



# LEGAL ALERT

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## United States Supreme Court Narrows Arranger Liability and Holds That Superfund Liability Is Not Joint and Several Where a Reasonable Basis for Apportionment Exists

*By Lisa A. Decker, Esq.*

On May 4, 2009, the United States Supreme Court issued an 8-1 opinion with broad implications for Superfund cleanups holding (1) that the Environmental Protection Agency ("EPA") cannot hold parties liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") as "arrangers" for disposal unless they "intended" their wastes to be disposed of, and (2) that defendants may avoid joint and several liability if a "reasonable basis" exists to apportion their liability. *Burlington Northern & Santa Fe Railway Co. v. United States* (No. 07-1601, May 4, 2009) (consolidated with *Shell Oil Co. v. United States* (No. 07-1607)).

The decision authored by Justice Stevens narrows the scope of arranger liability, but broadens the basis upon which potentially responsible parties (PRPs) at Superfund sites can argue that the costs of cleanup are divisible, making them responsible for only a portion of the cleanup costs (instead of being jointly and severally liable for all of the cleanup costs).



## Background Facts

In 1960, Brown & Bryant (B&B), a now defunct chemical distributor, began operating on a 3.8 acre parcel of land in California, purchasing pesticides from suppliers such as Shell Oil Company. In 1975, B&B expanded operations onto an adjacent 0.9 acre parcel owned by two railroads that were predecessors to BNSF and Union Pacific Railroad. Originally, B&B purchased pesticides in 55-gallon drums, but in the mid-1960s, Shell began requiring its distributors to purchase the pesticides in bulk and maintain bulk storage facilities. Over B&B's 28 years of operations, many of the chemicals spilled during transfers, deliveries, and equipment failures, resulting in soil and groundwater contamination.

In 1983, the California Department of Toxic Substances Control ("DTSC") began investigations and, by 1989, when B&B became insolvent and ceased all operations, the United States EPA was involved and the B&B facility was added to the National Priority List ("NPL"), allowing DTSC and EPA to undertake cleanup of the site. The EPA and State cleaned up the site, and then brought suit against the railroads and Shell in 1996 to recover their costs.

## District Court and Ninth Circuit Rulings

After a six-week bench trial, the district court ruled in favor of the governments, finding Shell liable as an arranger where the "disposal of hazardous waste was a foreseeable byproduct of, but not the purpose of the transaction giving rise to" arranger liability and the railroads liable as owners of a facility. However, the district court then determined that the harm was divisible and apportioned liability between

the potentially responsible parties ("PRPs"), holding the railroads liable for nine percent of the total response costs, and Shell liable for six percent. Importantly, the district court did not apportion the "orphan share" attributable to the defunct B&B (about 85 percent of the liability) to the PRPs, leaving it as an unrecovered cost for the government plaintiffs to absorb. *United States v. Atchison Topeka & Santa Fe Ry. Co.*, 2003 WL 25518047 (E.D. Cal. July 15, 2003) (Judge Oliver W. Wanger). On appeal, the Ninth Circuit upheld the determination that Shell could be liable as an arranger, agreeing that an entity can be an "arranger" even if it did not intend to dispose of the product, because "spillage" is "disposal" and the spillage by B&B of Shell's chemicals was foreseeable. However, although the Ninth Circuit validated the divisibility doctrine, acknowledging that "apportionment is available at the liability stage in CERCLA cases," it held that the PRPs had failed to prove a "reasonable basis for apportioning liability in this case." *United States v. Burlington Northern & Santa Fe Ry. Co.*, 502 F.3d 781 (9<sup>th</sup> Cir. 2007).

## Arranger Liability

Affirming that arranger liability is a fact-specific inquiry that must be decided on a case-by-case basis, the Supreme Court held that the standard for liability had not been met in this case with respect to Shell. The Court held that because CERCLA does not specifically define what it means to "arrange for" disposal of a hazardous substance, the phrase should be given its ordinary meaning. In common parlance, "arrange" implies action directed to a specific purpose, so that an entity may qualify as an arranger under CERCLA "when it takes intentional steps to dispose of a hazardous substance." Here, even



though Shell knew spills and leaks would result during the transfer of product to B&B, the facts did not support the conclusion that Shell entered into sales with the intent that at least a portion of the product be disposed of during the transfer process. Instead, the Court found that Shell took numerous steps to encourage its distributors to reduce the likelihood of spills (even though “Shell’s efforts were less than wholly successful”), and that mere knowledge of spills and leaks was insufficient to support a finding that Shell “arranged for” the disposal of its product under CERCLA.

#### Apportionment (Divisibility)

The Supreme Court pointed out that CERCLA does not contain joint and several liability language. Instead, the notion that PRPs should be held jointly and severally liable is a judicial doctrine grounded in Section 433A of the Restatement (Second) of Torts, which provides:

When two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.

The Court thus held, following a number of circuit court decisions, that “apportionment is proper when ‘there is a reasonable basis for determining the contribution of each cause to a single harm.’” Recognizing that “not all harms are capable of apportionment,” the Court held that in cases where multiple parties cause a

single harm, the defendants bear the burden of proving divisibility of that harm.

The Court reversed the Ninth Circuit’s opinion that the evidence for divisibility and apportionment on which the district court relied was not sufficient “to establish the precise proportion of contamination.” The district court based its calculation on three figures – the percentage of the total area of the facility that was owned by the railroads, the duration of B&B’s business divided by the term of the railroads’ lease, and the Court’s determination that only two polluting chemicals were responsible for roughly two-thirds of the contamination requiring remediation – and then added a 50 percent margin of error to reach its determination that the railroads were responsible for nine percent of the total cleanup costs. Based on that, the Supreme Court concluded that “the facts contained in the record reasonably supported the apportionment of liability.”

In so holding, the Court also emphasized that equitable considerations “play no role in the apportionment analysis; rather, apportionment is proper only when the evidence supports the divisibility of the damages jointly caused by the PRPs.” By contrast, where PRPs are jointly and severally liable, contribution actions allow the PRPs to recover from each other on the basis of equitable considerations.

#### What Does This Opinion Mean to You?

The implications of the decision will continue to evolve, but for now it appears that:

- The decision will make it harder to pursue entities as “arrangers.” Mere knowledge



that disposal occurs during transfer or use of a product is not sufficient.

- Increase in litigation regarding whether “arrangers” took “intentional steps to dispose of a hazardous substance.”
- More litigation regarding what constitutes a “reasonable basis” for apportionment and divisibility.
- More focus by PRPs regarding causation of contamination and divisibility than on allocation based on equitable factors.
- Increase in litigation regarding responsibility for orphan shares if there is a basis for apportionment and divisibility.
- Potential increased risk to property owners for orphan shares not allocated to other PRPs where the other PRPs can prove that the damages are divisible and that there is a reasonable basis for apportionment.



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Lisa is a partner at the Denver office of Snell & Wilmer. She has extensive experience in environmental litigation matters. She has litigated actions arising under state and federal superfund (CERCLA) laws, natural resource damages, the Clean Water Act (CWA), toxic mold, Resource Conservation and Recovery Act (RCRA), NEPA, underground storage tank law, toxic and environmental tort and class action litigation for personal injury and property damage, and defense of citizen suit actions. Outside of the environmental arena, Lisa has litigated products liability claims, fraudulent advertising claims, insurance coverage, and construction defect cases.