



2001

Letting Frustrations Get the Better of Us - Second Circuit Allows a Lessee/Sublessor to Escape CERCLA Liability - *Commander Oil Corp. v. Barlo Equipment Corp.*, 215 F.3d 321 (2d Cir. 2000)

Neil R. Burger

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

Neil R. Burger, *Letting Frustrations Get the Better of Us - Second Circuit Allows a Lessee/Sublessor to Escape CERCLA Liability - Commander Oil Corp. v. Barlo Equipment Corp.*, 215 F.3d 321 (2d Cir. 2000), 54 SMU L. Rev. 433 (2001)
<https://scholar.smu.edu/smulr/vol54/iss1/19>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

LETTING FRUSTRATIONS GET THE
BETTER OF US—SECOND CIRCUIT
ALLOWS A LESSEE/SUBLESSOR TO
ESCAPE CERCLA LIABILITY—
*COMMANDER OIL CORP. v. BARLO
EQUIPMENT CORP.*, 215 F.3d 321
(2d Cir. 2000)

*Neil R. Burger**

THE Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)¹ imposes strict liability on a wide range of persons and entities that are sufficiently related to contaminated land.² Although the statute specifically names those who are subject to strict liability for cleanup costs, courts have struggled with CERCLA's ambiguities and inconsistencies.³ In *Commander Oil Corp. v.*

* B.A., 1998, Emory University; Candidate for J.D., 2002, Southern Methodist University School of Law.

1. 42 U.S.C. §§ 9601-9675 (1994).

2. Liability is imposed on four classes of potentially responsible parties (PRPs):

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for the 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, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is such release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

Id. § 9607(a).

3. See, e.g., *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986); *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570-71 (10th Cir. 1995); *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1480 (9th Cir. 1995); see also WILLIAM H. RODGERS, JR., 4 ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES § 8.3(c)(1), at 514 (1992) ("Vagueness, contradiction, and dissembling are familiar features of the environmental statutes, but CERCLA is secure in its reputation as the worst drafted of the lot."). It should be of no surprise that courts have encountered problems interpreting CERCLA. The lame-duck Ninety-Sixth Congress hurried the Act through the legislature to beat the arrival of President-elect Reagan and the Republican Senate in December 1980. See Frank

Barlo Equipment Corp.,⁴ the Second Circuit Court of Appeals became frustrated with CERCLA's imprecise definitions and ruled that a lessee/sublessor with site control over contaminated land was not liable for contribution to the cost of cleanup.⁵ The court analyzed Barlo's potential liability as an "owner" and as an "operator."⁶ After discussing the rationales for imposing CERCLA liability, the court determined as a matter of law that, while in certain circumstances holding a lessee/sublessor liable would be correct, such a harsh penalty was not appropriate in this instance.⁷ Although correctly ruling that not all lessees should be held strictly liable, the court should not have reversed the district court's ruling that Barlo fell within the definition of "owner." The court improperly allowed equity principles and its own frustrations with CERCLA's drafting to cloud its judgement.

Commander Oil became the owner of record of the disputed land in Uniondale, New York, in 1963. The land was divided into two plots, 7A and 7B. In 1964, Barlo leased the land and warehouse facilities on lot 7A from Commander Oil. Lot 7B, the contaminated land at issue in this case, was leased to Pasley Solvents & Chemicals, Inc. ("Pasley").⁸ In 1972, Commander Oil consolidated the two separate leases into one lease and one sublease. Under the terms of the new contract, Barlo held the entire property and subleased lot 7B to Pasley. With the new contract, Barlo became responsible for paying the taxes on all the property and performing the maintenance on the facilities. For the added burden, Barlo made a slight profit from the sublease to Pasley.⁹

In 1981, the Nassau County Department of Health discovered contamination caused by above-ground petroleum and solvent storage tanks on lot 7B.¹⁰ After an investigation by the Environmental Protection Agency, Commander Oil was forced to reimburse the government for response costs associated with the cleanup.¹¹ A settlement deal, totaling almost two million dollars, among several liable parties was ultimately reached in 1996.¹²

Commander Oil filed a CERCLA action for contribution and contractual indemnification against Barlo and Pasley in 1990.¹³ Also in the com-

P. Grad, *A History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1-2 (1982).

4. 215 F.3d 321 (2d Cir. 2000).

5. *Id.* at 324.

6. *Id.* at 327-30; *see also* 42 U.S.C. § 9601(20)(A) (defining the term "owner or operator").

7. *Commander Oil*, 215 F.3d at 324.

8. *Id.* Pasley did not factor into the allocation of liability and contribution. It was deemed financially unable to pay by the district court. *Id.* at 325.

9. *Id.* at 324-25. Barlo contested the fact that it had any added responsibility under the consolidated lease. *Id.*

10. *See id.*

11. *Id.* at 325.

12. *Id.* Barlo was not part of this settlement agreement.

13. *See id.* Pasley was not required to contribute. *See supra* text accompanying note 11.

plaint, Commander Oil pleaded for damages under state laws for trespass, negligence, nuisance, and waste.¹⁴

In granting partial summary judgement for both Commander Oil and Barlo, the district court held that Barlo was an "owner" within the definition of CERCLA section 9607(a)(1).¹⁵ Under the meaning of that section, the district court reasoned, an entity that has "authority and control" of a contaminated plot of land is an "owner" for CERCLA purposes.¹⁶ The court implicitly found that the actual responsibilities of Barlo under the consolidated lease equated the lessee/sublessor (Barlo) with an "owner" and justified imposing strict liability.¹⁷ After Barlo was determined to be legally liable for contribution, a bench trial was held, and Barlo was allocated 25% of the cleanup costs. Barlo appealed, arguing that only the recorded owner of a parcel of land is an "owner" under the meaning of CERCLA.¹⁸

Writing for the Second Circuit Court of Appeals, Judge Walker reversed the district court's holding that Barlo was liable for contribution as an "owner" under CERCLA.¹⁹ Judge Walker began the opinion by lamenting that the court was faced with another interpretation problem with an environmental statute.²⁰ The court was unsure whether the term "owner" or "operator" applied to Barlo. In the end, it found that neither fit.²¹ Under the court's reasoning, a lessee/sublessor could be liable as an "owner" in some circumstances, but imposing strict liability on Barlo was not appropriate. Barlo did hold some of the responsibilities of an owner, but too many were reserved for Commander Oil for the harsh penalty of CERCLA liability to attach.²²

The court began by recognizing that most courts confronted with the issue of whether ownership liability should be imposed on a lessee have concluded that site control is a sufficient indicator of adequate responsibility.²³ Judge Walker gleaned from those opinions that liability under CERCLA is meant for a lessee that "is the active user and polluter of the property."²⁴ For that group of lessees "CERCLA liability seems particularly appropriate."²⁵ The court concluded that those other courts had

14. See *Commander Oil*, 215 F.3d at 325. These additional claims were dismissed by the district judge and are not the focus of this Note.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 325-27.

19. *Id.* at 324. Judges Cabranes and Katzmann also served on the panel.

20. *Commander Oil*, 215 F.3d at 326. Judge Walker displayed his frustration with the drafting of CERCLA throughout the opinion. See *id.* at 327.

21. *Id.* at 327, 332.

22. *Id.* at 328, 332.

23. *Id.* at 328; see *Castlerock Estates, Inc. v. Markham*, 871 F. Supp. 360, 367 (N.D. Cal. 1994); *Burlington N. R.R. Co. v. Woods Indus., Inc.*, 815 F. Supp. 1384, 1391-92 (E.D. Wash. 1993); *Pape v. Great Lakes Chem. Co.*, No. 93C1585, 1993 WL 424249, at *3 (N.D. Ill. Oct. 19, 1993).

24. *Commander Oil*, 215 F.3d at 328.

25. *Id.*

dangerously interwoven the concepts of “owner” and “operator.” A broad definition of “owner” would make the group of people liable as “operators” too small. Basing its reasoning on the principle of avoiding redundancy in statutes, the court found the lower court in error as a matter of law.²⁶

According to the appellate court, there would be situations in which a lessee could be held liable as an “owner.”²⁷ Since CERCLA involves strict liability, the principles of *Rylands v. Fletcher* are central to its imposition.²⁸ The court correctly stated its rule that behind the “theory of strict liability is the underlying fairness of imposing on the beneficiaries of an ultra-hazardous activity the ultimate costs of that activity.”²⁹ Looking at the facts determined by the lower court regarding Barlo’s involvement with plot 7B, the court determined that “Barlo lacked most of the bundle of rights that comes with ownership of property.”³⁰

Although CERCLA is a poorly drawn statute, it clearly places liability for contaminated land on a lessee that exerts sufficient control and responsibility.³¹ The factors the court listed for determining when a lessee/sublessor would be liable as an “owner” are specifically worded to the facts of the case. They are not general factors to guide a future court’s analysis.³² By looking at the underlying general principles of the five factors, Barlo should be held liable. It is irrelevant whether Barlo had the right to sublease the property without notification, because in the instant case, there was a contract that makes Barlo the sublessor. With that contract, Barlo bound itself to the risks of land control. The facts were disputed, but the district court concluded that Barlo had the responsibilities associated with ownership—specifically, the payment of taxes and maintenance obligations. The district court was in a better position to determine the amount of control Barlo had over lot 7B. The appeals court wrongly substituted its interpretation, under the guise of statutory confusion.

The court’s reliance on *Rylands v. Fletcher* further supports the imposition of strict liability on Barlo. In determining that Barlo was an “owner” for CERCLA purposes, the lower court considered the fact that Barlo

26. *Id.* at 328-29.

27. *Id.* at 330-31. The court listed five factors that a court needs to consider before imposing ownership liability on a lessee: (1) the length of the lease; (2) the termination rights of the lease; (3) whether the lessee has the right to sublet without permission; (4) whether the lessee is responsible for payments, such as insurance, taxes, and operation costs; and (5) whether the lessee is responsible for structural repairs. *See id.*

28. *Id.* at 330 (citing *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868)).

29. *Id.* at 330.

30. *Commander Oil*, 215 F.3d at 332.

31. *See, e.g., Servco Pac. Inc. v. Dods*, 106 F. Supp. 2d 1034, 1046 (D. Haw. 2000) (finding a lessee liable under CERCLA as a matter of law); *Long Beach Unified Sch. Dist. v. Godwin*, 32 F.3d 1364, 1367 (9th Cir. 1994) (stating that an easement holder could be liable as an “operator”); *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1484 (9th Cir. 1995) (holding that imposing liability is correct, even though the result may seem harsh).

32. *See supra* note 27 (listing the five factors of the court).

received a profit from the sublease of plot 7B. Although this point was contested, it was inappropriate for the appeals court to ignore the finding. Since Barlo benefited from the sublease, under *Rylands v. Fletcher*, it should bear the risks associated with hazardous activity.³³

CERCLA is based on the need to hold the people and entities associated with the land responsible for contamination in order to ensure that the taxpayers do not have to pay.³⁴ It is not an equity statute. The Second Circuit Court of Appeals wrongly injected principles of fairness into the equation. CERCLA imposes bright line liability that does not require a legal balancing test. The court's determination that strict liability was not appropriate for Barlo³⁵ went beyond the bounds of its judicial review.³⁶ The person that was closest to the facts, the district judge, found that Barlo had sufficient authority over the land. The circuit's reversal of that fact, based on fairness, is unwarranted. In the CERCLA context, equity may be used to apportion liability among liable parties, rather than to determine which parties are liable.³⁷

In another attempt to justify its conclusion, the court found it inappropriate to add the risk of CERCLA liability to parties operating under a lease.³⁸ But when a party enters into a contract, it becomes attached to risk. Barlo knowingly entered into the consolidated lease agreement with Commander Oil. The court failed to acknowledge this fact. In doing so, it cited the need for expectation of liability. The liability imposed by CERCLA has always engulfed parties that had no expectation of its reach. Barlo should not be excluded with the excuse that it subleased contaminated land before it was wrong to do so.

33. See *United States v. S.C. Recycling and Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1984) ("As a general rule, a lessor or sublessor who allows property under his control to be used by another in a manner which endangers third parties or which creates a nuisance, is, along with the lessee or sublessee, liable for the harm."), *aff'd in part, vacated in part sub nom*, *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988).

34. See *Bell Petroleum Serv., Inc. v. Sequa Corp.*, 3 F.3d 889, 897 (5th Cir. 1993) ("CERCLA is a strict liability statute, one of the purposes of which is to shift the cost of cleaning up environmental harm from the taxpayers to the parties who benefited from the disposal of the wastes that caused the harm.").

35. *Commander Oil*, 215 F.3d at 332.

36. The issue of whether a lessee/sublessor could be liable as an "owner" under CERCLA was a case of first impression before the court, so the circuit court reviewed the question under a *de novo* standard. *Id.* at 326. This standard is appropriate for review of the law, but not the facts. Ultimately the Second Circuit came to the same legal conclusion as that of the trial court: that a lessee/sublessor could be held liable as an "owner." The difference in the outcome of the case came from the appellate court's reversal of the district's factual determinations. Factual determinations should be reviewed for abuse of discretion, rather than *de novo*. See Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 994-995, 1000-04 (1986).

37. See *Bell Petroleum Serv.*, 3 F.3d at 901.

38. *Commander Oil*, 215 F.3d at 330 ("We are reluctant to surprise Barlo with new and unexpected liability, and to undermine the security of lessees/sublessors throughout the circuit who have entered into subleases before this decision.").

CERCLA might be a poorly drafted statute, but its underlying principles of liability are straightforward. As a remedial statute, it is to be construed liberally in order to achieve its goals.³⁹ It is reasonable to be frustrated over the inconsistent and ambiguous terms and definitions. For Congress's goal of imposing strict liability on owners and operators of hazardous facilities⁴⁰ to be realized, courts must apply the underlying principles of CERCLA liability. Congress intended to hold entities in Barlo's situation liable for the environmental harm committed on their land. Barlo made money off the land, so Barlo should have to deal with the consequences. By allowing its own frustrations to get the better of it, the Second Circuit let a polluter slip through the cracks of statutory interpretation. No doubt more will follow.

39. *See id.* at 327.

40. 42 U.S.C. § 9607(a)(1).