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CLIENT ALERT

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Supreme Court Decision Affects Arranger Liability and Apportionment in Superfund Cases

The U.S. Supreme Court issued its opinion in *Burlington Northern & Santa Fe Railway Co., et al. v. United States, et al.* ("BNSF") on May 4, 2009. The Court's 8–1 decision almost certainly will have an impact on future litigation of two key issues raised in cases under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"): (1) the limits of "arranger" liability pursuant to CERCLA section 107(a)(3) and (2) the proof required to establish a reasonable basis for apportionment sufficient to avoid joint and several liability for cleanup costs among potentially responsible parties ("PRPs").

Facts

Brown & Byrant ("B&B"), an agricultural chemical distributor, leased a small parcel of land adjoining its property from the Burlington Northern & Santa Fe Railway Company and Union Pacific Railroad Company ("Railroads"). Most of B&B's operations (loading, storing, and disposing of chemicals) resulting in contamination of soil and groundwater occurred on its own property. After a six-week bench trial, the District Court found that only two of the three chemicals causing the contamination were spilled on the leased parcel. B&B purchased one of those chemicals, a pesticide called D-D, from Shell Oil Company ("Shell"). Beginning in the mid-1960s Shell switched from selling D-D in 55-gallon drums to bulk sales, which required purchasers such as B&B to maintain bulk storage facilities. The process of transferring the D-D from the tanker trucks to the bulk storage facility, and into other trucks and containers used in B&B's operations, resulted in spills and leaks. Shell, aware of this possibility, sent safety manuals and required distributors like B&B to comply with self-certification requirements.

Procedural History

The District Court found Shell was liable under CERCLA section 107(a)(3) because it "arranged" for disposal of "hazardous substances" by virtue of its knowledge that B&B spilled D-D during transfers of the chemical on-site. The Court also ruled the Railroads were liable as owners of a portion of the facility. The Court then apportioned six percent of the liability to Shell and nine percent to the Railroads. On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed Shell's arranger liability, but reversed the District Court's apportionment of liability and held the parties jointly and severally liable for the total costs. The Ninth Circuit acknowledged that apportionment was permissible under CERCLA, but found that "the record did not establish a reasonable basis for apportionment."

The Supreme Court Decision

The Supreme Court reversed the Ninth Circuit on both issues, holding that Shell was not liable as an "arranger" under section 107(a)(3) and that the apportionment by the District Court of the Railroads' liability was reasonable.

Arranger Liability

The Court reviewed the "arranger" liability case law, noting that CERCLA does not define the term "arrange," and articulated a standard for determining whether a party "arranged for disposal" within the meaning of CERCLA. That standard, or test, hinges on whether the alleged arranger "[took] intentional steps to dispose of a hazardous substance." In so holding, the Court rejected the argument that Shell's mere knowledge that spills occurred was sufficient to bring Shell within the scope of CERCLA liability. The Court cautioned that "[a]lthough we agree that the question whether [section 107(a)(3)] liability attaches is fact intensive and case specific, such liability may not extend beyond the limits of the statute itself." Further, the Court found Shell's attempts to reduce the likelihood of spills, through its safety brochures and certification program, to be significant to its conclusion that Shell did not intend to dispose of a hazardous substance. In short, under BNSF, where an alleged arranger neither clearly sells a useful product nor clearly disguises a contract for disposal as a sale, the trial court must review the specific facts presented in order to ascertain the intent of the alleged arranger. The issue of the party's intent to dispose of waste containing hazardous substances will become a key element in litigation and negotiations involving a party's potential CERCLA liability.

Apportionment

The Supreme Court restated the well-established precedent that a defendant may attempt to establish a basis for apportionment of CERCLA liability and that the common law of torts, as stated in the Restatement (Second) of Torts § 433A, guides the apportionment of CERCLA liability. Applying these principles, the Court concluded that the apportionment of the District Court was reasonable as to the Railroads. The Court did not reach the issue of whether the apportionment as to Shell was reasonable because it held that Shell was not liable. In effect, the Court found that the facts on which the District Court relied were sufficient to provide "a reasonable basis for division [of harm or liability] according to the contribution of each [party]." Restatement (Second) of Torts § 433A. Those facts pertained to "percentages of land area, time of ownership, and types of hazardous products." Thus, the Court held that the method of apportionment truly need only be reasonable — not necessarily perfect.

Potential Implications

Although this decision represents a significant victory for the parties involved, the Court, while clarifying the law, did not substantially change it. The Court reviewed the language of the statute and the case law on the issues of arranger liability and apportionment and applied that law to the facts presented, giving apparent weight to the analysis and judgment of the District Court. In most CERCLA cases, parties have had only limited success avoiding joint and several liability in claims asserted by the United States and individual states. The BNSF decision will give litigants renewed hope for successfully defending against joint and several liability, and is sure to spur new strategies and more litigation for those facing joint and several liability.

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