Bloomberg BNA

Daily Environment Report™

Superfund

Arranger Liability Still Confusing Courts Four Years After Supreme Court Decision

The scope of arranger liability after *Burlington Northern* is still confusing lower courts and could be headed to the U.S. Supreme Court for another look, speakers at a superfund webinar said Sept. 24.

The Supreme Court may also be asked to reconsider the allocation and apportionment portion of the *Burlington Northern* decision and clarify the distinction between Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act, the speakers said during Bloomberg BNA's webinar, ''Not Settling for Less: Finality in CERCLA Settlements.''

In a decision in May 2009, the Supreme Court narrowed the scope of arranger liability under CERCLA (*Burlington Northern & Santa Fe Ry. v. United States*, 556 U.S. 599 (2009); (84 DEN A-1, 5/5/09).

Situation After Four Years. More than four years later, lower courts are still confused about the impact of the decision on the scope of arranger liability, panelist Jane E. Fedder of Polsinelli P.C. in St. Louis said.

Fedder pointed to a recent Missouri district court decision denying summary judgment to a party that sold and sent for repair used electrical transformers that contained PCB-laden coolant fluid, *Wilson Rd. Dev. Corp. v. Fronabarger Concreters Inc.*, 2013 BL 242283 (E.D. Mo., Sept. 11, 2013); 181 DEN A-7, 9/18/13).

''The court focused on the fact-intensive inquiry called for by *Burlington* but left out the part about conducting that inquiry within the limits of the statute,'' Fedder said. ''So much so that it said that courts like it in the Eighth Circuit are still governed by [*United States v. Aceto Agr. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989)] and consider factors such as control of the hazardous substances, ownership or possession of the substance, knowledge about the disposal site, specific intent to dispose, actual participation in activities, and primary motivation to dispose.''

The district court distinguished *Burlington* and limited it to cases involving the sale of a new product by a seller who clearly manifested an intent to prevent the disposal of hazardous waste, Fedder said.

'A Mess of a Decision.' However, in the case of transformers sent for repair, the fact that the defendants had retained ownership and knew that the oil would be removed and not returned, coupled with the absence of evidence that the defendants made any effort to minimize disposal of waste, could lead a fact finder to conclude that the defendants intended to dispose of hazardous substances, she said.

''In other words, it's a mess of a decision which conflicts to a degree with a long line of other transformer cases,'' she said.

The Eighth Circuit may be asked to rule on the *Wilson Road* case, she said. Scope of liability for sales of used transformers is currently on appeal to the Fourth Circuit in *Duke Energy Progress Inc. v. Alcan Aluminum Corp.*, 2013 BL 121456 (E.D.N.C., May 6, 2013); 93 DEN A-3, 5/14/13).

''The scope of arranger liability might get back in front of the Supreme Court for products other than newly manufactured hazardous substances,'' Fedder said. ''Whether the scope of inquiry is going to differ based upon a used piece of equipment as opposed to virgin pesticides, for example.''

Allocation v. Apportionment. The part of the *Burlington Northern* decision concerning allocation versus apportionment of liability has also tripped up the courts, speaker Gail Wurtzler of Davis Graham & Stubbs LLP in Denver said.

''I think many of the folks in the defense bar have been disappointed with how the lower courts have implemented the *Burlington Northern* decision regarding allocation and apportionment,'' she said. ''I think that would be something the Supreme Court might take

the opportunity to clarify if a case works its way up to them.''

Moderator Doug Arnold of Alston & Bird LLP in Atlanta pointed to PCS Nitrogen's petition for certiorari pending before the Supreme Court, appealing the Fourth Circuit's ruling in *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F3d 161 (4th Cir. 2013); 67 DEN A-7, 4/8/13).

PCS Nitrogen said in its petition that a ''divisibility fog'' has descended on the lower courts, he said. ''According to PCS of the more than 40 district court opinions that have been issued since *Burlington Northern*, not a single one has found liability from a CERCLA site to be capable of apportionment.''

''Instead, according to PCS, the district courts and a couple of circuit courts continue to apply what they just characterize as pre-*Burlington Northern* standards of hypertechnical grounds for finding there's not sufficient precision for purposes of apportionment,'' he said.

Arnold said the court may not grant certiorari in the PCS Nitrogen case, but the issue will likely get another look by the Supreme Court.

Section 107 v. Section 113. The issue of whether a private party who voluntarily cleans up a site and is also subject to an order to clean up a different portion of the site can pursue both a § 107 cost recovery and a § 113 contribution claim is a source of confusion for lower courts, too, Fedder said.

''Based on the number of cases that have come out in the last few years, I would say the issue is not resolved,'' she said.

Wurtzler agreed. ''Notwithstanding the Supreme Court's decisions on the topic before, it still seems to be something that is very confusing for the lower courts and we end up with a lot of conflicting decisions from different districts,'' she said. ''It is not entirely clear to anyone how that is supposed to work.''

Panelist Sarah T. Babcock of Alston & Bird LLP in Atlanta pointed out the Seventh Circuit's recently amended opinion in *Bernstein v. Bankert*, 2013 BL 207809 (7th Cir., Aug. 05, 2013).

The Seventh Circuit ''sort of had a different spin on the 107/113 issue, appearing to agree with a lot of the courts that have determined that if a PRP has a claim under 113 they cannot bring an action under 107 against other PRPs,'' she said.

But the court said that PRP would not have a § 113 claim until the government's covenant not to sue took effect at the end of the remedial action, she said.

''So in the interim, the PRP would have a 107 claim, and then as soon as their covenant not to sue took effect, that would somehow get converted into a 113 claim,'' she said. ''I think that creates some practical issues that folks in the CERCLA community have been aware of and that the Supreme Court may want to pick that up.''

Lone Pine for CERCLA Cases? Lone Pine orders might be useful in CERCLA litigation to avoid a ''discovery free-for-all,'' Arnold suggested.

''Lawyers can borrow this case management tool from toxic tort litigation to try to extricate innocent defendants early in the litigation,'' Wurtzler said.

This type of order comes from *Lore v. Lone Pine Corp.*, 1987 BL 20 (N.J. Super. Ct. Law Div., Nov. 18, 1986), in which the court required the plaintiffs to present evidence to support their claims before full discovery.

It is appropriate for defendants to seek Lone Pine orders when the court learns fairly early in the case that there is something that casts serious doubt on the merits of the plaintiff's claim, Wurtzler said.

Wurtzler found only one reported case in which a defendant in a CERCLA § 107/113 action sought and obtained a Lone Pine order, *Asarco LLC v. NL Indus. Inc.*, 2013 BL 63037 (E.D. Mo., March 11, 2013) .

Lone Pine orders are not routinely entered in the toxic tort context, and are very rare in the CERCLA context, she said. They may be a useful tool for CERCLA cases, but lawyers should carefully consider whether the order will make a real difference based on the specific facts of the case.

If the defendant can easily prove it was not involved at the site, or point to an earlier EPA conclusion that the defendant was not a PRP, and it is unlikely the plaintiff can make the required showing, a Lone Pine order might be appropriate, she said. But lawyers should also consider whether Rule 12 or Rule 56 motions would be more effective under the circumstances.

''Just because you can seek a Lone Pine case management order, doesn't mean you should do so,'' she said. ''You really need to consider your facts and your judge, and make an informed decision as to whether it's really worth the effort.''

BY PERRY COOPER

To contact the reporter on this story: Perry Cooper in Washington at pcooper@bna.com.

To contact the editor responsible for this story: Peter Hayes at phayes@bna.com.

  DEN ISSN 1060-2976