

USEFUL PRODUCTS / USEFUL RULING: SUPREME COURT LIMITS SCOPE OF CERCLA ARRANGER LIABILITY

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To Our Clients and Friends:

In a decision that narrows the scope of liability under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), the United States Supreme Court held that knowledge of accidental spills and leaks of a hazardous material is insufficient grounds to establish that a corporation is an “arranger” and, therefore, liable for response costs.

The Court’s May 4 decision in *Burlington Northern & Santa Fe Railway Co. v. United States* tackled the issue of who is considered an “arranger” and, therefore, liable for cleanup costs under CERCLA, and clarified the effect of the so-called “useful products” exception to CERCLA liability. Relying on the plain language of the statute, the Court held that an entity may qualify as an “arranger” only when the entity takes intentional steps to dispose of a hazardous substance. Knowledge that accidental spills or leaks take place during delivery is not enough to impose liability, particularly when the spills occur as a peripheral result of the legitimate sale of an unused, useful product. The decision was in favor of petitioner Shell Oil Company, which had sold pesticides to a now-defunct chemical distribution business.

In a fact pattern common in CERCLA cases, prior to its bankruptcy, Brown & Bryant, Inc. distributed pesticides purchased from Shell Oil Company, which were delivered to property partially owned by Brown & Bryant and partially leased by the distributor from Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company. During delivery of the pesticides, leaks and spills typically occurred. The California Department of Toxic Substances Control and the U.S. Environmental Protection Agency discovered groundwater and soil contamination at the site in 1989 and incurred \$8 million in remediation costs, which they sought to recover from Shell and the railroads under CERCLA’s joint and several liability regime. The Court held that Shell was not liable for the cleanup, despite the fact that Shell was aware of the spills and leaks that routinely occurred during the delivery of its products.

On the separate issue of apportionment, the Court upheld the District Court’s apportionment of liability among petitioners Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company (from whom B&B had leased property), and reiterated the established rule that apportionment is proper only when there is a reasonable

basis for determining the contribution of each cause to a single harm. The Court found the District Court's apportionment to be proper where it used a formula that was based on the percentages of leased land, the period of ownership and the types of hazardous substances that required remediation on the leased land. The Supreme Court upheld this apportionment over the government's argument that it was improper to use imprecise estimates.

The impact of the decision will be significant in CERCLA litigation involving private parties and cost recovery efforts. In particular, there will now be more discovery on apportionment issues such as the respective periods of operation at, or ownership of, contaminated parcels, the nature of the contamination that actually required remedial action, etc. The clarification of the arranger liability issue should also help limit the number of manufacturers and distributors of unused products that the government seeks to hold accountable under CERCLA.

Please feel free to contact us with any questions.

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