KIRKLAND ALERT
May 2009

Supreme Court Narrows Superfund Environmental Cleanup Liability

On Monday, May 4, 2009, the U.S. Supreme Court issued a decision that significantly alters the scope of private parties' liability for environmental cleanup costs under the federal "Superfund" statute, or CERCLA. In a resounding 8-1 opinion in *Burlington Northern*,[1] the Court (1) narrowed the scope of "arranger" liability, holding that only parties who *intentionally* dispose of hazardous substances may be held liable as arrangers, and (2) strengthened defendants' ability to avoid "joint and several" liability for cleanup costs if there is some reasonable basis for apportioning liability. The case is likely to reduce the potential for sellers and distributors of products containing hazardous substances to be held liable as arrangers under CERCLA and make it more difficult for EPA to hold individual defendants jointly and severally liable for all cleanup costs.

Factual Background. The case arose as the result of contamination discovered in the late 1980s at an agricultural chemical distribution facility located in Arvin, California. The Arvin facility was owned and operated by a small distributor, Brown & Bryant, Inc., whose business involved the repackaging, storage and sale of pesticides and other agricultural chemicals, some of which it purchased from Shell Oil. The contamination resulted from spills and releases that occurred over time in the course of Brown & Bryant's offloading, storage and repackaging of chemical products. Brown & Bryant later expanded its operations onto an adjacent 0.9-acre parcel that it leased from the Burlington Northern & Santa Fe Railway Company and Union Pacific Railroad Company. The railroads had no involvement in Brown & Bryant's operations other than being its landlord. In 1989, Brown & Bryant became insolvent and ceased operations. Federal and state authorities spent over $8 million cleaning up the site over the next 10 years. The government took action under CERCLA against the railroads on the basis of their status as "owners" of the adjacent leased property, and against Shell as having "arranged for disposal" of hazardous substances at the Arvin facility. Litigation ensued, and the case proceeded from the federal District Court in California to the Ninth Circuit Court of Appeals, and ultimately to the U.S. Supreme Court.

1. Arranger Liability Under CERCLA Limited to Intentional Disposal. The Supreme Court first addressed the question of whether "arranger" liability could be imposed on Shell, as a party who sold the product to Brown & Bryant, which was subsequently released causing contamination at the site. Arranger liability is based on the CERCLA provision imposing strict liability for cleanup costs on "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances."[2] EPA argued that because Shell had knowledge of the spills and releases that occurred during the delivery of chemicals, Shell should be held liable for the cleanup costs on the basis that it had "arranged for disposal" of hazardous substances by Brown & Bryant. The facts of the case indicate that Shell was in fact well aware that spills occurred routinely in the course of delivery, via common carrier tanker trucks, of its products to Brown & Bryant.[3] The lower courts accepted EPA's position and held Shell liable. Conceding that Shell did not qualify as a "traditional" arranger because it had not expressly contracted with Brown & Bryant to dispose of hazardous wastes, the Ninth Circuit nonetheless concluded that Shell could still be held liable under a "broader category of arranger liability" if the disposal of hazardous wastes was a "foreseeable byproduct" of the transaction.

The Supreme Court however did not agree with this conclusion. The Court looked to the plain meaning of the word "arrange," and found that "an entity may qualify as an arranger ... when it takes intentional steps to dispose of a hazardous substance." While acknowledging 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," the Court made clear that "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." Accordingly, the Court concluded that Shell could not be held liable under CERCLA as an "arranger of disposal" because it did not *intend* that the chemicals be disposed of during the transfer process.

A useful portion of the opinion from a practical perspective is the Court's explanation of why it felt the evidence did not support a finding that Shell intended to dispose of the chemicals. Specifically, the Court highlighted that "Shell took numerous steps to encourage its distributors to *reduce* the likelihood of such spills, providing them with detailed safety manuals, requiring them to maintain adequate storage facilities, and providing discounts for those that took safety precautions." Companies that enter agreements to sell hazardous materials would be well advised to employ similar mechanisms to ensure safety and minimize liability.

2. No "Joint and Several" Liability if There Is a Reasonable Basis for Apportionment. The Supreme Court next addressed the question of whether the railroads should, as EPA argued, be subject to "joint and several" liability for 100 percent of the cleanup costs or, instead, can liability be apportioned such that the railroads should only be liable for a smaller percentage of the total. Apportionment and the scope of joint and several liability have been continuously reoccurring issues in CERCLA litigation, some courts holding defendants to very high evidentiary standards before allowing apportionment. In *Burlington Northern*, the Supreme Court declared that CERCLA "did not mandate joint and several liability in every case," and that "apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm."[4] And while the Court stated that "defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists," the facts of *Burlington Northern* suggest that the Court has set a fairly low "bar" for defendants in making this case.

Specifically, the District Court had determined that the railroads were liable for only 9 percent of the total cleanup costs, based largely on three factors: (1) the percentage of the total land area that they owned, (2) the time the railroads had leased the land to Brown & Bryant as a percentage of the total time period Brown & Bryant operated the Arvin facility, and (3) the fact that only two out of the three types of products that gave rise to the contamination were handled on the railroad parcel.[5] On appeal, the Ninth Circuit faulted the District Court for relying on the "simplest of considerations," and concluded that liability could not be reasonably apportioned. The Ninth Circuit pointed out, for example, that the mere duration of the lease and the relative size of the land area were not reliable measures of the actual harm caused, and criticized the notion that spills of two out of three chemicals would account for two-thirds of the cleanup costs.

The Supreme Court nonetheless upheld the District Court's apportionment. Specifically, the Court determined that "it was reasonable … to use the size of the leased parcel and the duration of the lease as the starting point for its analysis."[6] The Court noted that the 9 percent apportionment was supported by "detailed findings" showing that "spills of hazardous chemicals that occurred on the Railroad parcel contributed to no more than 10 percent of the total site contamination," and that the main source of pollution was in the southeastern portion of the Brown & Bryant parcel most distant from the railroad parcel. In affirming the propriety of allocation based on a variety factors such as "volumetric, chronological, or other types of evidence, including appropriate geographic considerations," the Court seems to have set out a broad "reasonableness" standard for apportionment that may prove relatively easy for defendants to satisfy. In a footnote to the opinion, however, the Court declared that "equitable

considerations play no role in the apportionment analysis," suggesting that factors such as the degree of "culpability" of the party, the notion that "deep pockets" should pay more, and other fairness-based considerations may not be used to apportion liability.[7]

The broader implications of *Burlington Northern* are yet to be seen and are likely to be litigated in future cases. But the Court's opinion is sure to reduce defendants' exposure to "arranger" liability in the context of useful product sales, and will increase the likelihood defendants will be able to avail themselves of an apportionment of the liability, even when apportionment is based on limited evidence and less than precise calculations. Kirkland & Ellis can offer further information and advice on the Court's opinion and assessing liability in CERCLA cases.

---

1 The decision was issued a consolidated opinion in *Burlington Northern & Santa Fe Railway Co. et al. v. United States et al.*, No. 07-1601, and *Shell Oil Co. v. United States et al.*, No. 07-1607. Justice Stevens delivered the opinion of the Court, which was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Thomas, Breyer, and Alito. Justice Ginsberg filed a dissenting opinion.

2 42 U.S.C. §9607(a)(3).

3 Shell shipped product to Brown & Bryant by common carrier tanker trucks. Once they reached the facility, product was transferred to bulk storage tanks, from which it would be transferred to other smaller trucks and pull rigs. Justice Ginsberg, in her dissenting opinion, noted that leaks and spills occurred routinely when deliveries were made, that there were numerous failures of bulk storage tanks, and that Shell required Brown & Bryant to maintain bulk storage facilities and specified the equipment to be used in transferring chemicals from the delivery trucks to the tanks.

4 Citing to the common law principles of divisibility of harm as set forth in the Restatement (Second) of Torts, §433A(1)(b), p. 434 (1963-1964).

5 The District Court's calculation was as follows: (1) "the Railroad parcel constituted only 19 percent of the surface area of the Arvin site," (2) "the Railroads had leased their parcel to Brown & Bryant for 13 years, which was only 45 percent of the time Brown & Bryant operated the Arvin facility," and (3) "only spills of two chemicals ... substantially contributed to the contamination that had originated on the railroad parcel, and that those two chemicals had contributed to two-thirds of the overall site contamination." The District Court then multiplied 0.19 by 0.45 by 0.66 (two-thirds) and rounded up to find that the railroads were responsible for 6 percent of the remediation costs, to which the court added a 50 percent "margin of error" factor, to arrive at a final apportionment to the railroads of 9 percent of the total cost.

6 The Supreme Court indicated that there was little support for the District Court's finding that the two chemicals from the railroad parcel accounted for two-thirds of the overall costs, but dismissed this point as a harmless given the 50 percent margin of error built into the analysis.

7 The footnote goes on to clarify however that while equity plays no role in apportionment *per se*, "contribution actions allow jointly and severally liable [parties] to recover from each other on the basis of equitable considerations."

Should you have any questions about the matters addressed in this Alert, please contact the following Kirkland & Ellis authors or the Kirkland & Ellis attorney you normally contact:

Granta Y. Nakayama
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/gnakayama
+1 (202) 879-5074

Christian C. Semonsen
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/csemonsen
+1 (202) 879-5076

Lee Philip Rudofsky
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/lrudofsky
+1 (202) 879-5253