

U.S. Supreme Court Issues Important Decision Regarding Superfund Apportionment And Arranger Liability Issues

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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 percent 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 percent), 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 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 six percent of the Site response costs. The Ninth Circuit affirmed the finding of liability against

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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 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 importance of the apportionment issue can be seen in its application in the BNSF case. The Railroad and Shell Oil were the only financially viable parties from whom the United States could recover costs to perform remediation. The entity that owned and operated the Site was bankrupt. The United States sought joint and several liability so that the Railroad and Shell Oil would bear the financial share of the bankrupt operator of the Site. Because the Supreme Court imposed apportioned liability, the United States had to bear the costs that would otherwise have been the responsibility of the bankrupt operator. The Railroad only had to pay nine percent of the costs. And, because of the Supreme Court's resolution of the arranger liability claim against Shell Oil, as described below, Shell Oil had no liability. As a result, the United States recovered only nine percent of the costs to remediate the Site.

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 a less broad 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.

Partners Notes

Work Begins At The Lowenstein Center For The Public Interest

Lowenstein Sandler PC has officially begun work at the Lowenstein Center for the Public Interest. The Center is devoted to expanding the impact of Lowenstein Sandler's pro bono work and increasing the participation of the firm's attorneys and staff, as reflected in its mission statement.

The Center is led by member of the firm Kenneth H. Zimmerman and supported directly by attorneys who each devote 25 percent of their time to Center activities. Members of the inaugural staff are: Brooke Gillar, Melissa Lozner, Sally Na, David Reiner and Eric Weiner.

The Mission

From its founding, Lowenstein Sandler has been committed to advancing the public interest and serving the communities in which firm employees live and practice. The Lowenstein Center for the Public Interest couples the firm's strong pro bono program with other aspects of the firm's civic engagement to address significant social problems and offer meaningful assistance to low-income, disadvantaged and other vulnerable persons and the organizations that advocate for and support them.

The Center:

1. proactively identifies issues, programs, and partners to ensure that the firm's involvement achieves significant impact for those in need, building on the strong interests and passions of firm attorneys and staff and reinforcing the firm's commitment to civic leadership;
2. encourages the broadest possible participation from all of our attorneys to

bring to bear the judgment and experience of our senior attorneys while recognizing the inherent professional development opportunities for all attorneys;

3. ensures that attorneys, professional staff, and others in the firm participate in meaningful pro bono and civic opportunities;

The Center aims to:

4. increase opportunities to work with our neighbors, clients, and in our communities to advance the common good;

5. promote collaboration among attorneys and staff and, more broadly, enhance morale and spirit within the firm;

6. advance recruitment and retention of talented attorneys; and

7. fulfill our responsibilities as legal professionals and as citizens

Focusing its efforts in the following areas: (1) children/education, (2) community and sustainable development, (3) civil and human rights, (4) immigration, (5) criminal justice, and (6) the arts, the Center has already enabled Lowenstein Sandler to undertake pro bono appellate work on behalf of national children's rights organizations and transactional work to expand community responses to the foreclosure crisis and promote commercial development in distressed urban areas. Work has also included individual representation of immigrant children through the Kids in Need of Defense (KIND) program and ongoing impact litigation on behalf of developmentally disabled adults and children in special education programs, among many other efforts.

Please email the author at jstewart@lowenstein.com with questions about this article.