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ENVIRONMENT, NATURAL RESOURCES AND LAND USE ALERT

SUPREME COURT SIGNIFICANTLY LIMITS CERCLA LIABILITY

The Supreme Court, on May 4, 2009, drew sharp new lines around the scope of liability facing private parties under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[1] In *Burlington Northern & Santa Fe Railway Co. et al. v. United States et al.*,[2] the Supreme Court considered—

- whether a manufacturer "arranged for disposal" of its product by virtue of spills at a distributor's facility
- the nature of evidence sufficient to establish a basis for apportioning liability for cleanup costs.

In an 8-1 majority opinion written by Justice Stevens, the Court held that for a manufacturer to assume liability as an "arranger" under CERCLA, it had to "intend" that portions of its product would leak, spill or otherwise constitute wastes during the distribution, storage and transfer process. The Court also upheld a lower level of evidentiary support for apportioning liability in lieu of imposing joint and several liability.

ARRANGER LIABILITY REQUIRES AN "INTENT" TO DISPOSE

CERCLA imposes liability on entities that "arrange[] for disposal … of hazardous substances."[3] In *Burlington*, the Court considered whether Shell Oil Co. "arranged for disposal" of bulk shipments of pesticide products by a downstream distributor whose sloppy operations resulted in leaks, spills and

[1] 42 U.S.C. §9601 *et seq*.
[2] No. 07-1601, Slip Op. (May 4, 2009).
[3] 42 U.S.C. §9607(a)(3).

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site contamination. The 9th Circuit acknowledged that Shell was not a "traditional arranger" seeking to dispose of wastes but held Shell liable because "disposal" was "a foreseeable byproduct of, but not the purpose of, the transaction." The Court of Appeals reasoned that Shell was aware that some amount of product was likely to leak during transfer to and from bulk containers and, therefore, fit within the statutory liability scheme.

The Supreme Court rejected the 9th Circuit's "arranger" analysis, holding that an arranger must "[have] *the intention* that … a portion of the product be disposed of during the transfer process."[4] "[K]nowledge alone is insufficient to prove that an entity 'planned for' the disposal," particularly where the transaction involves the sale of an "unused, useful product."[5] As further evidence of Shell's **lack of intent**, the Court noted that Shell had provided the distributor with detailed safety manuals, required customers to maintain adequate storage facilities and provided discounts for customers that took safety precautions.

LOWERING THE BAR FOR AVOIDING JOINT AND SEVERAL LIABILITY

CERCLA liability is joint and several unless "there is a reasonable basis for determining the contribution of each cause to a single harm."[6] The District Court apportioned liability among three railroad defendants that had leased a small portion of property to the pesticide distributor responsible for contamination at the site. The District Court analysis considered: 1) the percentage of the larger Superfund site's surface area owned by the railroads; 2) the percentage of time of the railroads' ownership of the leased site during which releases took place; and 3) the volume, identity and location of hazardous substance contamination that could be attributed to the portion of the site owned by the railroads. To account for "calculation errors" in the formula, the district judge increased the final allocation by half, raising the railroads' potentially responsible party (PRP) liability from 6 percent to 9 percent of the total response cost at the site.

On appeal, the 9th Circuit rejected the apportionment formula, finding that, even if apportionment was theoretically possible at that site, the trial court's formula lacked the supporting data and precision necessary to measure the harm attributable to the portions of the site owned by the railroads.

The Supreme Court reversed the Court of Appeals, concluding that the District Court had acted reasonably in using the relative size of the leased railroad property and the duration of the railroad's lease to the distributor as a "starting point" for apportionment analysis. While acknowledging that the District Court's volumetric analysis of contaminants lacked evidentiary

[4] *Burlington*, Slip Op. at 12 (emphasis added).
[5] *Id.*
[6] *Id.* at 14.

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support in the record, the Court found that the lower court's inclusion of a "50% margin of error … reached the same result."[7]

A LONE DISSENT

Justice Ginsburg dissented, and the factual details she highlighted are notable given their **lack of influence** on the majority opinion. On the issue of "arranger" liability, Justice Ginsburg noted that Shell had made strategic decisions to switch from more secure 55-gallon drum storage to "economically advantageous" bulk storage and transfer and had specified the procedures used to transfer product to and from storage containers. "Mere knowledge [of leaks and spills] may not be enough," she conceded, but "[g]iven the control rein held by Shell over the mode of delivery and transfer," Justice Ginsburg concluded that Shell fit within the statutory scope of arranger liability.[8] On the apportionment issue, Justice Ginsburg asserted that the trial court's *sua sponte* apportionment ruling had "deprived the government of a fair opportunity to respond to the court's theories of apportionment and to rebut their factual underpinnings, an opportunity the government would have had if those theories had been advanced by petitioners themselves."[9] Justice Ginsburg's observations elicited no response from the majority.

PRACTICAL IMPLICATIONS OF *BURLINGTON*

While each CERCLA case is highly fact- and site-specific, *Burlington* has significant implications for companies seeking either to minimize their CERCLA liability or to recover remediation costs from other PRPs:

- First, any party facing potential arranger liability should seek to develop facts to support the contention that it lacked an intent to dispose. *Burlington* suggests that embracing good stewardship practices may help rebut a presumption of "intent" to act as an "arranger," but it is not the only means of doing so.

- *Burlington* also suggests that the bar for apportioning liability is considerably lower than that which district courts have typically erected. Moreover, the Supreme Court effectively ratified the use of "margin of error" adjustment to account for uncertainties and gaps in proof.

[7] *Id.* at 18.
[8] Dissent at 2-3.
[9] *Id.* at 3.

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The *Burlington* case also raises several significant policy issues that the Environmental Protection Agency (EPA), states and other stakeholders will need to consider:

- To the extent *Burlington* reduces EPA's leverage in threatening joint and several liability to cover "orphan shares" of CERCLA cleanups, the holding could have significant budgetary implications for federal and state Superfund efforts.
- To the extent that the federal government assumes a greater proportion of the cost associated with CERCLA cleanups, policymakers are likely to increase their efforts to reinstate some form of the Superfund tax.

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