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U.S. Supreme Court Limits Extent of "Arranger" Liability and Upholds Apportionment of Liability Under CERCLA

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On May 4, the U.S. Supreme Court issued its decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, a closely watched case involving fundamental issues of "arranger" liability and apportioning costs for cleanups under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Court held that under the plain language of CERCLA, an entity can be liable as an "arranger" only when it takes "intentional steps" to dispose of hazardous substances. Thus, a seller's knowledge alone that some of its sold product may be leaked or spilled is not enough to impose arranger liability. The Court also held that apportionment of CERCLA liability at multiparty sites is proper when there is a "reasonable basis" for determining the contribution of each party.

"Arranger" Liability Limited

Under CERCLA, an entity that "arranges" for the disposal of hazardous wastes can be held liable for later cleanup costs. In *Burlington Northern*, the Court addressed the extent of "arranger" liability where the alleged arranger sold products that ultimately contaminated soil and groundwater. Beginning in 1960, Shell Oil Co. (Shell) sold pesticides and other chemical products to Brown & Bryant (B&B), an agricultural chemical distribution business. Originally, B&B purchased Shell's products in 55-gallon drums. In the mid-1960s, Shell began requiring its distributors to maintain bulk storage facilities. Shell would, at its own expense and risk, arrange for delivery of its pesticide products to B&B. When the product arrived at B&B's property, B&B assumed stewardship. The product was transferred from tanker trucks to a bulk storage tank and eventually to bobtail trucks, nurse tanks, and pull rigs. Leaks and spills of the pesticide occurred during these transfers. Shell was aware that these spills took place and implemented steps to encourage safe handling (e.g., provided detailed safety manuals and required inspections of its distributors' facilities). Despite B&B's efforts, pesticides seeped into the soil and groundwater over the course of its 28-year operation. In cost recovery and contribution actions brought against Shell, plaintiffs asserted that Shell was liable under CERCLA as an entity that arranged for disposal of hazardous substances by virtue of its sales of pesticides to B&B.

The Court noted that although the question of arranger liability is a fact-intensive and case-specific inquiry, "such liability may not extend beyond the limits of the statute itself." The Court interpreted "arranged for" under its plain and ordinary meaning, which involves an action directed to a specific purpose. The Court then held that a party may qualify as an arranger "when it takes intentional steps to dispose of a hazardous substance." Significantly, the Court stated that even in the instances where an entity has knowledge that its product will be leaked or spilled, such knowledge alone is insufficient to prove that the entity "planned for" the disposal, particularly when the disposal is a peripheral result of the

sale of a useful product. Although the evidence showed that Shell was aware of accidental spills and overflows during the transfer of its pesticides after they came under the stewardship of B&B, there was no evidence that Shell intended those spills to occur. As a result, the Court held that Shell could not be liable as an arranger under CERCLA.

This holding could have far-reaching implications. Although the facts of *Burlington Northern* involved the sale of products, this decision also could be relied upon more broadly by other entities to argue that they did not have an "intention" to dispose and, therefore, cannot be liable as arrangers. As noted by the Court, such arguments will be highly fact intensive. Overall, by making it easier for certain parties to avoid "arranger liability" this decision will likely shrink the pool of possible responsible parties at any particular site.

Apportionment of Liability

The Court also addressed the issue of apportionment of liability where the remaining defendant, the owner of an adjoining property that formerly was leased by B&B, was determined by the district court to be liable for only 9% of the response costs, leaving a 91% orphan share (i.e., the former B&B property) to the government. Noting that CERCLA's strict liability standard does not mandate joint and several liability in every case, the Court held that apportionment of CERCLA liability at multiparty sites is proper when there is a "reasonable basis" for determining the contribution of each party.

The Court examined the trial court's reasoning for concluding that the harm caused by spills on the adjoining property was divisible from the harm on B&B's formerly owned property. The Court stated that it was reasonable for the district court to rely upon the fact that the adjoining property was only 19% of the surface area of B&B's operations and that B&B had leased the adjoining property for only 45% of the time that B&B had conducted its operations. Although the Court found less support in the record for the district court's conclusion that two chemicals found in the adjoining property accounted for only two-thirds of the contamination requiring remediation, the Court determined that such a miscalculation was harmless in light of the district court's ultimate allocation, which included a 50% margin of error. Thus, the Court held that the district court's allocation was supported by the evidence and comported with common law apportionment principles.

The implication of this holding is far-reaching, particularly at those sites where there is an "orphan" share and the defendants have met their burden to show a reasonable basis for apportionment. Current owners of land and governments conducting cleanups can expect to bear an increased burden of liability in future cases where apportionment is appropriate for historic contributors and where there is an "orphan share." This will also likely lead to new attempts by all parties involved in multiparty sites to devise creative formulas for including or excluding shares through the apportionment mechanism. Of the many other implications of this holding, it is likely that responsible parties will also focus on their own causation in an effort to minimize their share rather than equitably "splitting up the total pie," which has often been the practice at multiparty sites.

For further information on this case or its implications, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.

Kenneth A. Rubin	202.739.5140	krubin@morganlewis.com
Ronald J. Tenpas	202.739.5435	rtenpas@morganlewis.com
Michael W. Steinberg	202.739.5141	msteinberg@morganlewis.com

Philadelphia

John J. McAleese, III	215.963.5094	jmcaleese@morganlewis.com
William S. Pufko	215.963.5519	wpufko@morganlewis.com

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