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U.S. SUPREME COURT EXPANDS THE ABILITY TO AVOID JOINT AND SEVERAL LIABILITY AND NARROWS "ARRANGER" LIABILITY UNDER CERCLA: *BURLINGTON NORTHERN AND SANTA FE RAILWAY CO. ET AL. v. UNITED STATES ET AL.*

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On May 4, 2009, the U.S. Supreme Court ("Supreme Court"), in an 8-1 decision penned by Justice John Paul Stevens, ruled that liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") is not joint and several where a potentially responsible party ("PRP") can show that there is reasonable basis for apportionment of a party's liability for its contribution to site contamination creating a single harm. The Supreme Court's decision erodes long-held presumptions of the scope of joint and several liability under CERCLA and may prove to be a significant arrow in the quiver of PRPs. In addition, the decision reins in a trend of CERCLA "arranger" liability for the sale of useful products by requiring proof that a PRP intended to dispose of a hazardous substance.

The Facts and Lower Court Decisions

In 1960 Brown & Bryant, Inc. ("B&B") began operating a facility that distributed and applied agricultural chemicals in Arvin,

California. Its operations were initially located on 3.8 acres purchased by B&B. The operations were later expanded onto 0.9 acres leased from land then owned by the Atchison, Topeka & Santa Fe Railway Co. and the Southern Pacific Transportation Company (the "Railroads"). Shell Oil ("Shell") sold pesticides in bulk to B&B.

After B&B became insolvent and ceased operations, the EPA listed the Arvin site on the National Priorities List. In 1996 the United States and the State of California filed a cost-recovery action against the Railroads and Shell, seeking to recover over $8 million in response costs. The Railroads were named as a PRP given their ownership interest in the land, while Shell was alleged to be an arranger under CERCLA.

After highly disputed litigation involving a six-week bench trial, the district court found that the site had been contaminated through spills that occurred when chemicals were transferred from bulk containers into holding tanks, when these holding tanks corroded, and when runoff from washing pesticide-containing equipment permeated unlined pits. The district court held that the Railroads and Shell were both liable under CERCLA, but apportioned their liability, with the Railroads held to be liable for only 9 percent of total site response costs and Shell for only 6 percent. On appeal, the Ninth Circuit concluded that there was not a reasonable basis for such apportionment and that despite Shell's measures to discourage spills and leaks at the B&B operations, it had arranged to dispose of waste. On review, the Supreme Court reversed the Ninth Circuit.

Apportionment of Liability Destined to Be Argued in More Cases

The Supreme Court's affirmation of the district court's conclusions on apportionment will be cause for much rethinking of decades of Superfund practice. The Court, relying heavily on *United States v. Chem-Dyne Corp.*,572 F. Supp. 802 (1983), found that although CERCLA imposed strict liability, it did not mandate joint and several liability in every case. Rather, Congress intended the scope of liability to be determined from traditional and evolving principles of common law embodied in Section 433A of the Restatement (Second) of Torts, which states that, when two or more persons act independently to cause a single harm, apportionment is proper when "there is a reasonable basis for determining the contribution of each cause to a single harm." §433A(1)(b), p. 434 (1963–1964).

While the Supreme Court recognized that not all harms are

necessarily capable of apportionment, and reaffirmed that the burden is on defendants to prove that a harm can be apportioned, the Court reversed the Ninth Circuit, finding that the district court had indeed had a reasonable basis supporting its apportionment. Importantly, the district court had ultimately concluded that the harm at the site presented "a classic 'divisible in terms of degree' case, both as to the time period in which defendants' conduct occurred, and ownership existed, and as to the estimated maximum contribution of each party's activities that released hazardous substances that caused Site contamination."

The Supreme Court upheld the district court's apportionment of the Railroads' liability based on the percentage of the site containing the Railroads' parcel, the length of time the Railroads had leased their parcel to B&B, and the relative volume of hazardous substance-releasing activities on the B&B property compared to that which occurred on the Railroads' parcel.

Arranger Liability Requires Proof of Intent to Dispose

Under CERCLA, Section 107(a)(3) imposes liability on:

any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

Because CERCLA does not define "arrange," the Supreme Court used the dictionary definition of "arrange," concluding that "in common parlance, the word 'arrange' implies action directed to a specific purpose."

In its decision, the Supreme Court explains that state of mind and intent play a role in the determination of arranger liability. The Court found that the California DTSC and EPA had not proven that Shell had intended to dispose of a hazardous substance when it sold B&B new chemicals with a valid, intended use, concluding:

While it is true that in some instances an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes, 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 sale of an unused, useful product. In order to qualify as an arranger, Shell must have entered into the sale of D–D with the intention that at least a

portion of the product be disposed of during the transfer process . . . .

Analysis

First impressions may sometimes be deceiving. While on its face *Burlington Northern & Santa Fe Railway Co. et al. v. United States et al.* is fact-dependent, the decision will likely have far-reaching consequences with regard to the imposition of joint and several liability under CERCLA and as to what appeared to be more recent attempts to impose arranger liability directed at useful products. This decision marks the third significant Supreme Court case in the world of CERCLA since 2004's *Cooper Industries, Inc. v. Aviall Services, Inc.*

While the decision avoids making a categorical holding as to the availability of joint and several liability under CERCLA, it erodes the common perception that harm must be separate and distinct for allocation of liability under CERCLA. Even with a "single harm," liability may be determined by reasonable apportionment of the causes of harm. Indeed, the decision may warrant that EPA reconsider its practice of pursuing only a small manageable number of parties. And PRPs may be emboldened to more rigorously pursue apportionment defenses and take such considerations into account with regard to evaluating settlements.

With regard to arranger liability, knowledge alone of spills and leaks will not necessarily support liability for the sale of useful products. While ultimately an issue of fact, the intent requirement found by the Court appears at odds with the heavy hammer of strict liability under CERCLA. This aspect of the Court's decision appears destined to slow down efforts to impose CERCLA arranger liability involving useful products.

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