ARNOLD & PORTER LLP

Memorandum

From: The Environmental Practice Group

Date: May 4, 2009

RE: SUPREME COURT ISSUES LANDMARK DECISION ON SUPERFUND ARRANGER LIABILITY AND APPORTIONMENT ISSUES

The United States Supreme Court today issued what is clearly its most significant and wide-reaching opinion to date on liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). The Court dramatically narrowed the scope of CERCLA liability and gave the government a fairly resounding defeat. The case is *Burlington Northern and Santa Fe Railway Co.* v. *United States.*

In the past, two aspects of CERCLA have resulted in broad imposition of liability. First, the statute imposes liability not just on site owners and operators but also on "arrangers"—those who arranged to dispose of their hazardous substances at a site. Second, in cases where there are multiple potentially responsible parties (PRPs), CERCLA liability has generally been found by the courts to be joint and several, meaning each liable party could be pursued for the entirety of the cleanup costs. Today's opinion limits the application of both arranger liability and joint and several liability. The Court limited the scope of arranger liability by requiring an element of intent, thus reducing CERCLA liability exposure for those companies who routinely handle and sell commercial chemical products in commerce. Second, the Court pared back the application of joint and several liability under CERCLA by broadening the kinds of facts and evidence that will support an apportionment of liability.

In an 8-1 opinion written by Justice Stevens (with a lone dissent by Justice Ginsburg), the Court reversed the Ninth Circuit and held that arranger liability under CERCLA requires an element of intent. The Court found that a chemical seller's mere knowledge that a buyer will spill or leak its product is insufficient to find the seller "arranged" for the disposal of a hazardous substance when the leaks or spills occur as a "peripheral" result of the legitimate sale of a useful product. In this case, Shell Oil Company (Shell) sold and delivered agricultural chemicals to B&B, an agricultural chemical distribution business, where the chemicals spilled and leaked in the course of B&B's operations. The Ninth Circuit found Shell liable because (a) spills occurred every time Shell delivered the product; (b) Shell arranged for the delivery by common carrier; (c) Shell changed its delivery process to require the use of large storage tanks that were more likely to leak; (d) Shell provided incentives for B&B to improve the handling of the product; (e) Shell reduced the purchase price by an amount related to product losses from leakage; and (f) Shell distributed a manual for safe operation of the tanks B&B used to hold the product. The Supreme Court disagreed. It found that Shell could not be held liable as a CERCLA arranger. Although the Court recognized that 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 wastes in some instances, "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 a holding that has even greater significance than its paring back of arranger liability, the Supreme Court also found a reasonable basis for apportioning liability with respect to railroads that owned a portion of the

property where B&B had operated. This holding has wide-ranging implications for CERCLA's presumption of joint and several liability.

The District Court below had apportioned liability based on percentages of land ownership, periods of ownership, and rough estimates of the volume of releases, and assigned the railroads a 9% share. The Ninth Circuit rejected that apportionment and imposed joint and several liability on the railroads. In so doing, the Ninth Circuit stated that apportionment had to be based on "adequate records" detailing the amount of leakage attributable to activities on certain parcels, how that leakage traveled to and contaminated the soil and groundwater, and the costs of cleanup. Because such detailed information had not been presented at trial, the Ninth Circuit had found the railroads and Shell jointly and severally liable. Because such historical records are often sparse (or nonexistent) at CERCLA sites, the Ninth Circuit's holding placed a substantial burden on those PRPs seeking apportionment of liability.

Again, the Supreme Court disagreed. It found that the District Court's ultimate allocation of liability was supported by the evidence and comported with traditional tort law apportionment principles.

Today's decision will have far reaching repercussions. First, the decision should limit the government's ability to hold entities liable for "arranging" for the disposal or treatment of a hazardous substance to those situations in which an entity enters into a transaction for, at least partly, the actual purpose of disposing of a hazardous substance. An entity that sells a useful product should not be liable as an arranger under CERCLA, even if the entity has actual knowledge that its product may be improperly disposed of by the purchaser resulting in contamination. The government or other parties seeking to impose arranger liability will have to establish actual intent to dispose of the materials.

Second, the decision broadens the universe of factors that can be utilized, and lightens the evidentiary burden required, to apportion liability. As a result, the decision will cut back on the imposition of joint and several liability and reduce the likelihood that potentially responsible parties will get stuck with "orphan shares." In many multiple PRP cases, evidence of the type found sufficient by the Supreme Court will generally be available. Correspondingly, in those cases where a reasonable basis for apportionment exists, the government may now bear the burden of any orphan share liability. Today's decision will certainly create new litigation over when joint and several liability may be applied. For example, one issue not directly addressed by the court is whether a site owner with no involvement in creating the contamination will be able to argue for apportionment based on its lack of contribution to the contamination.

If you have any additional questions about this opinion and its potential ramifications to your company, please contact your Arnold & Porter attorney or:

Michael D. Daneker
+1 202.942.5177
Michael.Daneker@aporter.com

Joel M. Gross
+1 202.942.5705
Joel.Gross@aporter.com

Meetu Kaul
+1 202.942.5225
Meetu.Kaul@aporter.com