MAY 2009

SCALING BACK SUPERFUND: SUPREME COURT NARROWS SCOPE OF "ARRANGER" AND AFFIRMS "DIVISIBILITY" DEFENSE TO JOINT AND SEVERAL LIABILITY

On Monday, May 4, 2009, in an 8–1 decision, the Supreme Court of the United States definitively narrowed the scope of "arranger" liability under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).[1] The Court also affirmed a district court's decision to apportion liability, thereby affirming the opportunity for CERCLA defendants to broadly raise divisibility of harm as a defense to joint and several liability. Superfund litigants on both sides of the aisle will take note of this holding and its potential implications for potentially restricting the scope of Superfund liability in all contexts.

BACKGROUND

The facts of the case are straightforward. In 1960, Brown & Bryant ("B&B") began operating an agricultural chemical distribution business, purchasing pesticides and other chemical products from suppliers such as Shell Oil Company ("Shell"). B&B operated in Arvin, California, on 3.8 acres of former farmland. In 1975, B&B expanded its operations onto an adjacent 0.9 acre parcel of land owned jointly by what is now the Burlington Northern and Santa Fe Railway Company as well as the Union Pacific Railroad Company ("Railroads"). B&B stored and distributed various hazardous chemicals including the pesticides D-D and Nemagon, both of which Shell sold. When D-D arrived at the site, the facility transferred the chemical from tanker trucks to a bulk storage tank. From there, B&B transferred the chemical by use of "bobtail trucks, nurse tanks, and pull rigs." During each transfer, the product leaked and spilled.

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1. *Burlington Northern and Santa Fe Railway Co. v. United States*, 566 U.S. _____ (2009) ("*BNSF*").

In light of the spills, Shell made efforts to ensure safe use of its products. Shell provided its distributors with detailed safety manuals and instituted a voluntary discount program for distributors that made improvements in their bulk handling and safety facilities. Later, Shell required its distributors to obtain an inspection and certification of compliance with applicable laws and regulations. Despite these efforts by Shell, the Court noted that B&B remained a "sloppy operator." For 28 years, spills, equipment failures, and the rinsing of tanks and trucks allowed the chemicals to seep into the facility's soil and groundwater. In 1983, the California Department of Toxic Substances Control ("DTSC") and the United States Environmental Protection Agency ("EPA") investigated the site and discovered significant soil and groundwater contamination. B&B undertook some remediation efforts but became insolvent and ceased operations. The state and federal agencies took over the remediation effort and by 1998 had spent $8 million in cleanup costs.

In the remediation process, EPA ordered the Railroads to participate in the cleanup. The Railroads sued B&B, and in 1996 the Railroads' lawsuit was consolidated with the agencies' lawsuits against Shell and the Railroads. The Eastern District of California found the Railroads liable as owners and operators of the facility and found Shell liable because it had "arranged for" the disposal of hazardous substances through its sale and delivery of D-D. The court did not impose joint and several liability on Shell and the Railroads for the entire response cost because it found that the site harm, although single in nature, was divisible and therefore capable of apportionment.

The agencies appealed the district court's apportionment, and Shell cross-appealed its liability. The Ninth Circuit confirmed the holding against Shell, holding that "Shell was aware of, and to some degree dictated, the transfer arrangements, knew that some leakage was likely in the transfer process, and provided advice and supervision concerning safe transfer and storage. Disposal of a hazardous substance was thus a necessary part of the sale and delivery process."

The Ninth Circuit, however, reversed the District Court's apportionment. The court held that the district court erred in finding that the record established a reasonable basis for apportionment. The Ninth Circuit imposed joint and several liability on both Shell and the Railroads.

The Supreme Court granted certiorari to determine whether Shell was properly held a liable party and whether Shell and the Railroads were properly deemed joint and severally liable. The Supreme Court reversed the Ninth Circuit, holding that Shell was not an "arranger" under CERCLA and affirming the district court's apportionment finding.

CERCLA "ARRANGER" LIABILITY

On the issue of Shell's liability as an "arranger," the Court acknowledged that CERCLA imposes liability for environmental contamination upon "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances." 42 U.S.C. § 9607(a). At issue was whether Shell's activity rose to the level of "arranging" for the disposal of hazardous substances. The Ninth Circuit, while conceding that Shell was not, in this instance, a traditional arranger, held Shell liable because it knew leakage of its product was likely and because disposal of the product was a "necessary part of the sale and delivery process."

The Supreme Court, rather than looking at what happened on site after Shell sold D-D, went to the language of the statute, exploring the ordinary meaning of the term "arrange." As CERCLA does not define "arrange," the Court cited to the word's dictionary definition and found that it implied "action directed to a specific purpose." Consequently, the Court held that "under the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance." The Court disagreed with the agencies' argument that Shell's continued participation in the delivery, with knowledge that spills and leaks would occur, was sufficient to establish intent to dispose. Rather, the Court found that:

> knowledge alone is insufficient to prove that an entity "planned for" the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product. In order to qualify as an arranger, Shell must have entered into the sale of D-D with the intention that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in [the statute]. Here, the facts found by the District Court do not support such a conclusion.

The Court further relied on evidence that "Shell took numerous steps to encourage its distributors to *reduce* the likelihood of such spills providing them with detailed safety manuals, requiring them to maintain adequate storage facilities, and providing discounts for those that took safety precautions." Despite the limited utility of Shell's efforts, the Court held that Shell's "mere knowledge that spills and leaks continued to occur is insufficient grounds for concluding that Shell 'arranged for' the disposal of D-D within the meaning of § 9607(a)(3)."

DIVISIBILITY AND APPORTIONMENT

After concluding that Shell should be shielded from any CERCLA liability, the Court turned to whether the district court properly apportioned liability to the Railroads, finding that they should not be exposed to joint and several liability. The Court ultimately affirmed the district court's apportionment finding.

The Court first acknowledged the possibility of a divisibility of harm defense, noting that the "'universal starting point for divisibility of harm analyses in CERCLA cases is § 433A of the Restatement (Second) of Torts.'" The Court held that apportionment is proper "where there is a reasonable basis for determining the contribution of each cause to a single harm."

The district court had found that the B&B site presented a "classic" situation to divide harm among the various liable parties. To do so, the district court calculated the Railroads' liability based on three figures:

1) the percentage of surface area owned by the Railroads (19%);
2) the length of time the Railroads leased their parcel to B&B (13 years—or 45% of the time that B&B operated there); and
3) the volume of substance-releasing activities on the B&B parcel relative to the railroad parcel (10 times)—The district court further concluded that "only spills of two chemicals, Nemagon and dinoseb (not D-D), substantially contributed to the contamination that had originated on the Railroad parcel and that those two chemicals contributed to two-thirds of the overall site contamination requiring remediation [66%]"

Accounting for these numbers, the district court multiplied the percentages together to arrive at an allocation of 6% liability on the part of the Railroads. The court then allowed for calculation errors of up to 50% and finally allocated 9% of liability on the Railroads.

The Ninth Circuit found a lack of sufficient data for these results, finding that the lease duration and size of the leased area were much too small to reliably measure harm. The Supreme Court, however, deferred to the district court, holding that "it was reasonable for the court to use the size of the leased parcel and the duration of the lease as the starting point of its analysis."

Ultimately, the Supreme Court supported the district court's divisibility of harm analysis:

> Because the District Court's ultimate allocation of liability is supported by the evidence and comports with the apportionment principles outlined above, we reverse the Court of Appeals' conclusion that the Railroads are subject to joint and several liability for all response costs arising out of the contamination at the [Site].

By doing so, the Supreme Court endorsed the divisibility of harm defense under CERCLA—a defense that Superfund defendants should look to when seeking to avoid CERCLA's draconian imposition of joint and several liability, even against the least of those parties that contribute to Superfund contamination.

IMPLICATIONS FOR SUPERFUND LITIGANTS

Litigants exposed to potential Superfund liability should consider the implications of the Supreme Court's recent ruling since the decision will affect both the fact of Superfund liability and its scope.

In the first instance, *BNSF* arms defendants with a more certain defense to "arranger" liability. Companies may now, with more confidence, raise the defense that they sold a useful product and that they should not be liable even if that sale resulted in a release of hazardous substances to the environment.

At the same time that *BNSF* significantly limits arranger liability, there are likely questions that will arise from the holding. Though the decision requires an intent to dispose in order to find arranger liability, the holding may not foreclose liability against those parties that are selling products for resale, but for which there may be evidence of an intent to dispose of a portion of the product. The Court looked to Shell's affirmative steps to ensure good housekeeping and management by its distributors. A failure to take affirmative steps like Shell's may be a distinguishing factor in other Superfund matters.

Furthermore, the Court did not completely foreclose a plaintiff's opportunity to point to a defendant's knowledge of site conditions and activity to seek arranger liability against Superfund defendants. In its analysis, the Court concedes that, in some instances, "an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous waste." Superfund plaintiffs should look to the broad facts in Superfund litigation to determine whether certain defendants actually "arranged" for the disposal of hazardous substances at a site.

Finally, in what can be seen as a significant assist to many Superfund defendants, particularly those subject to large joint and several liability claims filed by the federal government, the Supreme Court affirmed the legitimacy of divisibility of harm as a complete defense to joint and several liability under CERCLA. Defendants should consider what elements of their nexus to Superfund liability could demonstrate divisibility. The Court does not limit the defense to bright-line criteria such as property boundaries, but rather allows courts to consider issues of degree such as the amount of time a defendant operated or participated at a site and the degree to which a party's nexus contributed to a site's remediation costs. These elements should allow litigants and their experts to formulate persuasive divisibility arguments from potentially complicated facts—particularly where multiple parties have contributed to a single harm. Moreover, the Court's deference to the district court's factual findings may suggest that the battle over apportionment is more likely to be won or lost at the district court level.

CONCLUSION

Parties to CERCLA suits should consider the potential opportunities, as well as pitfalls, presented by the Supreme Court's holding in the *BNSF* case as they sort through the ever-complex minefield of Superfund litigation.

Jones Day was involved in this matter, filing an amicus brief in support of the prevailing position.

LAWYER CONTACTS

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