Case Law Alert

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SUPREME COURT DETERMINES ARRANGER LIABILITY AND APPORTIONMENT

On May 4, 2009, the Supreme Court addressed two important issues arising under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). First, the Court's decision in Burlington Northern & Santa Fe Railway Co. v. United States, No. 07- 1601, limited the scope of arranger liability under CERCLA. Second, the court employed a simple mathematical formula for apportioning liability and avoiding joint and several liability for an indivisible, single harm.

The case arose from a typical CERCLA fact pattern. In the early 1990s, after the owner of a contaminated site became insolvent, the United States Environmental Protection Agency (EPA) and the California Department of Toxic Substances Control (DTSC) brought suit against two railroad companies and Shell Oil Company, seeking recovery of over $8 million in response costs that EPA and DTSC (the Governments) had incurred responding to contamination at a site in Arvin, California. The District Court found Shell liable as an arranger under 42 U.S.C. § 9607(a)(3), and the railroad companies liable as owners of a portion of the facility under 42 U.S.C. § 9607(a)(1)–(2). The District Court concluded that the single harm was divisible among the responsible parties, and therefore did not impose joint and several liability on the railroad companies and Shell. The court apportioned the railroads' liability based on three factors: the portion of the total site owned by the railroads, the duration of the railroads' ownership interest compared to the length of the entire business operation, and the number of chemicals found on the railroads' portion of the site compared to the total number of chemicals requiring remediation at the site. The court also apportioned Shell's liability based on estimates of Shell's chemical spills.

During the 1960s and 1970s, Shell shipped the pesticide D-D, a hazardous substance, to the site as a virgin material, intended for further redistribution. Originally, Shell shipped D-D in 55-gallon drums, however beginning in the mid-1960's, Shell began shipping D-D in bulk. Shell, aware that these bulk shipments commonly resulted in spills and leaks during the transfer, provided its distributors with safety manuals, instituted a discount program for facilities with safety improvements, required inspection by a qualified engineer and required distributors to certify compliance with applicable laws and regulations. Despite these

controls, the site continued to be contaminated with delivery spills and equipment failures. Even though Shell never planned for the actual disposal of D-D, the District Court and the Court of Appeals both held that Shell was liable as an arranger under a "broader" category of arranger liability because Shell knew that disposal of hazardous waste was a foreseeable byproduct of the transaction. The Ninth Circuit concluded that an entity could arrange for disposal even if it did not intend to dispose a hazardous substance.

Noting that arranger liability requires a fact-intensive inquiry, Justice Stevens, writing for the Court, applied the plain meaning of the word "arrange" to evaluate whether Shell was liable as an arranger. The Court found that the word "arrange" implies action directed to a specific purpose, and noted that the actor's state of mind plays an indispensible role in making a determination of arranger liability. Thus, even though Shell's efforts to reduce accidental spills "were less than wholly successful," Shell was not liable as an arranger because Shell did not enter into the transaction with the intention that at least a portion of the product be disposed during the transfer. The lesson learned from this decision is that state of mind now plays an important role in determining arranger liability.

The Supreme Court also reviewed the District Court's decision to apportion liability among the railroads, which ultimately left the Governments responsible for the orphan shares amounting to 91% of the remediation costs. The railroads owned a 0.9-acre parcel adjacent to the main 3.8-acre site, and the owner expanded its operations and began leasing this parcel in 1975. Both the Governments and the railroads argued against apportionment, leaving the District Court to independently apportion liability. Using simple math based on the size of the parcels, the length of operations and the number of chemicals, the District Court calculated the railroads' proportionate share as 6% of the total remediation cost, and increased that percentage by 50% to account for "calculation errors." The Supreme Court upheld this calculation, noting that divisibility may be established by volumetric, chronological, and geographic considerations. Justice Ginsburg, writing in dissent, noted that the Court's independent calculation "deprived the government of a fair opportunity to respond to the Court's theories of apportionment." The same holds true for the railroads. Potentially responsible parties must recognize that they need to present evidence on apportionment, even if they argue against any finding of liability.

QUESTIONS OR ASSISTANCE?

If you have questions or need assistance with any of these issues, please contact Joseph P. Williams at (860) 251-5127 or Ryan McKain at (860) 251-5011. Both are attorneys in our Environment, Energy and Land Use Practice Group.

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