ESSAY

BEFORE AND BEYOND *BURLINGTON*: THE EVOLUTION OF ARRANGER LIABILITY AND APPORTIONMENT IN CERCLA CLAIMS

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INTRODUCTION

On May 4, 2009, the Supreme Court issued an unexpected opinion[1] with the potential to redefine the future scope of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2] In *Burlington Northern & Santa Fe Railway Co. v. United States*, the Court not only restricted the scope of arranger liability, but it also expanded the availability of apportionment to potentially responsible parties (PRPs), providing them with a more effective weapon to combat the threat of joint and several liability. Given CERCLA's well-deserved reputation for extensive and costly application, either one of the Court's two notable holdings in *Burlington* would have been sufficient to herald the case as a landmark decision in CERCLA jurisprudence.

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[1] *See generally* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009) (narrowing the scope of arranger liability and creating greater opportunity for apportionment).

[2] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (2006).

I. *BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. UNITED STATES*

A. Background

For twenty-eight years, Brown & Bryant, Inc. (B&B) operated an agricultural chemical distribution business in Arvin, California.[3] For the first fifteen of those twenty-eight years (from 1960-1975), B&B limited its operations to a 3.8-acre parcel owned outright by the company.[4] In 1975, B&B also began leasing "an adjacent .9-acre parcel . . . owned jointly by the Atchison, Topeka & Santa Fe Railway Company, and the Southern Pacific Transportation Company (now known respectively as the Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company) (Railroads),"[5] and B&B conducted its operations from both parcels for the next thirteen years.

From its Arvin facility, "B&B stored and distributed various hazardous chemicals . . . . [including] the pesticides D-D and Nemagon, both sold by Shell [Oil Company]."[6] To supply B&B with its requested orders of D-D, "Shell would arrange for delivery by common carrier, f.o.b. destination."[7] During transfer of D-D from Shell's tanker trucks to B&B's bulk storage tank, B&B routinely spilled the chemical onto the ground, prompting Shell to impose safe handling practices in an attempt to minimize the frequency and severity of the spills.[8] In addition to providing B&B and other distributors with safety manuals and mandating independent inspections to ensure distributors' compliance with applicable environmental laws and regulations, Shell also offered discounts to those distributors who voluntarily upgraded "their bulk handling and safety facilities."[9] Shell's numerous attempts to improve the

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[3] *Burlington N. & Santa Fe Ry. Co.*, 129 S. Ct. at 1874-75.

[4] *Id.* at 1874.

[5] *Id.*

[6] *Id.* at 1875.

[7] *Id.* "F.o.b. destination means 'the seller must at his own expense and risk transport the goods to [the destination] and there tender delivery of them . . . .'" *Id.* at n.2 (citing U.C.C. § 2-319(1)(b) (2001)).

[8] *Id.* at 1876.

[9] *Id.*

safety of B&B's operations ultimately failed to prevent continued leaks and spills at the Arvin facility, and, in 1983, the Environmental Protection Agency (EPA) and the California Department of Toxic Substances Control (DTSC) discovered "a plume of contaminated ground water located under the facility that threatened to leach into an adjacent supply of potential drinking water."[10]

Although B&B ceased operations in 1989 and declared bankruptcy shortly thereafter, the legacy of chemical contamination at the site quickly earned the Arvin facility a spot on the National Priority List and eventually required EPA and DTSC to undertake substantial remediation efforts whose costs had exceeded $8 million a decade later.[11] In response to an EPA administrative order issued in 1991, the Railroads independently spent more than $3 million conducting their own remediation efforts on the 0.9-acre parcel.[12] Lawsuits seeking to recover response costs from B&B were later filed in the United States District Court for the Eastern District of California by EPA and DTSC as well as the Railroads, and those suits were eventually consolidated in 1996.[13]

B. Procedural History

1. United States District Court for the Eastern District of California

After a six-week bench trial in 1999, the district court in 2003 held that (1) the Railroads, as both former and current owners of the 0.9-acre parcel, were PRPs pursuant to 42 U.S.C. § 9607(a)(1)-(2), and (2) Shell, because it had "arranged for" the disposal of D-D (a hazardous substance), was a PRP pursuant to 42 U.S.C. § 9607(a)(3).[14] Despite having classified both the Railroads and Shell as PRPs, the district court "did not impose joint and several liability . . . for the entire response cost

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[10] *Id.* at 1875-76.
[11] *Id.* at 1876.
[12] *Id.*
[13] *Id.*
[14] *Id.*

incurred by [EPA and DTSC];"[15] instead, the court "found that the site contamination created a single harm . . . that . . . was divisible and therefore capable of apportionment."[16]

To compute the Railroads' liability, the district court relied on three factors: (1) the percentage of the two-parcel site owned by the Railroads (19%); (2) the percentage of the Railroads' involvement in B&B's operations (45%), which the district court expressed as the ratio of the Railroads' thirteen-year-long lease to B&B compared to B&B's twenty-eight years of operations; and (3) the percentage of contamination attributable to the Railroads' 0.9-acre parcel (66%), which was arrived at after determining that two of three polluting chemicals that had been spilled on the 0.9-acre parcel required remediation, and those two particular substances accounted for two-thirds of the overall contamination at the Arvin facility.[17] By multiplying the three factors (0.19 x 0.45 x 0.66), the district court determined that the Railroads were 6% liable for the contamination at the Arvin facility.[18] Recognizing the potential for error in the apportionment methodology, the district court then applied a 50% margin of error, capping the Railroads' liability at 9%.[19] To compute Shell's liability, the district court relied on "estimations of chemicals spills of Shell products," and those estimations yielded an overall liability of 6% for Shell.[20]

2. Ninth Circuit

On appeal to the Ninth Circuit, EPA and DTSC sought reversal of the district court's apportionment, and Shell appealed the district court's arranger liability analysis which had resulted in Shell being named a PRP along with the Railroads. Although Shell lost its appeal, EPA and DTSC persuaded the Ninth Circuit to impose joint and several liability on Shell and the Railroads.

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[15] *Id.*
[16] *Id.*
[17] *Id.* at 1882.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 1876-77.

In its analysis of arranger liability in the context of Shell's activities, the Ninth Circuit "acknowledged that Shell did not qualify as a 'traditional' arranger . . . insofar as it had not contracted . . . to directly dispose of a hazardous waste product,"[21] but the Ninth Circuit focused heavily upon CERCLA's expansive definition of "disposal"[22] to support its "conclu[sion] that an entity could arrange for 'disposal' 'even if it did not intend to dispose' of a hazardous substance."[23] Because CERCLA's definition of "disposal" includes unintentional acts such as "leaking" and "spilling,"[24] the Ninth Circuit considered it reasonable to establish a "'broader category of arranger liability' if the 'disposal of hazardous wastes [was] a foreseeable byproduct of, but not the purpose of, the transaction giving rise to' arranger liability."[25]

As for the issue of apportionment, the Ninth Circuit agreed with the district court that the case involved a single, divisible harm that was, therefore, capable of apportionment; however, the Ninth Circuit ultimately reversed the district court and imposed joint and several liability on the Railroads and Shell, insisting that they had failed to satisfy their burden of proving a reasonable basis for apportionment.

3. Supreme Court

a. Issue 1: Arranger Liability

In its discussion of arranger liability, the Court noted that the *Burlington* facts fell squarely within a grey area that exists between the black and white, easy to analyze extremes of arranger liability.[26] The Court agreed with the lower courts'

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[21] *Id.* at 1877.

[22] *See infra* note 42.

[23] *Burlington N. & Santa Fe Ry. Co.*, 129 S. Ct. at 1877 (quoting United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 949 (9th Cir. 2008)).

[24] *See infra* note 42.

[25] *Burlington N. & Santa Fe Ry. Co.*, 129 S. Ct. at 1877 (alteration in original) (quoting United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 948 (9th Cir. 2008)).

[26] *See id.* at 1878-79 ("It is plain from the language of the statute that CERCLA liability would attach . . . if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance. It is similarly clear that an entity could not be held liable as an arranger merely for selling a new and

earlier conclusions that "whether [arranger] . . . liability attaches is fact intensive and case specific," but it was quick to point out that any such liability "may not extend beyond the limits of the statute itself."[27] Noting that CERCLA "does not specifically define what it means to 'arrang[e] for' disposal of a hazardous substance," the Court proceeded to "give the phrase its ordinary meaning."[28] Based on the Court's analysis of the phrase's ordinary meaning, it concluded that "under the plain language of the statute, an entity may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance."[29]

The district court and Ninth Circuit had both favored an analysis of arranger liability that relied heavily upon CERCLA's broad definition of "disposal," a definition which includes unintentional acts such as "spilling" and "leaking."[30] Based on that analysis, the lower courts regarded liability as appropriate in cases where "entities not only . . . directly dispose[d] of waste products but also when they engage[d] in legitimate sales of hazardous substances knowing that some disposal may occur as a collateral consequence of the sale itself."[31] According to the lower courts, Shell's willingness to continue selling D-D to B&B despite Shell's knowledge of B&B's routine spills and leaks "'was sufficient to establish Shell's intent to dispose of hazardous substances.'"[32]

Although the Court did not entirely discount the role that knowledge can play in discerning an entity's intent, the Court held that:

> [K]nowledge alone is insufficient to prove that an entity "planned for" the disposal, particularly when the disposal

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useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination. Less clear is the liability attaching to the many permutations of 'arrangements' that fall between these two extremes—cases in which the seller has some knowledge of the buyers' planned disposal or whose motives for the 'sale' of a hazardous substance are less than clear." (citation omitted)).

[27] *Id.* at 1879.

[28] *Id.* (alteration in original).

[29] *Id.*

[30] *See infra* note 42.

[31] *Burlington N. & Santa Fe Ry. Co.*, 129 S. Ct. at 1879-80 (footnote omitted).

[32] *Id.* at 1880.

> occurs as a peripheral result of the legitimate sale of an unused, useful product. In order to qualify as an arranger, Shell must have entered into the sale of D-D with the intention that at least a portion of the product be disposed of during the transfer process . . . .[33]

The Court also highlighted as indicia of intent Shell's numerous attempts to mitigate B&B's spills and leaks. In the end, the Court reversed the Ninth Circuit, "conclud[ing] that Shell was not liable as an arranger for the contamination that occurred at B&B's Arvin facility."[34]

b. Issue 2: Apportionment

The Court began its analysis of the apportionment issue by noting that CERCLA and joint and several liability are not synonymous. Although CERCLA is unquestionably a strict liability statute, Congress gave the courts discretion to assess the appropriateness of apportionment.[35]

Applying relevant apportionment analysis to the facts in *Burlington*, the Court first pointed out that:

> [B]oth the District Court and the Court of Appeals agreed that the harm created by the contamination of the Arvin site, although singular, was theoretically capable of apportionment. The question then is whether the record provided a reasonable basis for the District Court's conclusion that the Railroads were liable for only 9% of the harm . . . .[36]

Before addressing that question, though, the Court made a brief detour from the analysis to acknowledge that the district court had essentially elected to apportion liability sua sponte. Given that apportionment is a means by which a PRP can evade joint and several liability so long as the PRP satisfies the burden of establishing a reasonable basis for apportionment,

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[33] *Id.*

[34] *Id.*

[35] *See id.* at 1881 ("Congress intended the scope of liability to 'be determined from traditional and evolving principles of common law.'" (quoting United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983))); *see also id.* ("[A]pportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'" (quoting RESTATEMENT (SECOND) OF TORTS § 433A(1)(b) (1963-64))).

[36] *Id.*

the Railroads typically would have been expected to provide sufficient evidence to justify apportionment. In this case, however, "the District Court ultimately concluded that this was 'a classic "divisible in terms of degree" case, both as to the time period in which defendants' conduct occurred, and ownership existed, and as to the estimated maximum contribution of each party's activities that released hazardous substances that caused Site contamination.'"[37]

Although the Ninth Circuit disputed the reasonableness of the district court's basis for apportionment, the Supreme Court upheld the district court's original analysis and findings.[38] As a parting shot, the Court even went out of its way to highlight a glaring discrepancy in the Ninth Circuit's opinion: "Although the Court of Appeals faulted the District Court for relying on the 'simplest of considerations: percentages of land area, time of ownership, and types of hazardous products,' these were the same factors the court had earlier [in its opinion] acknowledged were *relevant* to the apportionment analysis."[39]

II. BEFORE *BURLINGTON*

> For three years, the Senate worked on a bill that would respond to emergencies caused by chemical poisons, and to seek to discourage the release of those chemicals into the environment . . . .
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> . . . .
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> There is simply no good reason for us to respond to one type of release of a poison, but not another. The test should not be whether poison was released into river water rather than into well water; or by toxic waste buried in the ground rather than toxic waste discharged to the ground. The test should be whether the poison was released. I assure you that

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[37] *Id.* at 1882.

[38] *See id.* at 1883 ("[T]he primary pollution at the Arvin facility was contained in an unlined sump and an unlined pond . . . most distant from the Railroads' parcel and . . . spills . . . on the Railroad parcel contributed to no more than 10% of the total site contamination . . . . With those background facts in mind, we are persuaded that it was reasonable for the court to use the size of the leased parcel and the duration of the lease as the starting point for its analysis." (citations omitted)).

[39] *Id.* (emphasis in original) (citation omitted) (quoting United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 943 (9th Cir. 2008)).

> the victim does not care to make those distinctions, nor should we.[40]

To describe CERCLA as "broad" would certainly not be incorrect, but it might be an understatement.[41] From its nearly all-inclusive definitions[42] and retroactive application[43] to its plentiful categories of PRPs[44] and penchant for imposing joint

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[40] Sen. Robert T. Stafford, *Why Superfund Was Needed*, EPA J., June 1981, http://www.epa.gov/history/topics/cercla/04.htm.

[41] *See* Rena I. Steinzor, *The Legislation of Unintended Consequences*, 9 DUKE ENVTL. L. & POL'Y F. 95, 99-100 (1998) ("[T]he scope of the liability scheme [is] incredibly broad. To this day, the law imposes liability for 'releases or threatened releases' of a 'hazardous substance' into the 'environment' from a 'facility.' It is no overstatement to suggest that it covers any conceivable spill, leak, or on-ground disposal of any solid or liquid mixture that contains even trace amounts of toxic chemicals at any location, except a release explicitly permitted under federal law. Or, to put it more provocatively, a spill involving a cup of household ammonia in your mother's driveway theoretically qualifies her as a potentially liable party under Superfund. Move the location of the spill to a landfill that accepted both ordinary garbage and industrial hazardous waste, and your mother could become a full-fledged target of the Superfund liability scheme." (footnote omitted)).

[42] *See, e.g.*, 42 U.S.C. § 9601(9)(A)-(B) (2006) (defining "facility" as not only a "building" or "structure" but also a "ditch," "pond," or "pipe," and also including within the definition "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located"); 42 U.S.C. § 9601(14) (2006) (including within the definition of "hazardous substance" those chemicals targeted by other environmental statutes such as CAA, CWA, RCRA, and TSCA but specifically excluding "petroleum . . . natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel"); 42 U.S.C. § 9601(21) (2006) (defining "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body"); 42 U.S.C. § 9601(22) (2006) (including within the definition of a "release" both intentional acts such as "pumping" and "pouring" and unintentional acts such as "spilling" and "leaking"); 42 U.S.C. § 9601(29) (2006) (adopting the Solid Waste Disposal Act's definition of "disposal," which, like CERCLA's definition of "release," includes both intentional acts such as "discharge" and "dumping" and unintentional acts such as "spilling" and "leaking").

[43] *See, e.g.*, 42 U.S.C. § 9607(a)(2) (2006) (including as one category of PRPs those persons who owned or operated a facility at the time of the hazardous substance disposal).

[44] *See, e.g.*, 42 U.S.C. § 9607(a)(3) (2006) (establishing the concept of "arranger liability," a concept which allows the EPA to broaden the class of PRPs by targeting not just the current or past owners or operators of a facility but also those persons who "arranged for disposal" of a hazardous substance at that particular facility); *see also supra* note 42 (describing the way in which CERCLA broadly defines the term "disposal").

and several liability,[45] CERCLA's reach and impact have been widespread throughout its thirty-year history.

CERCLA applies to any release or threat of a release of a hazardous substance into the environment from a facility,[46] and it gives the federal government the power either to compel cleanup by the responsible parties[47] or to initiate government-led cleanup efforts and then seek cost recovery from the responsible parties.[48] CERCLA's nickname "Superfund" is derived from the $1.6 billion Hazardous Substance Response Trust Fund that was established to cover the costs of

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[45] Steinzor, *supra* note 41, at 98-99 ("The congressional debate that led to passage of the original Superfund law in 1979 was dominated by passionate speeches about the dire threats posed by toxic waste sites and, particularly on the House side, intricate explanations of how liability for the costs of cleaning up such sites should operate. In a non-negotiable power play, the Senate dropped an explicit reference to 'strict, joint and several' liability, sending the bill over to the House with a replacement provision that alluded to the 'same standard of liability which obtains under section 1321 of Title 33 [the Federal Water Pollution Control Act]' and the message that the ultimate fate of the legislation depended on House acceptance of the Senate bill without any modification. The House accepted the Senate's ultimatum and passed the bill without changes. This veiled approach worked out far better than the bill's primary sponsors, Senator Robert Stafford (R-Vt.) and Congressman James Florio (D-N.J.) dared hope, with the federal courts following the lead of the legislative history and dutifully reading strict, joint and several liability into the new statute." *Id.* (alteration in original) (footnotes omitted)); *see also* United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 945 (9th Cir. 2008) ("Joint and several liability, even for PRPs with a minor connection to the contaminated facility, is the norm, designed to assure, as far as possible, that *some* entity with connection to the contamination picks up the tab.") (emphasis in original).

[46] *See generally* 42 U.S.C. § 9604 (2006) (authorizing the President to take all necessary removal and remedial actions necessary so long as they are in accordance with the National Contingency Plan).

[47] *See* 42 U.S.C. § 9606(a) (2006) (establishing bases for: (1) civil injunction actions "when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility" and (2) administrative orders "as may be necessary to protect public health and welfare and the environment"); *see also* 42 U.S.C. § 9606(b)(1) (2006) (giving district courts the authority to impose fines of up to $25,000 per day for a PRP's noncompliance with an EPA administrative order).

[48] *See, e.g.*, 42 U.S.C. § 9607(a)(4)(A) (2006) (imposing liability 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"); *see also* 42 U.S.C. § 9607(a)(4)(B) (2006) (imposing liability for "any other necessary costs of response incurred by any other person consistent with the national contingency plan"); *see also* 42 U.S.C. § 9607(a)(4)(C) (2006) (imposing liability for "damages for injury to, destruction of, or loss of natural resources").

government cleanup efforts.[49] Although the government typically attempts to replenish the Superfund with funds later collected from responsible parties, responsible parties from whom to recover do not always exist. In recognition of the rapidly dwindling funds in the Superfund, Congress passed the Superfund Amendments and Reauthorization Act (SARA) in 1986 which, among other things, imposed environmental taxes on corporations as a means to generate an additional $8.5 billion to replenish the Superfund.[50] Given the limited resources of the Hazardous Substance Response Trust Fund[51] in relation to the number of sites potentially requiring cleanup,[52] private funding for future cleanups will be crucial to the program's continued success. Access to this private funding, assuming a solvent PRP can be found, will necessarily depend in large part upon the courts' continued willingness to apply joint and several liability in post-*Burlington* CERCLA actions.

A. Arranger Liability

Before *Burlington*, courts assessed arranger liability[53] on the basis of multiple factors,[54] and the Ninth Circuit even went

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[49] Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 921 (2004).

[50] *Id.*

[51] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-380, SUPERFUND: EPA'S ESTIMATED COSTS TO REMEDIATE EXISTING SITES EXCEED CURRENT FUNDING LEVELS, AND MORE SITES ARE EXPECTED TO BE ADDED TO THE NATIONAL PRIORITIES LIST, 3 (2010), *available at* http://lautenberg.senate.gov/assets/62210-GAO-Superfund.pdf ("Since 2001, appropriations from general revenues have been the largest source of funding for the trust fund. Superfund program appropriations have averaged about $1.2 billion annually since 1981, although the annual level of these appropriated funds has generally declined in recent years when adjusted for inflation. By the start of fiscal year 2009, the balance of the trust fund had decreased in value from its peak of $5.0 billion in 1997 to $137 million. As part of the American Recovery and Reinvestment Act of 2009 . . . EPA's Superfund remedial program received an additional $600 million." *Id.* (footnotes omitted)).

[52] *Id.* at 1 ("The . . . EPA . . . has . . . identified more than 47,000 hazardous waste sites potentially requiring cleanup. As of the end of fiscal year 2009, 1,269 of the most seriously contaminated sites were included on EPA's National Priorities List (NPL): 1,111 nonfederal sites and 158 federal facilities." (footnote omitted)).

[53] *See* 42 U.S.C. § 9607(a)(3) (2006) (establishing liability for "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous

so far as to extend arranger liability to "transactions that contemplate[d] disposal as a *part* of, but not the focus of, the transaction."[55] The Ninth Circuit's arranger liability analysis has also relied heavily upon the "useful product doctrine," which places significant emphasis on the distinction between wastes and useful products.[56] Under the useful product doctrine, if the genuine intent of a transaction or series of transactions is the sale of a useful product and not merely the veiled attempt of "a party, wishing to dispose of a hazardous substance, to escape by a sale its responsibility to see that the substance is safely disposed of,"[57] then a court is likely to side with the PRP and exempt the PRP from arranger liability.

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substances . . . at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances").

[54] *See, e.g.*, Morton Int'l, Inc. v. A.E. Mfg. Co., 343 F.3d 669, 677 (3rd Cir. 2003). The court stated the following:

> [C]ourts are virtually unanimous with respect to two points. First, the determination of "arranger liability" is a fact-sensitive inquiry that requires a multi-factor analysis. Second, courts must look beyond the defendant's characterization of the transaction at issue in order to determine whether the transaction, in fact, involves an arrangement for the disposal or treatment of a hazardous substance.

Id. However, the court went on to state:

> [T]here is not as much agreement among our sister circuits as to which factors must be considered – or what priority they should receive – in conducting the multi-factor "arranger liability" analysis. . . . [S]ome courts require a showing of intent to dispose or treat hazardous substances while others require only a demonstration of control and/or ownership over the hazardous substances that are being disposed of or treated.
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> There has been some disagreement, too, as to whether ownership or control over the material being processed is the more critical factor . . . .

Id. (citations omitted).

[55] United States v. Burlington N. & Santa Fe Ry. Co., 479 F.3d 1113, 1139 (2007) (emphasis in original).

[56] *See, e.g.*, Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 508 F.3d 930, 934 (9th Cir. 2007) ("We have held that these [CERCLA] definitions [of the terms 'disposal' and 'treatment' that appear in the arranger liability provision, 42 U.S.C. § 9607(a)(3) (2006)] necessarily implicate the concept of 'waste' . . . . A person may be held liable as an 'arranger' under § 9607(a)(3) only if the material in question constitutes 'waste' rather than a 'useful product.' Application of this distinction has been referred to as the 'useful product doctrine.'" *Id.* (citations omitted)).

[57] *Id.* at 936.

B. Apportionment

Before *Burlington*, courts generally recognized that apportionment, though not specifically listed as one of CERCLA's three statutory defenses,[58] was a judicially-acceptable mechanism by which a PRP might avoid joint and several liability so long as the PRP could establish divisibility of the harm and a reasonable basis for apportionment;[59] however, despite their recognition of apportionment as an

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[58] *See* 42 U.S.C. § 9607(b)(1)-(3) (2006) (listing "act of God," "act of war," and "act or omission of a third party" as available defenses).

[59] *See, e.g.*, United States v. Capital Tax Corp., 545 F.3d 525, 535 (7th Cir. 2008) ("The concept of divisibility has largely been derived from § 433A of the Restatement (Second) of Torts. . . . The Restatement does suggest . . . that liability can be apportioned if Capital Tax can show that its portion of the damages is susceptible of a 'reasonable estimate.'" (citations omitted)); United States v. Hercules, Inc., 247 F.3d 706, 717 (8th Cir. 2001) ("The universal starting point for divisibility of harm analyses in CERCLA cases is the Restatement (Second) of Torts, which provides for the apportionment of damages among two or more parties when at least one is able to show either (1) 'distinct harms' or (2) a 'reasonable basis for determining the contribution of each cause to a single harm.'" (quoting RESTATEMENT (SECOND) OF TORTS § 433A (1965)); United States v. Twp. of Brighton, 153 F.3d 307, 318 (6th Cir. 1998) ("We look first to § 433A of the RESTATEMENT (SECOND) OF TORTS (1965), for the 'traditional and evolving principles of common law' that we use to determine divisibility. The Restatement says that '[d]amages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm.'" (alteration in original) (citations omitted)); *see also* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) ("A reading of the entire legislative history [of CERCLA] in context reveals that the scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases. The deletion was not intended as a rejection of joint and several liability. Rather, the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis." (citations omitted)); *see also id.* at 810 ("The term joint and several liability was deleted from the express language of [CERCLA] in order to avoid its universal application to inappropriate circumstances. An examination of the common law reveals that when two or more persons acting independently caused 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 has himself caused." (citing RESTATEMENT (SECOND) OF TORTS §§ 433A, 881 (1976))).

alternative to joint and several liability, courts have historically been reluctant to apportion liability.[60]

III. BEYOND *BURLINGTON*

On its face, *Burlington* is a game-changer in the context of CERCLA cases. Although limits on CERCLA liability have previously been discussed by lower courts—especially regarding the issue of apportionment—few expected the Court to transform those earlier discussions into decisions that, in the case of the Railroads, significantly curbed, and, in the case of Shell, altogether eliminated liability for response costs incurred at the Arvin facility. But *Burlington*'s staying power remains to be seen. Will *Burlington* ultimately become known as the case that fundamentally redefined CERCLA liability, or will the case, instead, fade into obscurity, resurfacing only in the dicta of future cases seeking to distinguish their facts from *Burlington*'s unique circumstances and, consequently, narrow holdings? The following post-*Burlington* cases shed some light on *Burlington*'s potential for long-term impact.

A. Arranger Liability

1. *Celanese Corp. v. Martin K. Eby Construction Co.*

On September 20, 2010, the Fifth Circuit applied *Burlington* in holding that a defendant construction company was not subject to CERCLA liability under a theory of arranger liability.[61] In the process of installing pipeline, defendant Eby's backhoe struck a methanol pipeline owned by plaintiff

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[60] *See, e.g.*, United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 945-46 (9th Cir. 2008) ("Apportionment is the exception, available only in those circumstances in which adequate records *were* kept and the harm *is* meaningfully divisible."); United States v. Hercules, Inc., 247 F.3d 706, 717 (8th Cir. 2001) ("We have previously observed that proving divisibility is a 'very difficult proposition.'"); United States v. Colo. & E. Ry. Co., 50 F.3d 1530, 1535 (10th Cir. 1995) ("[T]he courts have been reluctant to apportion costs between PRPs . . . ."); O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989) ("[D]amages should be apportioned only if the *defendant* can demonstrate that the harm is divisible. The practical effect of placing the burden on defendants has been that responsible parties rarely escape joint and several liability . . . ." (citations omitted)).

[61] *See* Celanese Corp. v. Martin K. Eby Constr. Co., 620 F.3d 529 (5th Cir. 2010).

Celanese Corporation. In its analysis of Eby's potential arranger liability, the Fifth Circuit noted that "under *Burlington*, Eby is liable as an arranger only if it took intentional steps or planned to release methanol from the Celanese pipeline."[62] Celanese acknowledged that Eby did not intentionally strike the Celanese pipeline;[63] nevertheless, Celanese argued Eby

> intentionally took steps to dispose of methanol by disregarding its obligations to investigate the incident and backfilling the excavated area where the incident had occurred. In other words, Celanese argues that Eby's conscious disregard of its duty to investigate is tantamount to intentionally taking steps to dispose of methanol. *Burlington*, however, precludes liability under these circumstances. In *Burlington*, the Court declined to impose arranger liability for a defendant with a more culpable *mens rea*. The defendant had actually arranged to ship hazardous chemicals under conditions that it knew would result in the spilling of a portion of the hazardous substance by the purchaser or common carrier. Given that there was no arranger liability under those circumstances, we fail to see how we can impose such liability here when Eby did not even know that it had struck the Celanese pipeline.[64]

2. *Bonnieview Homeowners Ass'n v. Woodmont Builders, L.L.C.*

On September 22, 2009, a district court in New Jersey rejected arranger liability claims that had been filed by both the plaintiffs and the defendants.[65] In its arranger liability analysis, the district court focused on *Burlington*'s intent requirement (i.e., "Under the plain language of the statute, an entity may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance."[66]). Since neither the plaintiff homebuilder nor the defendant homeowners had

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[62] *Id.* at 533.

[63] *Id.*

[64] *Id.* (citation omitted).

[65] *See* Bonnieview Homeowners Ass'n v. Woodmont Builders, L.L.C., 655 F. Supp. 2d 473 (D.N.J. 2009).

[66] *Id.* at 493 (quoting Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1879 (2009)).

knowledge of the contaminants that had previously been released on property that they later developed into residential lots, "there [was] no evidence that [the defendant homebuilder] took intentional steps to dispose of a hazardous substance,"[67] just as "[t]here [was] no evidence that the Individual Plaintiffs took steps to intentionally dispose of a hazardous substance at the Residential Lots."[68]

3. *United States v. Washington State Department of Transportation*

On September 15, 2009, a district court in Washington agreed with the Washington State Department of Transportation (WSDOT) that WSDOT may have a valid CERCLA claim for contribution against the U.S. Army Corps of Engineers (USACE) under a theory of arranger liability.[69] Citing *Burlington*, the district court noted that:

> [T]he determination whether an entity is an arranger requires a fact-intensive inquiry that looks beyond the parties' characterization of the transaction as a "disposal" or "sale" and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions. Considering the USACE's involvement with dredging the contaminated waterways in light of CERCLA's strict liability standard, the court cannot say as a matter of law that upon further discovery, the facts will fail to show that the USACE qualif[ies] as an arranger under [§ 107(a)(3) when taking] intentional steps to dispose of a hazardous substance through the granting of permits to dredge the waterway.[70]

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[67] *Id.*

[68] *Id.* at 498.

[69] *See* United States v. Wash. State Dep't of Transp., 665 F. Supp. 2d 1233 (W.D. Wash. 2009).

[70] *Id.* at 1242 (alterations in original) (quoting Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1879 (2009)) (internal quotation marks omitted).

4. *Frontier Communications Corp. v. Barrett Paving Materials, Inc.*

On July 7, 2009, a district court in Maine conducted a post-*Burlington* arranger liability analysis in an order on a motion to dismiss that had been filed by defendants Guilford Transportation Industries, Inc., and Maine Central Railroad Company (Railroads).[71] Plaintiff Frontier Communications Corporation had incurred significant costs in connection with its cleanup of contaminants in a portion of the Penobscot River and filed a complaint against the Railroads seeking contribution.[72] The Railroads argued that they could not be deemed 42 U.S.C. § 9607(a)(2) PRPs as prior owners or operators during the time when hazardous substances were disposed of, nor could they be deemed arrangers pursuant to 42 U.S.C. § 9607(a)(3).[73] The district court noted that regardless of the ultimate determination under 42 U.S.C. § 9607(a)(2), "the Complaint contain[ed] multiple factual assertions that, if true, could establish that the Railroad[s] arranged for the disposal of [the hazardous substances]."[74] Although the Railroads argued that *Burlington* had very recently "narrowed the scope of arranger liability,"[75] the district court reminded the Railroads that the Court in *Burlington* had treated arranger liability as "fact intensive and case specific."[76] The district court also noted that:

> [T]he allegations contained in the Complaint exceed[ed] the "mere knowledge that spills and leaks continued to occur" (what the *Burlington* Court specifically found to be an insufficient basis for arranger liability). Rather, in addition to alleging negligent disposal via spills, the Complaint also allege[d] disposal via sewer lines located on the property. To the extent that the sewer system . . . was owned and operated by the City of Bangor, the Railroad[s]' disposal of

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[71] *See* Frontier Commc'ns Corp. v. Barrett Paving Materials, Inc., 631 F. Supp. 2d 110 (D. Me. 2009).

[72] *Id.* at 112.

[73] *Id.* at 113.

[74] *Id.* at 114.

[75] *Id.* (internal quotation marks omitted).

[76] *Id.* (quoting Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1879 (2009)) (internal quotation marks omitted).

> [contaminants] via the sewer would fall well within the confines of arranger liability – *even after Burlington*.[77]

B. Apportionment

1. *ITT Industries v. Borgwarner, Inc.*

On March 24, 2010, a district court in Michigan denied defendants' requests for apportionment because they failed to satisfy the first prerequisite: proving divisibility of harm.[78] The district court cited *Burlington* for the proposition that, "[d]ivisibility can be based on a variety of factors including volumetric, chronological, or geographic considerations, as well as contaminant-specific considerations."[79] The district court dismissed the claim of geographic divisibility, noting that operations were conducted throughout the entire facility and, therefore, "were not 'limited to a discrete and measurable section of the property,' and do not fall within the parameters for geographic divisibility . . . ."[80] As for the divisibility argument based on one of the defendant's assertions that it did not release two of the hazardous substances identified at the site, the district court noted that "non-release may be a basis for divisibility."[81] Nevertheless, the district court cited evidence suggesting that the defendant had in fact released the contested contaminants.[82]

2. *United States v. Saporito*

On February 9, 2010, a district court in Illinois held that apportionment was improper because, though there was a single harm, that single harm was not divisible.[83] Defendant was the joint owner of equipment involved in metal plating

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[77] *Id.* (emphasis added) (citation omitted) (quoting Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1880 (2009)).

[78] *See* ITT Indus., Inc. v. Borgwarner, Inc., 700 F. Supp. 2d 848 (W.D. Mich. 2010).

[79] *Id.* at 877.

[80] *Id.* at 878 (quoting United States v. Twp. of Brighton, 153 F.3d 307, 320 (6th Cir. 1998)).

[81] *Id.*

[82] *Id.*

[83] *See* United States v. Saporito, 684 F. Supp. 2d 1043, 1062 (N.D. Ill. 2010) ("Here . . . there is only one cause [for the contamination]: the plating process itself.").

operations and tried to argue that liability should be apportioned among the other owners of the equipment. The district court distinguished joint ownership of equipment from the facts in *Burlington*, noting that:

> Ownership of the equipment necessary for [the] process is divided, but not in the way that ownership was divided among owners of separate parcels of land in *Burlington Northern*. . . . Rather than being comparable to the owner of a parcel that makes up one section of a facility, Defendant's ownership of some of the equipment necessary to the plating process makes him comparable to a joint venturer. And apportionment is not appropriate for joint venturers.[84]

3. *Evansville Greenway & Remediation Trust v. Southern Indiana Gas & Electric Co.*

On September 29, 2009, a district court in Indiana, responding to plaintiff's motion for summary judgment, noted that "[t]he full import of *Burlington Northern* is hotly debated,"[85] and that "[p]rior to the Supreme Court's decision in [*Burlington*] . . . the court would have had little difficulty concluding that the harm here is not divisible, that [defendant] would be jointly and severally liable for all remediation costs . . . ."[86] However, the defendant argued that "[*Burlington*] effected a dramatic change that will make it much easier for PRPs to avoid the burden of joint and several liability."[87] Because of *Burlington*, the district court "denie[d] plaintiff's motion [for summary judgment] to the extent that it [sought] a conclusive determination that [defendant] would be jointly and severally liable for all past and future remediation costs,"[88] concluding that a trial would be necessary to adequately address defendant's apportionment argument.[89]

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[84] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 876 (1979) for the proposition that apportionment does not apply to joint venturers).

[85] Evansville Greenway & Remediation Trust v. S. Ind. Gas & Elec. Co., 661 F. Supp. 2d 989, 1012 (S.D. Ind. 2009).

[86] *Id.* at 1011 (citation omitted).

[87] *Id.* at 1012.

[88] *Id.* at 1013.

[89] *Id.*

IV. CONCLUSION

In the nearly two years since *Burlington* first threatened to limit the application of arranger liability and promote the availability of apportionment, the case has yet to fulfill initial predictions that its defendant-friendly holdings would significantly weaken CERCLA's continuing influence. Lower courts appear to be demonstrating a willingness to respect the narrower scope of arranger liability contemplated by the Supreme Court, but there is a reluctance among lower courts to abandon joint and several liability in favor of apportionment. Of course, the real impact of *Burlington* on apportionment will not be felt until courts have had an opportunity to address cases capable of apportionment. The post-*Burlington* apportionment cases have been characterized by indivisible harms, which have deprived the courts of opportunities to assess whether or not there exists a reasonable basis for apportionment. Only time will tell whether *Burlington* will eventually achieve notoriety as the case that dramatically limited CERCLA liability or if the case will, instead, be distinguished into anonymity.