The Supreme Court Reins in Liability in Burlington Northern

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On May 4, 2009, the U.S. Supreme Court held that "arranger" liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is limited to situations in which an entity takes intentional steps to dispose of a hazardous substance. The Court also held that imposition of joint and several liability is unwarranted where there is a reasonable basis for apportionment based on broad factors and absent precision. Together these holdings may significantly narrow the range of parties pulled into CERCLA proceedings and limit the financial burden of many companies found liable for contributing to the contamination of industrial sites.

In 1960, Brown & Bryant, Inc. (B&B) began operating an agricultural chemical distribution business, purchasing pesticides and other chemical products from suppliers such as Shell Oil Company. B&B eventually expanded its operations onto an adjacent acre of land owned jointly by two railroad companies. During its years of operation, B&B stored and distributed various hazardous chemicals on the property, among them a pesticide known as D–D, which was sold by Shell. When B&B purchased D–D, Shell would arrange for delivery by common carrier, f.o.b. destination, and the chemicals were then transferred from tanker trucks to bulk storage on B&B's land. Aware that spills of D–D were commonplace during distribution, Shell took several steps to encourage the safe handling of its products.

Spills nevertheless persisted, and D–D eventually seeped into the soil and groundwater at the B&B site. In 1983, the state of California, and later EPA, began an environmental investigation that ultimately expended more than $11 million of response costs. The government brought suit in federal court, as did the railroads, each seeking to recover a portion of their respective response costs. The district court entered judgment in favor of the government—against the railroads because they were owners of a portion of the facility, see 42 U.S.C. § 9607(a)(1)–(2), and against Shell because it had "arranged for" the disposal of hazardous substances through its sale and delivery of D–D, see § 9607(a)(3). Although it found the parties liable, the district court did not impose joint and several liability on Shell and the railroads, instead finding that the harm was divisible. On appeal, the Ninth Circuit found that an entity could arrange for disposal "even if it did not intend to dispose" of a hazardous substance and therefore confirmed Shell's liability. But the Court of Appeals held that the district court erred in finding that the record established a reasonable basis for apportionment of the costs and therefore held Shell and the railroads jointly and severally liable

for the governments' costs of responding to the contamination.

The Supreme Court granted certiorari in *Burlington Northern & Santa Fe Railway Co. v. United States*, No. 07-1601, and in an 8–1 decision written by Justice Stevens, held that although arranger liability is "fact intensive and case specific," it "may not extend beyond the limits of the statute itself." Because CERCLA does not expressly define what it means to "arrang[e] for" disposal of a hazardous substance, the Court concluded that the phrase should be given its ordinary meaning, which "implies an action directed to a specific purpose." As a consequence, the Court found that arranger liability is appropriate when an entity "takes intentional steps to dispose of a hazardous substance," noting that "knowledge alone is insufficient to prove that an entity 'planned for disposal.'" Shell had no intent to dispose of a hazardous substance, the Court found, and therefore could not be held liable as an arranger.

The Court also found that the railroads (liable as site owners) were improperly held jointly and severally liable for the full costs of the governments' response efforts: apportionment—not joint and several liability—is appropriate when there is "a reasonable basis for determining the contribution of each cause to a single harm." The Court held that the district court had a reasonable basis for apportionment based on three broad factors: the portion of the property owned by the railroads; the number of years that the railroads leased a portion of the property to B&B; and the type of hazardous chemicals used on the leased portion. Although the Court of Appeals had criticized the district court for relying on these "simplest of considerations," the Supreme Court found them to be sufficient to calculate a 9 percent share of liability for the railroads.

Burlington Northern will likely shrink the pool of companies subject to arranger liability under Section 9607(a)(3), as only those entities that *intentionally* took steps to dispose of a hazardous substance can now be held liable; the focus of such "arranger" cases will inevitably shift to the indicia of any such intention. The decision allows CERCLA defendants a wide basis to argue against the imposition of joint and several liability, even where imprecise information such as years of site ownership and operation and general product use is available to aid in apportionment. As a consequence, the government and private plaintiffs are likely to bear a greater share of cleanup costs at some sites, a result Justice Ginsburg, as the lone dissenter, lamented is "at odds with CERCLA's objective – to place the cost of remediation on persons whose activities contributed to the contamination rather than on the taxpaying public."

For more information on *Burlington Northern* or CERCLA, please contact Rob Kirsch, Dan Squire, Ken Meade or your WilmerHale lawyer.

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