

ENVIRONMENTAL

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Supreme Court Holds that Joint & Several Liability Under CERCLA is Improper Where There is a Reasonable Basis for Apportionment



On May 4, 2009, the United States Supreme Court, in an 8-1 decision, determined that arranger liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, hinges on whether the entity intended that some portion of its product be disposed. In the same decision, the Court held that where a reasonable basis for apportionment exists, a potentially responsible party ("PRP") should not be held responsible for 100% of the response costs incurred under CERCLA.

Background

From 1960 to 1989, Brown & Bryant, Inc. ("B&B") operated an agricultural chemical distribution business at a site in Arvin, California. Operations eventually expanded to the adjacent parcel owned by two railroads ("Railroads"). Among other things, B&B purchased a pesticide from Shell Oil Company ("Shell"). Shell delivered the product by tanker trucks. The product was transferred from the trucks to a bulk storage tank and later to delivery vehicles. These transfers resulted in spills to the ground which contaminated both soil and groundwater at the site and on the Railroads' property.

Shell was aware that such spills took place, and took steps to encourage safe handling of its product, including providing safety manuals to its distributors and instituting a discount program for customers that made improvements in handling and safety. Shell visited the site twice and, in 1981, B&B certified to Shell that it had made a number of recommended improvements to its facilities.

In 1983, California's Department of Toxic Substances ("CDTS") began investigating B&B's operations and the United States Environmental Protection Agency ("EPA") began its own investigation soon thereafter (collectively "Governments"). The Governments undertook cleanup efforts at the site under CERCLA §104, and by 1998 had spent over \$8 million. In response to an administrative order issued by USEPA, the Railroads also spent \$3 million to perform certain remedial tasks for the site.

History of the Action

The Railroads sued B&B in 1991 to recover their costs. In 1996, the action was consolidated with two CERCLA cost recovery actions brought by CDTS and USEPA against Shell and the Railroads. By 1998, B&B was insolvent and ceased operations. The trial was held in 1999, and in 2003, the District Court issued its determination that Shell and the Railroads were potentially responsible parties (PRPs) under CERCLA §107(a)(1)-(2) because (1) Shell "arranged for disposal" of hazardous waste because it sold and delivered product to B&B; and (2) the Railroads were owners of a portion of the facility at the time of disposal.

The District Court did not impose joint and several liability on Shell or the Railroads for the entire amount of response costs incurred by the Governments.

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The court reasoned that while there was a single harm, namely the contamination of the site, it was divisible and capable of apportionment. The District court considered the percentage of the total area owned by the Railroads, the term of the lease for the Railroad's property, and contaminants spilled on the leased parcel and determined that the Railroads were responsible for 9% and Shell responsible for 6% of the Governments' response costs.

On appeal, the Court of Appeals for the Ninth Circuit upheld the determination that Shell was a PRP under CERCLA; however it determined that there was no reasonable basis for apportionment, and held Shell and the Railroads jointly and severally liable for the Governments' cleanup costs.

As a Seller/Distributor of Product Shell was not an "Arranger" for the Purpose of CERCLA Liability

In reversing the Court of Appeals' decision, the Supreme Court determined that Shell was not a PRP by reason of its knowledge that minor, accidental spills occurred during the transfer of its product to the purchaser, B&B. The Court stated that, based on the language of CERCLA §107(a)(3) which imposes liability on an entity that "arrange[s] for disposal...", CERCLA liability would attach if an entity's sole purpose was to discard of a used and no longer useful hazardous substance. The Court reasoned that CERCLA liability would not attach if the entity's sole purpose was to sell a new and useful product and then, unbeknownst to the seller, the purchaser disposed of it in a manner that led to contamination.

This case, however, fell between the two ends of the spectrum due to Shell's knowledge of the minor, accidental spills. The Supreme Court held that an entity qualifies as an "arranger" under CERCLA only when it takes intentional steps to dispose of a hazardous substance. There was no evidence that Shell intended for some of its product to be disposed. Shell instituted a number of programs designed to reduce such accidental leaks. These types of accident-prevention programs were viewed by the Court as evidence that Shell had no intention that its product be disposed. As a result, Shell was found to have no liability for the Governments' response costs.

Joint and Several Liability is not Appropriate where Allocation is Possible

The Supreme Court also determined that apportionment of liability is appropriate when there is a reasonable basis for determining the contribution of each party. Established federal case law on apportionment states that if there is a single harm, but that harm is divisible among several parties, each party is liable for only that portion of the harm which it caused. On the other hand, if the harm is not able to be divided, each party is jointly and severally liable, or liable for the entire harm.

The Supreme Court held that the District Court properly allocated liability to the Railroads based on several factors: (1) the Railroad property comprised only 19% of the surface area of the entire site; (2) B&B leased the Railroads' property for 45% of the total time B&B was in operation; and (3) only two of the three chemicals at issue contributed to contamination on the Railroads' property. The District Court then multiplied these three percentages to arrive at an allocation rate for the Railroads. The Supreme Court held that the record supported the District Court's findings and that the allocation complied with existing laws.

Conclusion

PRPs currently involved in a CERCLA action should review their litigation strategy following the *Burlington* decision. The decision provides guidance on arranger liability, which may lead to fewer sources of funds for either public or private cleanups. Its holding concerning allocation could result in fewer environmental cleanups and more expensive and intensive litigation if PRPs adopt the position that they are unwilling to bear anything more than their "fair share". Government attorneys will need to adopt their litigation strategy to this shifting attitude, which may produce fewer voluntary cleanups at multi-party sites by larger, "deep pocket" PRPs. Private CERCLA actions may no longer be financially justifiable given the time and expense involved in first locating each small PRP and then proving the appropriate allocation. ■

Please contact us for more information if you think that the Burlington ruling may impact your company.