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## Environmental Alert

### Supreme Court decision provides framework for limiting Superfund cleanup liability

On May 4, 2009, the United States Supreme Court issued two key rulings on the scope of federal liability for environmental cleanup costs under the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"), also known as the Superfund law:

- The Court narrowed the scope of CERCLA liability based on "arrangement for disposal" of hazardous substances, holding that "arranger" liability requires evidence of an intent to dispose of such substances, and that it cannot be based solely on evidence that the would-be "arranger" was aware that its products containing such substances would probably be spilled or leaked during handling by third parties to whom they were sold.
- More importantly, the Court approved a framework for apportionment of liability that would enable CERCLA-liable parties to avoid joint and several liability on a theory of divisibility of harm.

The apportionment ruling in particular has the potential to change the way parties evaluate and litigate their CERCLA liability risk. The ruling breathes new life into the application in CERCLA cases of common law principles of divisibility of harm at a contaminated site. As a result, it will encourage parties involved in multi-party sites to litigate the issue of divisibility of harm in hopes of limiting their exposure altogether, instead of accepting the likelihood of joint and several liability and resolving the allocation of costs in equitable contribution proceedings with other jointly and severally liable parties. A by-product of the ruling is the risk that more "orphan shares" - shares of cleanup costs allocated to parties that are dead, defunct or insolvent - will be unfunded, because solvent parties who can demonstrate the divisibility of harm will not be responsible to pay them.

These rulings appear in the Court's 8-1 opinion reversing the Ninth Circuit Court of Appeals' decisions in *Burlington Northern & Santa Fe Railway Co. et al. v. United States, et al.*, No. 07-1601 and *Shell Oil Company v. United States*, No. 07-1607.

### The Facts

**The Arvin Site.** Court's decision in these cases (referred to collectively as "*Burlington Northern*") arises out of a longstanding

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dispute regarding the basis for Shell's liability as an "arranger" for disposal at the Brown & Bryant Superfund Site in Arvin (Kern County), California, and the extent of CERCLA liability of two railroads, Burlington Northern and Union Pacific Railroad Company (the "Railroads") for cleanup costs at that site. Brown & Bryant, an agricultural chemical distributor, began operating at the Site in 1960, and later expanded its operations by leasing an adjacent parcel owned by the Railroads. Brown & Bryant periodically purchased pesticides from Shell, and some of these chemicals wound up in soil or groundwater at the Site as a result of spills or leaks during delivery or transfer. The Site was investigated and remediated by the U.S. Environmental Protection Agency and the California Department of Toxic Substances Control ("Agencies"), which then sought recovery of costs in federal district court under CERCLA from a number of parties, including Shell and the Railroads. By the time of the litigation, Brown & Bryant had gone out of business and was judgment proof.

***The District Court's decision.*** The district court found that Shell had "arranged for disposal" of hazardous substances, and was therefore liable for cleanup costs under Section 107(a)(3) of CERCLA, 42 U.S.C. §9607(a)(3). The District Court also held that the Railroads, which were liable in their capacity as owners of a portion of the Site, were not jointly and severally liable for all of the Agencies' response costs, but instead were liable only for a fraction – 9% -- of the costs. In finding liability to be subject to apportionment, the district court relied on evidence that the Railroads' parcel constituted only 19% of the Site, that the Railroads had leased their parcel to Brown & Bryant for only 45% of the time that Brown & Bryant had operated the Site, that the volume of activities on the Railroads' parcel that resulted in the release of hazardous substances was only about 1/10 the volume of such activities elsewhere on the Site, and that the chemicals released at the Railroads' parcels contributed to only 2/3 of the total Site contamination requiring remediation. Based on this evidence the district court computed the Railroads' CERCLA liability by multiplying three of the foregoing percentages together ( $0.19 \times .45 \times .66$ ), rounding the result up to 6%, and then applying an uncertainty factor of 50% to increase the resulting percentage share to 9%.

***The Ninth Circuit decision.*** The Court of Appeals affirmed the finding of Shell's liability as an "arranger" for disposal, but reversed the apportionment of liability, holding that the evidence was insufficiently precise or reliable to form a reasonable basis for finding that the harm was not single and indivisible and, hence, for apportioning liability amongst the responsible parties.

## **The Supreme Court's Decision**

The Supreme Court reversed the Ninth Circuit on both issues.

With respect to Shell's liability, the Court held that an entity's knowledge that its product will be leaked, spilled, dumped or discarded does not, in and of itself, prove that an entity "arranged," i.e., planned for, the disposal, "particularly where the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product." Instead, for Shell to be liable as an "arranger" under such circumstances, there had to be evidence that Shell sold its product with the intention that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in the definition of "disposal." Finding such evidence to be lacking in the record, the Court reversed the judgment against Shell.

As for the Railroads, the Court acknowledged that "not all harms are capable of apportionment," and placed the burden on CERCLA defendants seeking to avoid joint and several liability to prove that there is a reasonable basis for apportionment. Disagreeing with the Ninth Circuit, the Court found that the evidence relied upon by the district court indeed provided a reasonable basis for a finding of divisibility of harm. The Court appeared to be influenced heavily by the fact that the "primary pollution" at the Site took place at a location far distant from the Railroads' leased parcels, and by evidence that the contamination at the Railroad's parcels contributed to no more than 10% of the total contamination at the Site. In this context the Court approved of the district court's process of apportioning liability based on "volumetric, chronological, or other types of evidence," including appropriate geographical considerations."

The Court was not troubled by the fact that the evidence did not support a precise calculation of the amount of hazardous chemicals contributed by the Railroads' parcel to the total Site contamination, or the exact percentage of harm caused by each chemical. Instead, it found support for the district court's apportionment in evidence that there were fewer spills on the Railroads' parcel than elsewhere at the Site, that "not all" of the spills on the Railroads' parcel migrated to the distant area of primary pollution, and that some types of spills on the Railroads' parcel did not require remediation. The Court also found that the district court's application of a 50% margin of error had the effect of offsetting any uncertainty in its calculation of the volumetric contribution of contamination at the Railroads' parcel to that at the entire Site.

Justice Ginsburg was the sole dissenter. She contended that Shell's arranger liability should have been affirmed on the basis of evidence that Shell was aware for 20 years of "direct" and "routine" spills and leaks during the deliveries of its product, and that Shell had a "control rein" over the mode of delivery and

transfer. As for the apportionment issue, Justice Ginsburg had no quarrel with the principles laid down by the majority, but observed that the district court's apportionment formula appeared to be the product of its own analysis, not a resolution of competing arguments by the litigants. (Neither the Agencies, which opposed apportionment altogether, nor the Railroads, which denied liability altogether, proposed apportionment methodologies to the district court.) On this basis Justice Ginsburg opined that the matter should have been remanded to the district court for further consideration of that court's apportionment methodology.

## **The Impact**

The decision on "arranger" liability clarifies a relatively discrete issue that will be important to parties in Shell's position, but the ruling does not alter the landscape of CERCLA liability on a broader scale.

The apportionment ruling, on the other hand, has the potential to change the way in which businesses, regulatory agencies, and courts approach CERCLA liability and litigation. This is so for at least two reasons.

- First, the Court's blessing of the district court's formula for apportionment revitalizes -- and expands -- the concept of divisibility of harm at a site contaminated by multiple sources and parties, and creates a strong incentive for otherwise jointly and severally liable parties to try to limit their liability by litigating the apportionment issue. The factors on which the Court relied in approving the apportionment of liability -- such as the relative volume, toxicity and mobility of hazardous substances in the environment -- have long been major factors guiding courts in contribution cases involving the equitable allocation of cleanup costs among jointly and several liable parties. In the wake of *Burlington Northern*, these factors loom much larger, as they can form the basis for limitations of liability.
- Second, any decision that makes it easier to avoid joint and several liability also has the effect of increasing the likelihood that site will have unfunded "orphan shares." Orphan shares are shares of response costs attributed to otherwise liable parties that are dead, defunct or insolvent. When liability is joint and several and costs are allocated in contribution amongst the existing, solvent, liable parties, orphan shares are typically allocated amongst them as well. But when liability is apportioned, the risk of unfunded orphan shares increases. This risk can affect the manner in which regulatory agencies like the U.S. Environmental Protection Agency, as well as private parties considering voluntary cleanups, may

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