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SAHN WARD & BAKER, PLLC, *is a full service law firm concentrating in the areas of zoning and land-use planning; real estate law and transactions; civil litigation in state and federal trial and appellate courts; corporate/business law and commercial transactions; environmental law; municipal law and legislative practice; estate planning and administration; and real estate tax certiorari and condemnation. The Firm is committed to providing its clients with the highest quality legal representation, counsel and advice and to using our expertise to achieve our clients' goals. The Firm has an extensive client base that includes Fortune 500 companies, prominent regional businesses, government agencies and authorities and individuals. Our offices are centrally located to serve clients on Long Island and in New York City.*

U.S. SUPREME COURT HOLDS THAT "JOINT AND SEVERAL" LIABILITY SHOULD NOT BE IMPOSED IN A SUPERFUND ACTION WHERE A REASONABLE BASIS FOR APPORTIONMENT EXISTS; COURT ALSO LIMITS ARRANGER LIABILITY

On May 4, 2009, the United States Supreme Court issued its decision and opinion in *Burlington Northern & Sante Fe Railway Co., et al. v. United States, et al*. (Nos.: 07-1601 and 07-1607). The 8-1 decision involves broad implications for the scope of both "arranged for" liability and apportionment of response costs for cleanups at the nation's hazardous waste sites.

One of the most draconian aspects of the Federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund") is the application of the principle of joint and several liability, whereby a potentially responsible party ("PRP") is required to pay for the entire cleanup at a Superfund site. Under those circumstances, the PRP is left with the burden of pursuing other PRPs in a contribution action under §113(f) of CERCLA. In addition, under this principle, the PRP may be required to pay for the "orphan share" of any insolvent PRPs, even in the case that those insolvent PRPs are more responsible for the contamination than the PRP being held jointly and severally liable for all of the cleanup costs.

Over the years, courts have come to recognize that liability under CERCLA should be governed by evolving principles of the common law. This is true even though there are many cases where joint and several liability has been imposed. The Restatement of Torts §433A notes the common law provides that the liability of jointfeasors (PRPs for our purposes) should be apportioned where there is a "reasonable basis for determining the contribution of each cause to a single harm." Under the common law, therefore, only where no "reasonable basis" for apportionment exists, should joint and several liability be imposed.

In the *Burlington* case, the U.S. Supreme Court, for the first time, addressed when the lower courts can appropriately apportion liability under CERCLA. Noting that the apportionment does not need to be based on mathematical certainty or detailed records, the court stated that such apportionment can be based on reasonable estimates of responsibility that take into consideration factors such as the length of time the hazardous substances were used, the extent of the impacted area, and how the use contributed to the contamination. The Court ruled that PRPs at a multi-party Superfund site are not jointly and severally liable if a "reasonable basis" exists to apportion their liability.

In the same decision, the U.S. Supreme Court also addressed the issue of when a party can be liable under CERCLA §107(a)(3) for "arranging for" disposal of hazardous substances. The Court ruled that the United States Environmental Protection Agency ("EPA") cannot hold parties liable under CERCLA as "arrangers" for disposal unless that disposal of waste was "intended." The Court held that a supplier of chemicals is not liable under CERCLA even if the supplier knew that the chemicals would occasionally be spilled when delivered, so long as the supplier had no intent to dispose of the chemicals.

Background

The *Burlington* case involved the cleanup of a chemical distribution plant near Bakersfield, California, where California's Department of Toxic Substances Control ("DTSC") and EPA (together, "the Governments") pursued three entities as PRPs: a defunct chemical distributor, Brown & Bryant, Inc.; Shell, which made the two chemicals that contaminated the Site; and the two railroads, Burlington Northern and Sante Fe Railroad and Union Pacific Railroad ("the Railroads"), which leased the subject land to Brown & Bryant. Aside from leasing the .9 acres to Brown & Bryant, the Railroads took no part in Brown & Bryant's operations. Shell transported the chemicals at its own expense and risk until they reached Brown & Bryant's facility. Shell's product arrived at Brown & Bryant's facility by truck and was transferred to Brown & Bryant's storage tanks via hoses. Spills occurred despite steps Shell took to encourage Brown & Bryant to transfer the chemicals without spilling them.

The Governments brought a cost recovery action against the Railroads and Shell. The evidence supported a finding that most of the contamination at the Site resulted from Brown & Bryant's sloppy operations which were unrelated to either the Railroads' property or Shell's chemical sales. The Governments asserted that the Railroads were liable under CERCLA §107(a)(1)-(2) as owners of a portion of the facility from which the releases had occurred, and that Shell was liable under CERCLA §107(a)(3) as a party that "arranged for disposal" of some of the released hazardous substances. The District Court ruled in favor of the Governments, finding that both the Railroads and Shell were PRPs under CERCLA. This finding was based on the fact that the Railroads owned part of the facility and Shell had "arranged for disposal... of hazardous substances," through sale and delivery of the chemicals. The District Court apportioned liability. It held that the Railroads were liable for 9% of the Governments' total response costs, while Shell was liable for 6%.

On appeal, the Ninth Circuit agreed that Shell could be held liable as an arranger and affirmed the District Court's decision in that respect. Although the Court of Appeals agreed that harm in this case was capable of being apportioned, it found that the record did not sufficiently support apportionment, and held Shell and the Railroads jointly and severally liable for the Governments' response costs.

The United States Supreme Court reversed the Ninth Circuit Court of Appeals on both the arranger and the joint and several liability issues. It ruled that the facts reasonably supported the District Court's apportionment of only 9% of the liability to the Railroads. The Court did not address the Shell apportionment, because it held that Shell had not arranged for disposal and, therefore, was not liable at all. The Governments were, therefore, left having to bear 91% of the total response costs for the orphan share resulting from Brown & Bryant's activities.

Implications of the U.S. Supreme Court's Decision in *Burlington*

Chemical manufacturers and sellers of chemicals of chemical products can be comforted by the Court's ruling that they may not be found liable under CERCLA as arrangers, even if they have knowledge that there are sure to be occasional spills of their chemical products. Arranger liability requires evidence of intent, according to the U.S. Supreme Court's decision in *Burlington*. Lower courts will now be addressing questions about the amount and kind of intent necessary for arranger liability to attach. Sending drums of hazardous waste to a disposal facility is an activity that one can be sure will fall into the category of arranging for an intended disposal, while it now seems clear that merely selling chemical products will not be defined as arranging for an intended disposal. Nevertheless, since there are activities that fall between, we can anticipate that environmental lawyers will be litigating over the U.S. Supreme Court's standard for "intent" as established in its decision in *Burlington*.

The decision will also provide further support for a defense to arranger liability when a disposal is merely incidental to a business's legitimate commercial activities, but if these types of parties are no longer considered liable as arrangers, other PRPs, landowners and transporters for example, will have to take on more responsibility. It will be interesting to see if this decision impacts cleanups in the context of the redevelopment of brownfield sites, since parties may be unwilling to conduct cleanups if the pool of PRPs from which they can recover any orphan share they voluntarily paid, becomes too small or disappears.

The joint and several liability aspect of the *Burlington* decision is quite significant. The U.S. Supreme Court's ruling that a reasonable apportionment need not be based on detailed records, but rather can be based on relative harm by taking into consideration a variety of factors, will change the way Superfund cases are litigated. Parties will have a strong argument that they can only be held liable for that portion of the contamination they caused as long as a "reasonable basis" for apportionment exists. If some of the parties are defunct, as is often the case at Superfund sites, then the government *(i.e.*, the public) will be stuck with those orphan shares. As a result, we can anticipate an increase in litigation over what makes a "reasonable basis" for apportionment. There also likely will be more time spent gathering facts to support an apportionment. Another significant result of the decision could be a demand for legislation to change the liability standard so the public is not stuck with the orphan polluter's share, or the reinstatement of the Superfund tax which lapsed in the 1990s.

The way a Superfund case is litigated has changed as a result of the Supreme Court's decision in *Burlington.* If you have any questions about the *Burlington* case, or about how it may impact your business, please contact Miriam E. Villani at Sahn Ward & Baker, PLLC.

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