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ENVIRONMENTAL LAW

High Court to Decide Who Should Pay for Cleanup Under CERCLA

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Special to the Legal

On Oct. 1, the U.S. Supreme Court agreed to hear the challenges of Shell Oil Co. and railroads Burlington Northern & Santa Fe Railway Co. and Union Pacific Railroad Co., from the decision of the 9th U.S. Circuit Court of Appeals in *Burlington Northern & Santa Fe Railway Co. v. United States* and *Shell Oil Co. v. United States*. In their petitions for certiorari, Shell and the railroads asked the Supreme Court to consider issues concerning joint and several liability under the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA, and the manner in which liability to fund the cleanup of a Superfund site may be apportioned.

UNDERLYING CONTAMINATION AND EPA INVESTIGATION

Burlington Northern & Santa Fe Railway Co. v. United States and *Shell Oil Co. v. United States* stemmed from a cleanup of a California agricultural chemical distribution facility, with extensive soil and groundwater contamination resulting primarily from years of pesticide use. The facility was owned and operated by Brown & Bryant Inc. A small portion of the facility's operations were on land leased by the railroads to B&B. In 1991, the U.S. Environmental Protection Agency ordered the railroads to undertake certain steps to prevent further contamination on that portion of land they owned; and in 1992, the railroads sued B&B seeking contribution towards costs incurred in the cleanup ordered by the EPA.

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The EPA and the California Department of Toxic Substances Control, or DTSC, expended substantial amounts to clean up the site. In 1996, the EPA and the DTSC sued B&B, Shell and the railroads under the CERCLA for recovery of their site cleanup and investigation costs. B&B, which was found to be in violation of hazardous waste laws and to have caused significant soil and groundwater contamination, became defunct shortly after being ordered to remediate hazardous substances in soil and groundwater at the site.

The EPA and the DTSC thus looked to Shell and the railroads to recover their response costs and fund cleanup of the entire site. The government's asserted basis for identifying Shell as a potentially responsible party, or PRP, was its having manufactured and sold a fumigant, which was placed in the soil at the site and used to safeguard crop roots. The railroads were identified as PRPs because they owned and leased to the facility a small portion of the land on which the facility's operations were located. Shell was on the hook as an "arranger" and the railroads as "owners" under the CERCLA.

DISTRICT COURT APPORTIONED LIABILITY AMONG THE 3 PRPS

In 1999, the District Court considered the liability of each of the parties to fund the cleanup and pay response costs. The District Court determined that Shell and each of the railroads were potentially responsible parties and were liable under the CERCLA for the almost $8 million in cleanup and response costs incurred to address contamination at the site from the storage and distribution of chemicals.

Although the government asked the District Court to find these PRPs jointly and severally liable for all the costs, the District Court found sufficient evidence and reasonable grounds to divide liability among the PRPs, apportioning liability based on each party's contribution to the environmental harm. Remarking on the heavy burden that Shell and the railroads were required to overcome to justify apportionment of damages, the District Court determined that these PRPs had demonstrated the requisite grounds for apportionment and had adduced sufficient evidence to support divisibility.

The District Court employed a formula to apportion cost responsibility based on the percentage of property the railroads owned and the railroads' years of ownership. To devise the responsibility of Shell, the District Court considered how much hazardous substance leaked or spilled during delivery and compared that to the total amount of spilled chemicals. Notwithstanding its authority to reallocate defunct-B&B's "orphan" share (by far the largest share) to the other PRPs under the CERLCA, the court declined, concluding that doing so would

be inequitable to Shell and the railroads. Because the District Court's ruling resulted in Shell and the railroads' being liable for only a small percentage of the total costs, the EPA and the DTSC were left with significant unrecovered costs.

9TH CIRCUIT REVERSED

The EPA and the DTSC appealed the District Court's ruling to the 9th Circuit, arguing that the District Court lacked a reasonable basis to apportion liability, and arguing in favor of imposition of joint and several liability. The 9th Circuit agreed with the government and, in 2007, reversed the District Court's apportionment of liability under the CERCLA.

The court did not foreclose the potential that harm may be "divisible" or "apportionable" in some circumstances (citing to §433A of the *Restatement of Torts*, which circuit courts typically consider in determining whether apportionment applies in a CERCLA case), but effectively treated apportionment as the exception to the rule of joint and several liability under the CERCLA. The court disagreed with the lower court's approach, finding both that the PRPs fell short of proving a "reasonable basis" for apportioning liability, and that the evidence was not "sufficiently clear" to support the lower court's division and apportionment of liability as among Shell and the railroads.

Instead, the 9th Circuit found each of the three remaining PRPs jointly and severally liable under the CERCLA for millions of dollars in cleanup costs, even though the trial court had found Shell and the railroads liable for only a small portion (under 10 percent each) of the government's cleanup costs. Shell and the railroads unsuccessfully sought en banc consideration by the 9th Circuit. A dissenting opinion to the decision denying the petition for rehearing en banc argued that the panel's decision imposed a test for apportionment of liability that was "novel and unprecedented," which PRPs could not possibly satisfy.

HIGH COURT GRANTS PETITIONS FOR CERTIORARI

In their petitions for certiorari, Shell and the railroads argued that the 9th Circuit erred and departed from decisions of its sister circuit courts by reversing the District Court's divisibility analysis, rejecting the basis on which the District Court had approximated the CERCLA responsibility of each, and imposing joint and several liability. Both Shell and the railroads contended that they should not bear responsibility for the entire cost of the cleanup, and that Congress did not intend CERCLA liability to be joint and several because of the risk that it could saddle parties who only minimally contribute to contamination with huge expenses.

Shell further argued that the 9th Circuit erroneously imposed liability against it for merely selling the fumigant to B&B. In this regard, Shell contended that the 9th Circuit's overly expansive application of arranger liability was an outlier, and that the 9th Circuit stood alone in finding CERCLA liability against a manufacturer of a chemical as an "arranger of hazardous substance disposal" based only on its sale of a "commercially useful product." Shell further pointed to the fact that the fumigant was shipped by common carrier with title, possession and ownership transferred to B&B on arrival, such that "the manufacturer lacks ownership or actual control of the product that is spilled or leaked into the environment."

In response to Shell's claims that the 9th Circuit improperly imposed liability based on "the mere sale of a commercially useful product," the government opposed Supreme Court review, arguing that Shell "was deeply involved in the [chemical] delivery process" and knew that spills of the chemical "were inherent and inevitable in the delivery process that Shell arranged."

Representatives of the business community including the U.S. Chamber of Commerce, the American Petroleum Institute, the Association of American Railroads and the American Chemistry Council, among others, filed amicus briefs supporting petitioners' request that the Supreme Court review the case, out of concern for the chilling effect that broader exposure for shouldering the costs of site cleanups would have on companies that produce and supply chemicals in their daily course of business. Specifically, the amici argued that, if allowed to stand, the 9th Circuit's decision would "impose substantial and unwarranted burdens on manufacturers and suppliers of chemicals and other products and disrupt longstanding relationships between suppliers and the common carriers that deliver their goods."

On Oct. 1, the Supreme Court agreed to hear the challenges of Shell and the railroads to the 9th Circuit's decision. Shell and the railroads filed their briefs in mid-November, presenting for review the questions of whether joint and several liability may be imposed upon PRPs even where a district court finds an objectively reasonable basis for divisibility that would suffice at common law, and whether arranger liability under the CERCLA may be imposed on a manufacturer who merely sells and ships, by common carrier, a commercially useful product, and who transfers ownership and control to a purchaser who in turn causes contamination involving that product.

The Supreme Court's consideration of these issues may result in the court's defining or containing the scope of joint and several liability under the CERCLA, and might clarify the type and quantum of evidence, records and/or expert testimony needed to establish a reasonable basis for apportionment and avoid imposition of joint and several liability. Conversely, if the Supreme Court affirms the 9th Circuit's rulings, PRPs could be faced with a difficult burden of proving a reasonable basis for apportionment and more often face imposition of joint and several liability in the future. In addition, the Supreme Court's ruling could conceivably delimit the exposure of manufacturers involved with the sale of chemical products by narrowing the range of who may be liable as an "arranger" under the CERCLA.

The Supreme Court will hear oral argument in these consolidated matters Feb. 24, 2009. •