

Update on the Law

SUPREME COURT RULES ARRANGER LIABILITY AND APPORTIONMENT UNDER CERCLA IN BURLINGTON NORTHERN

The Supreme Court issued its decision in Burlington Northern & Santa Fe Railway v. United States on May 4, 2009. The essential rulings in the 8-1 decision are that, 1) a party is not considered an “arranger” in CERCLA unless they intended to dispose of their waste, and 2) that liable parties at a multi-party Superfund site are not *jointly and severally liable* if there is a “reasonable basis” to apportion the liability. Accordingly, the Court held that where a defunct or insolvent entity has a discernable portion of the liability for contamination at the site, that “orphan share” would become the responsibility of the government.

The essential facts of the case involved a small chemical manufacturer, B&B that repackaged agricultural chemicals. A portion of their property was leased to the Burlington Northern and Union Pacific Railroads, which played no part in the company’s operations. Shell Oil had sold a soil fumigant for agricultural purposes to B&B, which was intended for repackaging and sale. Shell had provided strict instructions on the handling of the product to avoid spills and contamination. The Supreme Court held that Shell could not be considered an arranger since it did not take “intentional steps to dispose of hazardous substances.” On the apportionment

issue, the court acknowledged that CERCLA does not specify joint and several liability, it is a judicial doctrine based in the *Restatement (Second) of Torts*. The Court held, based upon the language of the *Restatement*, that “apportionment is proper when ‘there is a reasonable basis for determining the contribution of each cause to a single harm.’” The Court concluded that there was sufficient evidence for apportionment, and that the evidence need not be precise.

This decision enables a defendant in the Superfund case to reduce its share of liability if it can prove a reasonable basis for apportionment. It also clarifies that the government is responsible for an “orphan share” if there is a basis to develop facts to support apportionment to the “orphan” party. In essence, the decision reduces the impact of the court created “joint and several” liability scheme in CERCLA matters. The decision will likely result in more emphasis being placed on state statutes that provide a broader foundation for liability, such as the New Jersey Spill Act; although the decision may be influential where a Court enters in the balancing of equitable factors in apportioning liability. As a practical matter, it is likely that the decision will cause more intense investigation and use of experts by individual parties, as opposed to groups, in future Superfund litigation.

DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, PC (www.dbnjlaw.com) is a full service law firm in New Jersey which provides a broad range of legal services, including the representation of clients in environmental cost recovery litigation. For additional information about the matters in this bulletin or in the firm’s environmental practice, please contact Steven A. Kunzman, Esq. who heads our Environmental Department. skunzman@newjerseylaw.net

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