CLIENT ALERT

U.S. Supreme Court Issues Significant Reversal in Key CERCLA Case, Narrowing Scope of "Arranger" Liability and Upholding Apportionment Principles

May.04.2009

The U.S. Supreme Court issued a significant decision today regarding liability and apportionment under the Superfund law (known as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.*). In *Burlington Northern & Santa Fe Railway Co. v. U.S.*, by a margin of 8-1, the Court significantly narrowed the scope of "arranger" liability and upheld a district court's apportionment of liability based on divisibility of harm. For those entities currently subject to "arranger" liability, the decision creates an opportunity for possible reduction in CERCLA liability.

Facts

Brown & Bryant (B&B) operated an agricultural chemical distribution business on property adjacent to land owned by several railroads. Beginning in the 1960's, B&B purchased the pesticide D-D from Shell Oil Co., and Shell would arrange for delivery. Leaks and spills of the D-D were common upon transfer, and Shell took steps to reduce these spills. In the 1980's state and federal authorities began investigation and remediation of a large plume of contaminated groundwater under the facility. EPA and the state pursued Shell and the railroads for cost recovery under CERCLA.

Lower Courts

The district court found both the railroads and Shell to be PRPs - it held that the railroads were the current owners and Shell "arranged for" disposal under § 9607(a)(3). The district court also performed an in-depth factual analysis of the amount of land owned, the amount of contamination by each of the relevant chemicals, and the time period of the ownership to reach an apportionment liability of 9% to the railroads and 6% to Shell.

On appeal, the Ninth Circuit found that Shell was liable as an "arranger," finding that it "arranged for delivery of the substances," "was aware of . . . the transfer arrangements," "knew that some leakage was likely," and "provided advice and supervision concerning safe transfer and storage." *U.S. v. Burlington N. & Santa Fe.Ry. Co.*, 520 F.3d 918, 950 (9th Cir. 2008). On the apportionment issue, the Ninth Circuit rejected the district court's apportionment analysis and held that both the railroads and Shell were jointly and severally liable for the Governments' costs.

Today's Opinion

The Supreme Court reversed the Ninth Circuit on both issues. First, it held that Shell was not liable for any of the response costs because it did not qualify as an "arranger." Looking first to the language of the statute, the Court recognized that CERCLA does not define "arranger." The Court looked to the plain meaning of "arrange" and found that "an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance." Knowledge alone, the Court stated, "is insufficient to prove that an entity planned for the disposal," even more so "when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product." The Court took particular notice of Shell's "numerous steps" to encourage its

distributors "to *reduce* the likelihood of such spills." The "mere knowledge that spills and leaks continued to occur" did not mean that Shell "arranged for the disposal of D-D within the meaning of § 9607(a)(3)."

Second, the Court reversed the Ninth Circuit's finding of joint and several liability, instead upholding the district court's apportionment. The Court found that the district court had a sufficient record to reasonably apportion liability as it did. Ultimately, the district court's "allocation of liability [wa]s supported by the evidence and comports with the apportionment principles" outlined by the Court.

Companies who are currently liable under CERCLA at sites as an "arranger" should take today's opinion as an opportunity to review whether the "arranger" claims against them are still viable. The Court not only narrowed prior judicial interpretations of "arranger," but also provided a more concrete definition to guide liability determinations. The decision also highlights the importance of spill prevention for programs in the sale and transport of hazardous material. Finally, the Court lauded and upheld the principles of apportionment that are so critical to both private and judicial allocation determinations.

Click for a copy of today's opinion. Please contact Rich Schwartz, Kirsten Nathanson, Dan Wolff, or Alison Share if you have any questions on the decision or its implications for your CERCLA liability.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Richard E. Schwartz
Senior Counsel – Washington, D.C.
Phone: +1 202.624.2905
Email: rschwartz@crowell.com

Kirsten L. Nathanson
Partner – Washington, D.C.
Phone: +1 202.624.2887
Email: knathanson@crowell.com

Daniel W. Wolff
Partner – Washington, D.C.
Phone: +1 202.624.2621
Email: dwolff@crowell.com