

Supreme Court Decision Limits Cercla Liability

On May 4, 2009, the United States Supreme Court issued an 8-1 decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, 556 U.S. ____ (2009) limiting the scope of three “deep pocket” defendants’ liability for cleanup costs incurred by the government at a Superfund site. The *BNSF* case addresses two important issues relating to liability under the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”): the element of intent necessary to be held liable as an “arranger” under CERCLA and the necessary evidentiary basis for apportionment of liability under CERCLA.

The *BNSF* case concerned contamination that had occurred over a number of years at a site known as the Brown & Bryant (“B&B”) Arvin facility. The lower courts found Shell Oil liable as an arranger under CERCLA for selling hazardous chemical products to B&B, while knowing that some portion of the products would be spilled on the site during delivery and transfer of the products. On review, the Supreme Court explained that “[w]hile 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.” Because Shell Oil had taken “numerous steps to encourage its distributors to reduce the likelihood of such spills,” its “mere knowledge that spills and leaks continued to occur is insufficient grounds for concluding” that Shell Oil arranged for disposal of the chemical within the meaning of CERCLA.

With regard to apportionment, the District Court found that, because the evidence suggested only a relatively small amount of contamination came from property the railroad defendants had leased to B&B, the railroads were not jointly and severally liable for cleanup costs for the entire site. Instead, the District Court limited their liability to 9% of the government’s costs. This apportionment was based on elements such as the size of the parcel the railroads leased to B&B and the duration of the lease. The Ninth Circuit found that such evidence was not a reliable measure of the harm caused by activities on the railroad properties and that the District Court had relied on estimates rather than specific and detailed records. Accordingly, the Ninth Circuit determined that the railroads should be held jointly and severally liable for the response costs. The Supreme Court disagreed, reasoning that even though “the evidence adduced by the parties did not allow the court to calculate precisely the amount of hazardous chemicals contributed by the railroad parcel to the total site contamination,” the

evidence was sufficient to show (among other things) that fewer spills occurred on the railroad parcel. Consequently, the Supreme Court reversed the Ninth Circuit and concluded that the District Court had reasonably apportioned the railroads' share of the response costs at 9%.

The *BNSF* decision is significant in that a large majority of the Court now seems to acknowledge rational limits to the traditionally broad reach of CERCLA's liability structure. While both of the limits analyzed by the Court in *BNSF* turn on situation-specific facts, the case represents a continuation of the Court's recent trend to interpret CERCLA liability more narrowly than in the past.

If you would like more information regarding this significant development, please feel free to contact Kevin R. Murray (kmurray@chapman.com), Thomas L. Van Wyngarden (vanwyngarden@chapman.com), James C. Burr (burr@chapman.com) or Patrick S. Malone (pmalone@chapman.com) at Chapman and Cutler LLP.

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