

Supreme Court Narrows "Arranger" Liability in CERCLA Litigation

By Carter E. Strang

On May 4, 2009, the United States Supreme Court (8-1) significantly narrowed "arranger" liability in CERCLA cases. It held, in *Burlington Northern & Santa Fe Railway Co. v. United States*, that under CERCLA: 1) parties are not liable as "arrangers" under CERCLA unless an "intent to dispose" of the waste by the alleged arranger is proven, and 2) that where a "reasonable basis" exist to apportion liability, "joint and several" liability is not applicable.

Defendant Shell was found liable in the trial court as an "arranger" for the sale of a pesticide to a customer, which customer's product handling practices at its facility caused it to spill and leak into the soil and groundwater. It was assessed 6 percent liability on an allocation basis for the \$8 million in clean up costs incurred by EPA. The co-defendant railroads (there were two of them) were liable as property owners of an adjacent parcel that the Shell customer leased and which became contaminated due to the customer/lessee's waste handling practices of many chemicals. They were assessed 9 percent liability. The customer had long ceased operation and was unable to pay any damages (it, then, represented an "orphan" share of liability).

The 9th Circuit upheld the "arranger" liability determination against Shell because evidence existed showing it was aware of the fact that its customer's product handling practices during transfer of it from Shell resulted in spills and leaks of the product into the environment. However, the Court reversed the trial court's allocation of damages against both Shell and the railroad defendants, holding "joint and several" liability was proper, thereby making each liable for the \$8 million of the EPA's costs.

The Supreme Court held that "[b]ecause CERCLA does not specifically define what it means to 'arrange[]' for disposal of a hazardous substance, the phrase should be given its ordinary meaning." The ordinary

meaning of "arrange," it further stated, implies action directed to a specific purpose, which requires a showing that it took "intentional" steps to dispose of the substance. Here, Shell's knowledge of "minor, accidental spills" that occurred during the transfer process to the customer did not equate with the requisite "intent," particularly in light of Shell's efforts to have the customer, and other customers in general, to adopt practices designed to reduce spills and leaks.

It also held that sufficient evidence existed to support the trial court's determination that an apportionment of liability (at 9 percent), rather than joint and several liability, was proper as to the railroad defendants. Such evidence considered included information about the percentage of land leased at the site in question, the duration and term of the lease, and information about the specific contaminants, including their location, migration and remediation.

The Court's holding is most noteworthy for its "arranger" liability determination. Certainly, parties facing such liability will be better able to challenge such claims. This will be problematic for the United States and may also be problematic for other CERCLA defendants facing other types of PRP liability. Such parties will likely be looked to by the United States to cover for damages that "arranger" defendants may now be able to avoid.



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