BRYAN CAVE
A Broader Perspective
Bulletin

Environmental Client Service Group

To: Our Clients and Friends May 7, 2009

Supreme Court Narrows Federal Superfund Liability

In a very recent two-part CERCLA decision favorable to industry, the U.S. Supreme Court on May 4, 2009: 1) narrowed the category of companies who are liable as "arrangers" for disposal under CERCLA; and 2) broadened a liable company's "divisibility" defense to CERCLA's presumptive "joint and several" liability. *Burlington Northern & Santa Fe Railway Co. v. United States* ("*BNSF*").

Narrowing of Arranger Liability

The Court held that a company who transports its useful product (*e.g.*, raw chemicals) to a facility is not liable as an "arranger" unless the government can prove the company "intended" to dispose of its useful product at the facility. The Court rejected the government's argument that since the company knew there would be minor spillage in the off-loading process at the facility, the company was liable under CERCLA as an arranger.

In this case a chemical supplier delivered its useful and unused chemicals to the owner/operator of the facility. The supplier knew that minor, accidental spills occurred during transfer of the chemicals from the common carrier to the facility's storage tanks after the chemicals had come under the facility's stewardship. The Court noted that the supplier took steps to encourage the facility to minimize spills during the transfer. The Court held that the supplier's knowledge of continuing spills and leaks was insufficient grounds to conclude that the supplier "arranged for" the disposal of its chemicals at the facility.

Practical Impact: Fewer companies who sell their useful and unused products to other companies will be prosecuted as an arranger based on incidental spills of the product at the time of delivery. The government (EPA and state agencies) will have a harder time prosecuting these cases, as they will have to prove the companies "intended" to dispose of the spilled or leaked product. Companies who sell and transport their useful and unused products may consider issuing and implementing safety notification procedures to their customers for the prevention of future spills and leaks. Such evidence will be useful in rebutting any inferences urged by the government that the company had the requisite intent to dispose of their products.

Broadening of the Divisibility Defense to Joint & Several Liability

In its second ruling, the Court relaxed the scope and nature of evidence needed by a company at a multi-party CERCLA site to defeat the imposition of joint and several liability. Under CERCLA joint and several liability, the government can prosecute any one of the companies at a multi-party site to recover 100% of its cleanup costs despite the fact that the company may have contributed a relatively minor share of the site's total contamination. Before this decision it was universally recognized that a company had a "divisibility" defense to joint and several liability, *i.e.*, if a company could establish the existence of distinct harms at the site or a single harm that was reasonably capable of apportionment, the company's liability for cleanup costs would be limited to the separate harm for which the company was responsible or its apportioned share. *See, e.g., United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992). Given the strict interpretation of this defense in the past by the government and some courts, many companies could not defeat joint and several liability because they could not establish distinct harms or a reasonable basis for apportionment at their multi-party site. The significance of the *Burlington Northern* decision is that the Court affirmed a trial court's "reasonable basis" for apportionment based in part on a relaxed standard of estimates and inferences rather than specific and detailed records.

In this case a company operated a chemical distribution business for 15 years on 3.8 acres and then expanded onto another 0.9 acres leased from a railroad for another 13 years. The company released contamination across both parcels. The government pursued the railroad for joint and several liability for the entire site. Rejecting the government's position that the harm was indivisible and not capable of apportionment, the trial court apportioned the railroad a 9% share of liability for cleanup costs. The trial court reasoned that (i) the railroad owned 19% of the site; (ii) the railroad's ownership period encompassed 45% of the time that the site operated as a waste disposal site; and (iii) 66% of the chemical contamination was associated with the type of chemicals that were disposed of on the railroad parcel. Multiplying these factors together (.19 x .45 x .66), the trial court initially assigned a 6% share to the railroad and then increased its share by 50% (*i.e.*, from 6% to 9%) to account for uncertainty in the analysis. The Supreme Court affirmed the trial court's apportionment by concluding that the record evidence before the trial court provided a reasonable basis for its 9% decision and thus rejected the government's claim that the railroad should be liable for all the cleanup costs at the site. In reaching this decision, the Supreme Court focused on whether the contamination at the site could be apportioned, implicitly rejecting the government's contention that the harm to be subjected to the apportionment analysis was the government's cleanup costs.

Practical Impact: Liable parties at some multi-party sites will be able to demonstrate apportionment with a more relaxed standard of proof to defeat the government's claim of joint and several liability. Whether a reasonable basis for apportionment exists continues to be determined by the trial court in its discretion on a case by case basis. The *Burlington Northern* provides industry at many sites with a broader, more relaxed standard to defeat the government's claim that regardless of the amount of contamination a company released at the site the company is jointly and severally liable under CERCLA for all cleanup costs.

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