



# Environmental Law Alert

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► This Alert will highlight the recent U.S. Supreme Court decision on CERCLA environmental liability.

## ► U.S. SUPREME COURT ISSUES FAVORABLE DECISION ON CERCLA ENVIRONMENTAL LIABILITY

On May 4, 2009, the United States Supreme Court rendered a decision regarding environmental liabilities under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") which is favorable to companies alleged to be liable for the costs of cleaning up contaminated property. The decision in *Burlington Northern & Santa Fe Railway Co. v. United States* (No. 07-1601) is important for two reasons. As set forth below, it limits the liability for those who "arrange" for the disposal of hazardous substances, and approves a creative and logical allocation of liability favorable to potentially responsible parties.

### Limitation on "Arranger" Liability

In *Burlington Northern*, the United States sought to hold Shell Oil Company liable for selling a pesticide to an operator of an agricultural chemical distribution facility known as Brown & Bryant, Inc. ("B&B"), after the facility became contaminated by spills of the pesticide during transfer from a common carrier to the operator's storage tanks. The Court held that to hold a company like Shell liable under CERCLA for having "arranged for disposal or treatment" of a hazardous substance, the company must have entered into a sale of the product with the intention that at least a portion of the product would be disposed of during the transfer process. The Court held that Shell's mere knowledge that spills and leaks occurred during the transfer of the pesticide from the common carrier to the operator was an insufficient grounds for concluding that Shell "arranged" for the disposal of the hazardous substance.



This decision is significant because it raises the standard for holding a seller of a commercial product liable as an "arranger" under CERCLA by introducing a requirement that the seller intended that at least a portion of the product would be disposed of during the transfer process. It is also significant in a larger sense.

It suggests a movement away from previous judicial trends that have tended to construe CERCLA liability very broadly to further the remedial purpose of the statute.

### Discretionary Allocations of Liability

The Court also affirmed a creative mathematical allocation of the railroad property owners' share of the costs to remediate the property used by B&B, only some of which was owned by the railroad owner defendants.

The district court had previously identified three factors to support an allocation of liability to the railroad property owners in this case: (1) that the railroad parcel constituted only part (19%) of the surface area of the entire site, (2) that the railroads had leased their parcel to B&B for only a fraction (45%) of the period of time of its operations, and (3) that the releases on the railroad property accounted for no more than a fraction (10%) of the volume of hazardous substances released by B&B's activities. The district court found that spills of two particular chemicals had substantially contributed to the contamination originating on the railroads' property, contributing only a fraction (66%) of the overall site contamination requiring remediation.

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Seeking to address all three factors logically, the district court multiplied 0.19 by 0.45 by 0.66 to arrive at a calculation of liability of approximately 0.06, or 6%. It then increased this percentage by a factor of 50%, to allow for the possibility of calculation errors. Therefore, the district court allocated liability to the railroads for only 9% of the total CERCLA response costs at the site (where the total costs were in excess of \$8 million).

The United States appealed this result, arguing that CERCLA's traditional concept of "joint and several liability" – under which a potentially responsible party is liable for all CERCLA response costs, regardless of its level of responsibility – should apply. The Ninth Circuit Court of Appeals sided with the government. It held Shell and the railroads jointly and severally liable for the government's costs, finding that there was no reasonable basis for limiting the damages attributable to the railroads' activities under the facts of the case.

The U.S. Supreme Court upheld the district court's allocation. Although the Ninth Circuit had faulted the district court for relying on the "simplest of considerations," the Supreme Court noted that the district court had relied on the very same factors that the Ninth Circuit had acknowledged were relevant to the apportionment analysis, but which the Ninth Circuit found did not apply under the facts of the case.

Like its ruling on "arranger" liability, the U.S. Supreme Court's ruling on allocation in *Burlington Northern* is favorable for potentially responsible parties in CERCLA cases. A mathematical calculation like this one is a welcome alternative to the draconian "all-or-nothing" approach for which CERCLA has historically been criticized.

Hopefully, *Burlington Northern* will serve as a precedent and impetus for more federal courts to make creative and logical liability determinations by applying apportionment formulas that do not unfairly allocate costs to individual private companies far in excess of their actual shares of responsibility.

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