

U.S. Supreme Court Narrows Scope of Superfund Liability

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Breaking Developments In Environmental Law

The United States Supreme Court has ruled that only persons who take intentional steps to dispose of a hazardous substance qualify for liability as an "arranger" under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). In an 8-1 decision, the Court in *Burlington Northern & Santa Fe Railway Co. v. U.S.*, adopted a narrow definition of "arranger" and, at the same time, endorsed an allocation method that could reduce the chances a responsible party might be held liable for all cleanup costs at a site.

The case arose after numerous pesticide releases contaminated soil and ground water at a chemical distribution business in Arvin, California. Shell sold the pesticides to the distributor and Burlington Northern and other railroads owned a part of the property occupied by the facility. During its 28 years of operation, contaminations resulted from delivery spills, equipment failures, and rinsing of tanks and trucks. The California and federal environmental regulators spent approximately \$8 million in response costs and ordered the railroads to undertake further cleanup at a cost of \$3 million.

The trial court held Shell liable under CERCLA as an "arranger" and the railroads as owners of contaminated property, and apportioned liability for the cleanup costs at 6 percent to Shell and 9 percent to the railroads. The Ninth Circuit affirmed Shell's liability under a broad reading of CERCLA's "arranger" liability, but reversed the allocation of liability to hold that Shell and the railroads each were responsible for all of the response costs incurred by the government.

The Supreme Court's decision reverses both those rulings. On the issue of arranger liability, the Court said: "Knowledge alone is insufficient to prove that an entity planned for the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sales of unused, useful product." In order to be liable as an arranger, the Court said Shell must have entered into the sale of the pesticides with the intention that at least a portion of the product be disposed of during the transfer process by one or more methods described in CERCLA. The Court ruled that Shell's awareness of minor, accidental spills occurring during the transfer of the pesticides at the facility did not support "an inference that Shell intended such spills to occur."

The ruling also endorsed the District Court's methodology for apportioning liability to the railroads. The trial court had taken into account the substances at issue, the size of the parcel owned by the railroads, and the duration of their lease of the property to the distribution facility

in order to arrive at the 9 percent allocation. The Court said that was a proper way to allocate and should not have been reversed by the Ninth Circuit.

While the Court's decision sets narrower boundaries for the scope of "arranger" liability under CERCLA, it does not specifically apply to state hazardous substance statutes. Nevertheless, because Washington, Oregon and many other state courts look to CERCLA for guidance to interpret their own cleanup laws, the definition of "arranger" adopted by the Court could prove to be influential for interpreting similar state laws. Furthermore, by approving the allocation methodology the Court provided lower courts with guidance that should result in greater consistency in the way liability is apportioned among responsible parties.

For more information, please contact the Environmental Law Practice Group at Lane Powell:

206.223.7000 Seattle
503.778.2100 Portland
environs@lanepowell.com
www.lanepowell.com

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