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### U.S. SUPREME COURT ISSUES IMPORTANT DECISION REGARDING SUPERFUND APPORTIONMENT AND ARRANGER LIABILITY ISSUES

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May 5, 2009

**On May 4, 2009, the United States Supreme Court issued its decision in *Burlington Northern & Santa Fe Railway Co. v. United States (BNSF)*, in which the Court addressed the apportionment of liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and the importance of "intent to dispose" when imposing arranger liability under CERCLA. Both issues arise frequently in CERCLA cases and the resolution of CERCLA liabilities will be significantly affected by this decision.**

The case came before the Supreme Court on separate petitions from two private parties held liable at a CERCLA site ("Site"), in California. The Burlington Northern & Santa Fe Railroad ("Railroad"), as owner of a portion of the Site, petitioned on the issue of apportionment of liability. The District Court had found the Railroad severally liable for 9% of the response costs, based on an evaluation of a number of factors, including the percentage of the Site that the Railroad owned (approximately 20%), the length of time that the Site owners leased the Railroad property, and the type and amount of contamination originating on

the Railroad property. The Ninth Circuit reversed because the apportionment evidence was not sufficiently clear and failed to provide a reasonable basis for apportionment. The District Court opinion was also noteworthy because, in dealing with another frequent issue in CERCLA cases — the orphan share (how to account for the share of liable parties now defunct) — the District Court refused to allocate any of the orphan share of the Site operator and partial owner to the Railroad or Shell Oil, the only financially viable liable parties before the court.

Shell Oil filed a separate petition before the Supreme Court on the issue of arranger liability. Shell Oil sold a product, a soil fumigant, to the operator of the Site. Shell Oil was aware that purchasers of its product had sloppy handling procedures that resulted in spills and leaks. Shell Oil provided proper handling instructions and other advice to its purchasers, including the operator of this Site. Shell Oil argued that it had not arranged for disposal of its hazardous substances, and had no CERCLA liability. The District Court imposed liability, although it apportioned the liability and found Shell Oil liable for 6% of the Site response costs. The Ninth Circuit affirmed the finding of

liability against Shell Oil, ruling that arranger liability can be imposed even absent an intent to dispose, if the spills and leaks were foreseeable. But the Ninth Circuit reversed the District Court's apportionment of Shell Oil's liability because the evidence in the record failed to provide a specific, reasonable basis for the apportionment.

The Supreme Court reversed the Ninth Circuit decision on both issues. With regard to the allocation of liability issue, the Court held that CERCLA does not mandate joint and several liability in every case. Instead, CERCLA adopts common law concepts of joint and several liability, as reflected in Section 433A of the *Restatement (Second) of Torts*. The *Restatement* allows for apportionment of liability when "there is a reasonable basis for determining the contribution of each cause to a single harm." The Court found that, although the burden of proof rests with the parties seeking to avoid joint and several liability, there can be apportionment when a reasonable

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factual basis for apportionment exists in the record. The Court rejected the Ninth Circuit's finding that the party seeking apportionment needed to establish the precise responsibility of each party to the harm.

Apportionment can be based on a reasonable, although less than precise, factual basis

The Supreme Court also reversed the Ninth Circuit on the arranger liability issue. The Court viewed arranger liability as falling along a range, with clear cases at either end of the range. On one end, for example, is a clear case of arranger liability, when the sole purpose of the transaction is to dispose of a used and no longer useful hazardous substance. On the other end, for example, is a clear case of no arranger liability, when an entity sells a new and useful product with no knowledge that the purchaser will dispose of the product so as to cause contamination.

The Shell Oil factual situation fell in between. Shell Oil sold a new and useful product, but was aware that the purchaser would spill or leak the product into the environment. To determine whether Shell Oil was

subject to CERCLA arranger liability, the Court looked to the plain language of CERCLA. The Court found that "arrange" implies a specific purpose, so that arranger liability applies when a party takes intentional steps to dispose of a hazardous substance. The Court held that knowledge of spills alone is not sufficient to prove that a party planned for disposal. The party must have entered into the transaction with the intention that at least a portion of the product be disposed. Based on the record in BNSF, the Court found that the evidence did not support an inference that Shell Oil intended disposal of its product. The record showed that Shell Oil encouraged its customers, including the Site operator in BNSF to reduce the likelihood of spills. The Court, therefore, held that no CERCLA arranger liability could be imposed on Shell Oil in this case.

This decision will affect every CERCLA case brought by a government entity. The apportionment of liability issue will be front and center as a defense for every party who may face CERCLA liability. While the exact impacts are not clear, every CERCLA defendant will now focus its litigation strategy and

settlement negotiations on facts supporting a reasonable basis of apportioning the smallest possible percentage of liability to it. CERCLA cases will likely turn on apportionment, and avoiding orphan shares of absent or bankrupt parties.

The arranger liability aspect of BNSF has less broad of an application, but is also significant. In any CERCLA case where intent to dispose is not obvious from the nature of the transaction, the intent of the alleged arranger will become a key factual issue.

**Parties in CERCLA cases will be arguing about the implications of the BNSF decision for years to come. Although the full potential impact of these rulings cannot adequately be addressed in this short alert, if you would like to receive a more detailed analysis of the implications of the decision, or to discuss the impacts of the decision on any pending CERCLA matters, please contact:**

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