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Burlington Northern and Santa Fe Railway Co. v. United States

Changing the Landscape of CERCLA Liability

June 22, 2009

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Issues: Arranger Liability & Divisibility

Questions addressed by Burlington Northern:

Arranger Liability

- What actions constitute "arrang[ing] for disposal" of a hazardous substance under CERCLA?

Divisibility

- What evidentiary basis must exist in order for a court to apportion liability among responsible parties?

Arranger Liability

What actions constitute "arrang[ing] for disposal" of a hazardous substance under CERCLA?

- Without an "intent to dispose" of hazardous substances, arranger liability will not be found
- "Intent to dispose" requires a plan directed at the purpose of disposal
- United States position focused on word "disposal," noting inclusion of spilling and leaking
- Supreme Court position – One cannot intend an accident to occur

Arranger Liability

Implications for the Future:

- A manufacturer will not be liable as an arranger merely for selling and arranging the transfer of the hazardous substance
  - This is so even when manufacturer knows accidental loss is likely to occur
- No arranger liability without a common sense intent to dispose of a hazardous substance – a "purpose" to dispose
- PRPs may take steps to reduce likelihood of accidental spills and leaks without fear that court will thus infer "control" and impose liability
- What about transshipment liability? Must government prove an intent to dispose of waste at a particular site?

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Divisibility

Has the Supreme Court Ever Done So Much By Doing So Little?

Divisibility

What evidentiary basis must exist in order for a court to apportion liability among responsible parties?

- A "reasonable basis" for apportioning the harm among the responsible parties must be found
- Relevant factors include:
  - Chronological: During what percentage of the polluting time period was the party in control of the site?
  - Geographical: What percentage of the contaminated site was the party responsible for?
  - Volumetric: What percentage of the pollutants found were the responsibility of the party?
  - Types of contaminants: What is driving the remedy?

Divisibility

Burlington Northern chips away at EPA's presumption of joint and several liability:

- Court emphasizes joint and several liability is not required in every case
- While defendants bear burden of proof, a "reasonable basis" for apportionment exists despite limited factual record and argument
- Court rejects "but for" causation argument by government
- Court ignores EPA's argument that appropriate place for apportioning liability is in contribution actions
- Divisibility is appropriate even if EPA is left with a large orphan share

Divisibility

Implications for the Future:

- Divisibility should be an issue in ***every*** multi-party case
- Burden may be on defendant, but it's a burden that in fact can be easily met
- Divisibility arguments need not be supported by extensive factual investigation or expert testimony; approximations of general factors may suffice (It's so simple, even a judge can do it.)
- Presence of an insolvent PRP will not impede defendant's ability to make divisibility claim

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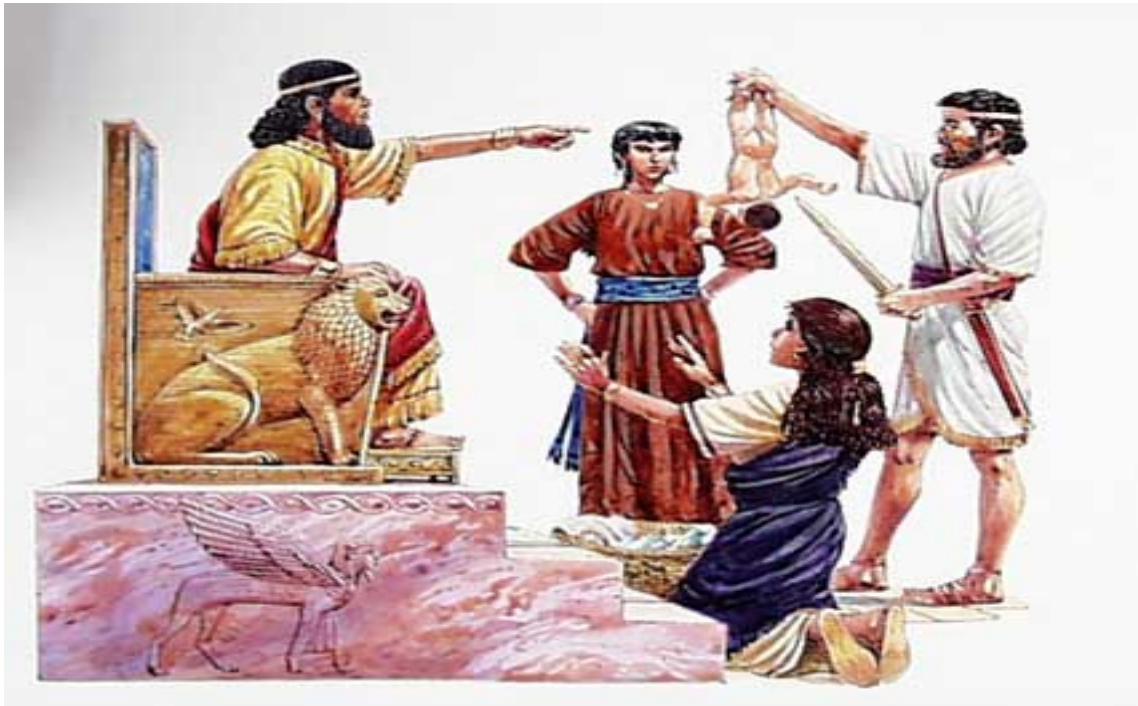
Divisibility

Bottom Line – It Doesn't Take A Solomon



Divisibility is E – A – S - Y

Divisibility

Bottom Line 2 --

Either the government is going to start settling cases much more cheaply or there will be significantly more Superfund litigation. The government no longer automatically wins.