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Rough Justice: U.S. Supreme Court Liberalizes Use of Apportionment Instead of Joint and Several Liability in Superfund Litigation and Clarifies Conditions for Imposing "Arranger" Liability under CERCLA

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In a much anticipated ruling, a nearly unanimous U.S. Supreme Court has determined that the imposition of liability as an "arranger" under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," commonly known as the "Superfund" statute) requires evidence of taking "intentional steps" to arrange for the disposal of hazardous substances – a company's mere knowledge of continuing spills and leaks by the purchaser of its chemicals is insufficient to impose arranger liability. *Burlington Northern & Santa Fe Railway Co., et al. v. United States*, 556 U.S. ___ (2009).

Equally significant, in a major defeat for federal and state government agencies seeking to recover costs for investigations and cleanups of contaminated soil and groundwater, the Court also ruled that defendants may defeat the imposition of "joint and several liability" in Superfund actions where they provide evidence of a "reasonable basis" for apportioning liability, even if such an apportionment is less than exact or fully precise.

In ruling on the scope of "arranger" liability, the Court noted that there is no specific definition of "arranger" contained in the statute, and therefore the term is to be given its ordinary meaning. That meaning involves issues of "intent" and the subjective determination of whether the potentially responsible party ("PRP") intended that a disposal of hazardous waste was to occur. Notably in this case, the defendant Shell Oil Company had transferred title to its chemicals to its customer, who caused the spills during delivery and storage. The Court found that mere knowledge that the customer sometimes spilled the chemicals was insufficient to make Shell an "arranger."

Regarding joint and several liability, the High Court made clear that apportionment of liability in the context of a CERCLA Section 107 action does not rest upon equitable considerations (as it does in a CERCLA Section 113 contribution action). Instead, the Court looks to whether defendants put forward evidence upon which to base a fixed amount of damage for which they are liable. The requisite showing can be satisfied by establishing facts as simple as: 1) the percentage of land surface area owned or operated by a PRP in a contaminated site, 2) the duration of the PRP's ownership period relative to the

overall duration of time during which spills and leaks occurred, and 3) the volume of hazardous substances disposed on a PRP's portion of a site relative to other portions of the site.

The Court also appears to have afforded trial judges considerable latitude to rely on multi-factor analyses to arrive at apportionments of liability, particularly where they include a small upward adjustment to account for any "margin of error" in their apportionment analysis.

This ruling continues the Court's recent string of decisions that clarify an often ambiguous statute and define the scope of the government's power to address environmental problems. Ultimately, the imposition of joint and several liability can only be avoided based on facts contained in the litigation record before the trial judge. This is necessary to allow the judge to reasonably support an apportionment analysis.

Thus, the practical import of the Court's decision in *Burlington Northern* may be to lower the bar for judges to apportion liability while concurrently creating an incentive for PRPs to be more forthcoming with evidence that they have some, rather than no, liability under CERCLA. For many companies facing contaminated property issues, the ruling may dictate a fundamental rethinking of their traditional analysis of CERCLA risks. For those already facing Superfund claims, it may suggest a need to rethink potential litigation strategies.

Morrison & Foerster LLP has advised clients on CERCLA liability and related environmental risk matters in transactions and represented a variety of companies in Superfund litigation since the inception of this statute in the 1980s. It continues to do so today. For more information or assistance in this area, please contact Michele Corash or Robert Falk in our San Francisco office at Mcorash@mofo.com or Rfalk@mofo.com, respectively, or Peter Hsiao in our Los Angeles office at Phsiao@mofo.com.
