



U.S. Supreme Court Narrows CERCLA Liability

Last week, the United States Supreme Court clarified the boundaries of two key variables of Superfund liability: “who” is liable and “for how much.” In the 8-1 decision in *Burlington Northern & Santa Fe Railway v. United States* (Docket Nos. 07-1601; 07-1607), the Court reversed the Ninth Circuit Court of Appeals in concluding that there are limits to the nebulous “arranger” category of liability, and that joint and several liability need not apply where a party’s involvement at a site is divisible and capable of apportionment. The Court’s opinion on these issues creates new lenses through which to view potential Superfund liability.

Facts

In *Burlington*, the Environmental Protection Agency (“EPA”) and California Department of Toxic Substances and Control (“DTSC”) incurred cleanup costs at a former agricultural chemical storage and distribution facility that was owned and operated by a now-defunct company, Brown & Bryant (“B&B”). The government sought costs under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) from Shell Oil on the theory that Shell “arranged for the disposal” of hazardous substances by virtue of leaks and spills that routinely occurred when Shell’s common carrier delivered chemical products in bulk to B&B for sale and distribution. The EPA and DTSC also sought costs from a railroad (Burlington Northern) that leased a portion of its property to B&B for its facility operations.

Arranger Liability

The Court of Appeals held that Shell was liable as an arranger on the basis that Shell had *knowledge* that the process of bulk chemical transfer to B&B would result in leaks and spills. The Supreme Court held that “mere knowledge” of leaks and spills is an insufficient basis upon which to base arranger liability because one must take “intentional steps to dispose” (e.g., intentional steps for leaks and spills to occur). The Court viewed Shell’s involvement in the handling and transfer of chemicals (e.g., providing safety manuals and discounts for customers that took safety precautions) as evidence that Shell did not intend to dispose of hazardous substances.

Apportionment

Although the district court initially apportioned only 6% and 9% liability to Shell and Burlington, respectively (leaving the government responsible for the remaining cleanup costs), the Court of Appeals imposed joint and several liability (100%) for the entire

cleanup on the Shell and Burlington defendants. The Supreme Court held that it was inappropriate for the Court of Appeals to assign joint and several liability to the railroad¹ because the district court's apportionment of 9% liability was "supported by the evidence" and comported with apportionment principles.

Significance of the Court's Decision

The Court's decision touches on a number of critical elements of CERCLA liability and has the potential to help (or hinder) a party's litigation or negotiation strategy. The Court's decision regarding allocation is likely to redirect CERCLA litigants' discovery efforts toward gathering evidence to demonstrate reasonable bases for apportionment, and may embolden potentially responsible parties ("PRPs") to test the boundaries of this defense. Similarly, although PRPs certainly welcome the limitations placed on arranger liability by the Supreme Court, developing facts to support (or refute) a party's "intent to dispose" will likely be a challenge for all CERCLA litigants. Additionally, given the refined standards for apportionment and the higher potential for the government to be responsible for insolvent party shares of cleanup costs, government entities are likely to engage in more aggressive PRP searches to ensure that a greater number of solvent parties are identified.

If you have any questions regarding the application of *Burlington Northern & Santa Fe Railway v. United States* to issues confronting your organization, please contact Lindsay P. Howard at (412) 394-5444 or lhoward@bccz.com or Emily T. Lewis at (412) 394-5451 or elewis@bccz.com or any of the attorneys in BCCZ's Environmental, Health & Safety or Litigation Services Groups at (412) 394-5400.

¹ The issue of apportionment to Shell was not relevant once the Court held that Shell was not a responsible party.