLA Overview

CERCLA imposes strict status-based liability on four types of potentially responsible parties (PRPs) when there is a release or threatened release of a hazardous substance at a facility that results in response costs.[6] The four types of PRPs include:

(1) The owner or operator of a facility;

(2) The owner or operator of a facility at the time of a disposal or treatment of a hazardous substance;

(3) Any person who arranged for the disposal or treatment of a hazardous substance; or

(4) Any person who accepts any hazardous substance for transport to a disposal or treatment facility.[7]

Fast Facts:

CERCLA imposes status-based, strict liability on parties that "arrange for" the disposal or treatment of a hazardous substance that enters the environment.

Since "arrange for" is not defined by CERCLA, several circuit courts have applied widely varying factors to determine when a party is liable as an arranger.

On May 4, 2009, the United States Supreme Court held that a party must "intend to dispose" of a hazardous substance to be liable as an arranger, and that a party's mere knowledge of leaks and spills is insufficient to impose arranger liability.

Once determined to be a PRP, a party may be forced to clean up a contaminated site or reimburse the government or other parties for their past and future response costs without regard to fault.[8] Response costs can range into the tens of millions of dollars. This article addresses those PRPs who arrange for the disposal or treatment of a hazardous substance that later is released into the environment in light of the recent United States Supreme Court decision in *Burlington Northern*.[9] The *Burlington Northern* decision significantly changes the old status-based strict liability for arrangers by requiring a new "intent-to-dispose" element.[10] Now, a party must have taken "intentional steps to dispose of a hazardous substance" to be liable as an arranger PRP.[11] Historically, arrangers have been the most diverse and difficult category of PRPs to identify. Several federal circuit courts have addressed various elements of the issue with mixed results. The *Burlington Northern* guidance will consolidate the variations among the circuits, but may still leave open avenues for the inclusion of additional factors other than intent.

The United States Supreme Court Opinion

The facts of *Burlington Northern* are common to many CERCLA cases and involved contamination of soil and groundwater at an agricultural chemical storage and distribution facility in Arvin, California.[12] The Arvin site was contaminated by spills during deliveries and distribution of the various chemicals and from leaking storage tanks located at the site.[13]

Burlington owned a portion of the Arvin site that it leased to Brown & Bryant, the operator of the facility. Shell delivered its D-D product (a pesticide) via large tanker trucks f.o.b. destination,[14] where it was then pumped into a bulk storage tank and later transferred in various ways at the site.[15] D-D is a corrosive chemical that erodes bulk storage tanks and their valves.[16] Evidence at trial indicated that Shell was aware of minor spills and leaks that occurred because of its delivery requirements and that Shell attempted to reduce the amount of spills and leaks.[17] The government and Burlington spent more than $11 million responding to the contamination.[18]

Four years after the six-week trial, the district court found Shell liable as an arranger, opining that "disposed" can mean "spilled" under CERCLA and that Shell had "sufficient knowledge and control" of spills during the delivery process to be an arranger, even though Shell did not intend to dispose of D-D.[19] On appeal, the Ninth Circuit also held that Shell was an arranger because disposal of D-D was a "foreseeable byproduct" of its sale, even if Shell did not intend to dispose of D-D at the time of the sale.[20]

In an 8–1 decision (Justice Ginsburg dissenting), the Supreme Court reversed the Ninth Circuit and held that Shell was not liable as an arranger even though it had knowledge of ongoing leaks and spills that were part of the chemical transfer process at the site.[21] The Supreme Court opined that Shell had to enter into the sale of D-D with "the intent that at least a portion of the

product be disposed during the transfer process…."[22] The Supreme Court emphasized that Shell did not have such an intention because it took numerous steps to reduce the likelihood of spills, even though spills and leaks were inherent in the delivery process.[23] In addition, the Supreme Court opined that Shell's mere knowledge of such leaks and spills was, alone, insufficient to attach arranger liability to Shell.[24]

The *Burlington Northern* opinion adds a clear "intent-to-dispose" requirement for courts to find a party liable as an arranger under section 107(a)(3). Presumably, the Court's opinion will be interpreted to include an "intent-to-treat" requirement as well, since the Court only addressed disposal under the facts of *Burlington Northern*. This new intent requirement significantly decreases the range of possible arrangers, increases the difficulty of proving arranger liability, and may have other yet-to-be determined effects on traditional CERCLA-status parties, insurance coverage for "intentional" arrangers, and interpretation of similar state laws, among others.

However, although the *Burlington Northern* opinion adds an intent requirement, it leaves open the door for the traditional "fact-intensive and case-specific" inquiry.[25] By concentrating on certain factors while ignoring others, the *Burlington Northern* opinion sheds light on this inquiry as well.

Other Circuit Court Arranger Factors

The Eighth Circuit was the first to pronounce a broad view of arranger liability in *United States v Aceto Agricultural Chemicals Corp.*[26] In *Aceto,* the court held that a pesticide manufacturer that sent partially made pesticide to another company for further processing into commercial-grade pesticide could be liable as an arranger.[27] The court relied on the manufacturer's continuous ownership of both the raw material and the finished product and the fact that the creation of pesticide waste was an inherent part of the final manufacturing process as important factors to support a finding of potential arranger liability.[28]

Since the Eighth Circuit's opinion in *Aceto,* several other circuits have addressed the scope of and elements necessary to establish arranger liability. In contrast to the expansion of arranger liability in *Aceto,* some courts have required a showing of a specific intent to dispose.[29] Others focus on the element of ownership and the PRP's knowledge that spills have occurred or will occur.[30] Some circuits instruct trial courts to consider the totality of circumstances, requesting that they weigh any and all relevant factors.[31]

These varied opinions and their circuit-by-circuit arranger factors added confusion to what looks to be a simple concept. For example, in 2003, the Third Circuit decided *Morton Int'l, Inc v AE Staley Manufacturing Co*[32] to "definitively address" the definition of arranger liability under CERCLA.[33] In *Morton,* the plaintiff sought to recover its clean-up costs against other PRPs via a section 113(f) contribution claim[34] in which Morton had been previously held liable for cleaning up the site. The contamination at the site included mercury-containing compounds originating from both "virgin mercury" and reused "dirty mercury" that were processed at the site.[35] Morton sued the parties that it contracted with to process the virgin and dirty mercury into finished products. Morton alleged that the parties were arrangers under section 107(a)(3). The parties admitted to purchasing the mercury products from Morton, but disputed that they had knowledge of waste disposal at the site, that they shipped dirty mercury to the site, and the general nature of the transactions.

The court broadly construed arranger liability based on the remedial purposes of CERCLA, finding that the other circuits were "virtually unanimous" as to an arranger "fact-sensitive inquiry that requires a multi-factor analysis," and that courts should look beyond a PRP's characterizations of a transaction to determine whether it was an arrangement for disposal or treatment.[36] But the *Morton* court admitted that other courts have disagreed regarding which factors must be considered, the relative weight of each factor, and whether any certain factor, like intent, must be proven.[37] The court proclaimed the "most important" principal factors to be "(1) ownership or possession; and (2) knowledge; or (3) control."[38] The knowledge factor included actual knowledge of releases during the process and presumed knowledge from industry custom and experience.[39] Specifically, the court required "either control over the process that results in a release of hazardous waste or knowledge that such a release will occur during the process."[40] However, the court blurred these principal factors by encouraging consideration of other factors that could be relevant in the analysis of a given case.[41]

Another case in the Ninth Circuit sheds further light on the problem with respect to the sale of a useful product. Generally, the sale of a useful product is not an arrangement for the disposal or treatment of a hazardous substance.[42] However, in *Cal Dep't of Toxic Substances Control v Alco Pac, Inc,* the court held that the useful product defense does not apply when the transaction contemplates disposal "as part of, but not the focus of, the

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transaction."[43] In *Alco,* the California Department of Toxic Substances Control (DTSC) sought response costs for cleanup of a former lead-processing facility. Alco would refine the lead-containing materials to reclaim the lead. The DTSC alleged that the defendants sold the lead-containing materials (used dross and slag) to Alco to dispose of as waste, making them liable as arrangers for the lead contamination that resulted at the site.[44] The Ninth Circuit reversed the district court's initial dismissal based on the useful product defense by distinguishing a difference between a "useful product" and "waste."[45] In doing so, the court analyzed several additional arranger factors, including (1) the "commercial reality" and value of the product, (2) the actions of the seller, and (3) whether the product was a principal product or byproduct.[46] From its analysis of these factors, the court concluded that a reasonable fact finder could find that almost all the transactions were arrangements for disposal or treatment.[47]

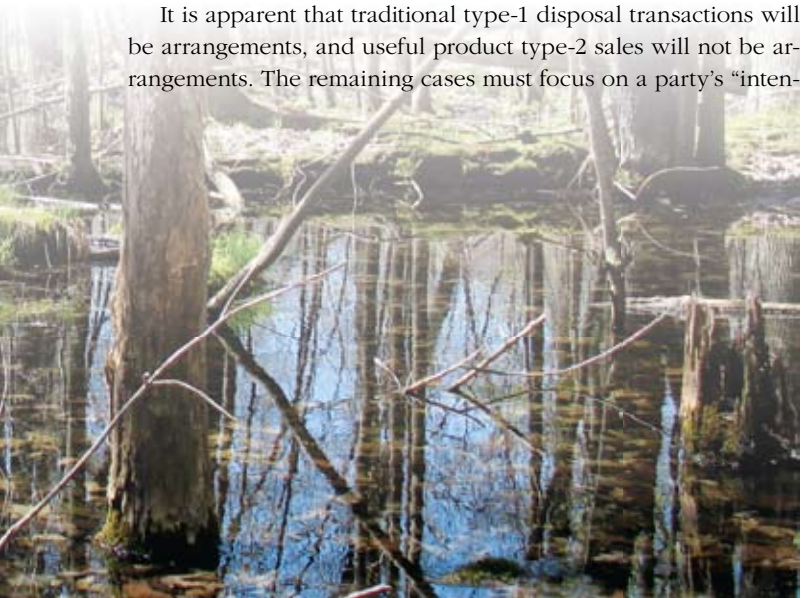
The *Burlington Northern* decision sheds light on the relevance of the factors used in the various circuits by generally ignoring many of them. Although the Supreme Court reiterated the call for a fact-intensive inquiry, it divided potential arranger cases into three types:

(1) Traditional transactions meant to dispose of a used and no longer useful hazardous substance;

(2) Sales of new and useful products where the seller is unaware of how the purchaser later disposes of the product; and

(3) Cases in between the preceding two types in which the seller has some knowledge of the disposal, or the seller's motives for the transaction are not clear.[48]

It is apparent that traditional type-1 disposal transactions will be arrangements, and useful product type-2 sales will not be arrangements. The remaining cases must focus on a party's "intentional steps to dispose of a hazardous substance."[49] The Supreme Court was generally dismissive concerning the litigants' arguments about ownership, control, possession, and incidental disposal.[50] However, a party's mere *knowledge* of leaks and spills will not make it an arranger, especially when it takes affirmative steps to reduce or eliminate such leaks and spills.[51]



What Does It All Mean?

The *Burlington Northern* decision significantly affects several areas of CERCLA arranger liability, including litigation, real estate purchases, material reuse/recycling, material disposal, product marketing and planning, consulting services, environmental remediation, and any other area in which entities have been or could be determined to be arrangers. In litigation, attorneys will want to closely analyze pleadings to ensure that they include the new intent requirement. Discovery should be refocused to discover a party's intent and the motivations behind a hazardous substance transaction. "[I]t would be error for us not to recognize the indispensable role that state of mind must play in determining whether a party has 'otherwise arranged for disposal…of hazardous substances.'"[52] Key witnesses may include corporate officials who planned the transaction, employees who implemented it, or experts able to testify about the general industry or company practices. Special attention should be directed to any documents that can demonstrate or negate intent. Such documents may include contracts, agreements, incentive programs, sales/marketing materials, instruction and training manuals, maintenance schedules, and other similar documents. If such documents and witnesses are favorable, then the party should consider moving for partial summary judgment regarding the arranger issue.[53]

Corporate and risk management departments for entities that produce hazardous substances, recyclers, remediation consultants, and other potential arrangers should conduct an internal review of their contracts, documents, and policies to locate and evaluate those documents and policies that may evince or lead to an inference of an intent to dispose where disposal is not intended. Written policies should be implemented to reduce the likelihood of spills or other release of the hazardous substance.

Insurance coverage may be affected by the plaintiff's mere allegation that an alleged PRP defendant intentionally arranged for the disposal of hazardous substances. Moreover, a determination that a third-party PRP's intent to dispose was an intentional act may potentially bar traditional third-party liability policies,

which usually exclude intentional acts. Additionally, the intent element may now preclude coverage in states that uphold coverage under the "qualified pollution exclusion" in many general commercial policies.

The *Burlington Northern* decision's heightened bar will reduce the number of PRPs available to contribute to response costs of a particular site, which will increase the per-share cost for the remaining PRPs. This means that owners, operators, and transporters could bear increased costs because of the absence of some arrangers.

Conclusion

The Court's decision in *Burlington Northern* significantly changes the liability analysis for PRPs under section 107 of CERCLA. To establish liability, parties must now prove an alleged arranger intended and planned for some of its product to be disposed of as part of a sale and that the potential arranger's mere knowledge of spills and leaks will not be sufficient to find such an intent. This standard significantly increases the difficulty of proving arranger liability, especially for historical contamination where records and witnesses are scarce. ■

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FOOTNOTES

1. 42 USC 9601 *et seq.*
2. Beck, *The Love Canal Tragedy,* EPA Journal (January 1979), available at <http://www.epa.gov/history/topics/lovecanal/01.htm> (accessed August 30, 2009).
3. *United States v Bestfoods,* 524 US 51, 55; 118 S Ct 1876; 141 L Ed 2d 43 (1998).
4. *Burlington Northern & Santa Fe Ry Co v US,* ___ US ___; 129 S Ct 1870; 173 L Ed 2d 812 (2009). The central issue in the *Burlington Northern* case was whether joint and several liability applied or whether the apportionment of liability could be based on a divisibility of harm analysis. The central issue in the *Shell Oil* case was whether Shell Oil was liable as an arranger for the contamination at the site.
5. See *id.*
6. 42 USC 9607(a)(4).
7. 42 USC 9607(a).
8. *Burlington Northern,* 129 S Ct at 1878.
9. 42 USC 9607(a)(3); *Burlington Northern,* 129 S Ct 1870.
10. *Burlington Northern,* 129 S Ct at 1879.
11. *Id.*
12. *Burlington Northern,* 129 S Ct at 1874–1875.
13. *Id.*
14. "F.o.b. destination" means the seller is at risk to transport and tender the goods to the destination. *Id.* at 1875 n 2.
15. *Id.* at 1874–1875.
16. *Id.* at 1875 n 1.
17. *Id.* at 1875.
18. *Id.* at 1876.
19. *United States v Burlington Northern & Santa Fe Ry Co,* 502 F3d 781, 806–810 (CA 9, 2007).
20. *United States v Burlington Northern & Santa Fe Ry Co,* 520 F3d 918, 948–949 (CA 9, 2007).
21. *Burlington Northern,* 129 S Ct at 1880.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 1879.
26. *United States v Aceto Agricultural Chemicals Corp,* 872 F2d 1373 (CA 8, 1989).
27. *Id.*
28. *Id.* at 1381–1382.
29. See, e.g., *Amcast Industrial Corp v Detrex Corp,* 2 F3d 746, 751 (CA 7, 1993); *United States v Cello-Foil Prods,* 100 F3d 1227, 1231 (CA 6, 1996).
30. See, e.g., *Jones-Hamilton Co v Beazer Materials & Services, Inc,* 973 F2d 688, 691–694 (CA 9, 1992).
31. See, e.g., *South Florida Water Mgt District v Montalvo,* 84 F3d 402, 407 (CA 11, 1996); *GenCorp, Inc v Olin Corp,* 390 F3d 433, 446 (CA 6, 2004) (intent inferred from the totality of the circumstances).
32. *Morton Int'l, Inc v AE Staley Mfg Co,* 343 F3d 669 (CA 3, 2003).
33. *Id.* at 675.
34. 42 USC 9613(f).
35. *Morton Int'l Inc,* 343 F3d at 676–677.
36. *Id.*
37. *Id.* at 677.
38. *Id.*
39. *Id.* at 678–679.
40. *Id.* at 677.
41. *Id.*
42. *Burlington Northern,* 129 S Ct at 1878.
43. *Cal Dep't of Toxic Substances Control v Alco Pac, Inc,* 508 F3d 930, 934 (CA 9, 2007) (emphasis in original).
44. *Id.* at 932.
45. *Id.* at 935.
46. *Id.* at 938.
47. *Id.* at 939.
48. *Burlington Northern,* 129 S Ct at 1878–1879.
49. *Burlington Northern,* 129 S Ct at 1879.
50. See *id.* at 1878–1880.
51. *Id.* at 1880.
52. *Id.* at 1879 (quoting *United States v Cello-Foil Products, Inc,* 100 F3d 1227, 1231 (CA 6, 1996).
53. *Bonnieview Homeowners Ass'n v Woodmont Builders, LLC,* ___ F Supp 2d ___; 2009 LEXIS 86737, 41–42 (D NJ, 2009) (no evidence of intent because defendant was unaware the soil was contaminated).