Environmental Transactions and Brownfields Committee Newsletter

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MESSAGE FROM THE CHAIR

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This newsletter covers a number of recent developments that should be of interest to transactional environmental attorneys. The first article discusses the U.S. Supreme Court's May 4, 2009 decision in *Burlington Northern and Santa Fe Railroad v. U.S.*, 129 S. Ct. 1870, 2009 WL 1174849. This important ruling by the Supreme Court narrows the scope of "arranger" liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and diminishes the threat that a court will find "joint and several" liability if there is a reasonable basis for apportioning the liability among the parties. The ruling is likely to have a dramatic impact upon negotiations between Potentially Responsible Parties (PRPs) and the government and to increase the size of the "orphan share" at contaminated sites.

Another article discusses a number of standards that are under development by ASTM and how those standards might impact real estate and corporate transactions. They include potential revisions to ASTM's Phase II Environmental Site Assessment Standard (E 1903), revisions being contemplated in the Vapor Intrusion Screening Standard Practice (E 2600), and a proposed standard guide to address Continuing Obligations under the Brownfields Amendments of 2002. ASTM standards are frequently adopted into regulations or guidelines issued by federal and state agencies, so it is important for transactional attorneys to monitor and help shape these standards. A related article discusses standards being developed by ANSI and how you can get involved in that process.

Another article summarizes the changes made on May 7, 2009, in the New Jersey Site Remediation program. Modeled upon similar programs in Massachusetts and Connecticut, New Jersey has now adopted a Licensed Site Remediation Professional (LSRP) program which will govern most cleanups in that state. New Jersey will have direct oversight over some other cleanups.

Another article addresses the environmental risks associated with large scale carbon capture and sequestration projects and the commercial and public risk transfer mechanisms that can be used to mitigate those risks.

We also wanted to be sure you were aware of the launching of the "Million Trees" public service project. This initiative, which was spearheaded by the Environmental Transactions and Brownfields Committee (ETAB Committee), was formally launched this past April. A tree planting activity took place in September at the 17th Section Fall Meeting in Baltimore and another in November at the national EPA Brownfields conference in New Orleans. Please support these efforts by joining us in person or making a donation to one of our partnering organizations. See http://www.abanet.org/environ/projects/million_trees/home.shtml.

We are also pleased to report that the long-awaited Section discussion board is now up and running. To access the board, go to http://www.abanet.org/environ/

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DiscussionBoard. We intend to use the list serve more often this coming year to alert ETAB Committee members to discussions on topics of interest to transactional attorneys.

If you would like to get more involved in the ETAB Committee, do not hesitate to contact me or any of the committee's vice chairs.

U.S. SUPREME COURT NARROWS ARRANGER LIABILITY, SUPERFUND LIABILITY NOT NECESSARILY JOINT AND SEVERAL

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On May 4, 2009, the U.S. 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

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expanded operations onto an adjacent 0.9-acre parcel owned by two railroads that were predecessors to Burlington Northern & Santa Fe Railway Co. (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 to 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 U.S, 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. EPA and the 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 finding the railroads liable as owners of the 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 9 percent of the total response costs, and Shell liable for 6 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 (9th 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 CERLCA "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

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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.

Implications for Environmental Law Practitioners

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.
- There will likely be an increase in litigation regarding whether "arrangers" took "intentional steps to dispose of a hazardous substance."
- There will likely be more litigation regarding what constitutes a "reasonable basis" for apportionment and divisibility.
- There will be more focus by PRPs regarding causation of contamination and divisibility than on allocation based on equitable factors.
- There will likely be an increase in litigation regarding responsibility for orphan shares if there is a basis for apportionment and divisibility.
- There will be a 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.

LIKE TO WRITE?

The Environmental Transactions and Brownfields Committee welcomes the participation of members who are interested in preparing this newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact the one of the editors: Dean Calland (dcalland@bccz.com), Tom Doyle (tdoyle@pierceatwood.com), or Robert Gelblum (rob.gelblum@ncmail.net).

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