LAW

Supreme Court Rules on Liability of Manufacturers of Hazardous Substances and when a Defendant is Liable only for a Portion of the Damages Incurred in Pollution Cases

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On May 4, 2009, the Supreme Court decided *Burlngton Northern and Santa Fe Railway Company v. United States*, 2009 WL 1174849 (U.S). The decision has two significant components. In the first, the Court clarified when a manufacturer of products is strictly liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as one that "arrange[s] for the disposal … of hazardous substances" because the purchaser of the product mishandles the product, causing environmental contamination. In addition, the Court made it easier for defendants to establish that they should pay only for that portion of the remediation costs for which they are actually responsible, instead of being liable for one hundred (100%) percent of the costs incurred by the government to clean up.

Arranger Liability Under CERCLA: Defendant Shell Oil Company (Shell) shipped pesticides and other chemicals to Defendant Brown & Bryant, Inc. (B&B), a chemical distribution business that operated since 1960 on a 3.7 acre parcel in California. In 1975, B&B expanded its operations by leasing .9 acres of adjacent land owned by the Defendant railroad companies ("Railroads"). Shell arranged for delivery of one of the pesticides used, D-D, by common carrier, and B&B assumed responsibility for the D-D as soon as the common carrier entered the B&B facility. On arrival and during transfers, leaks and spills occurred, and continued even after Shell took steps to encourage the safe handling of its products. California and the EPA spent over $8 million to clean up.

The Supreme Court held that EPA did not show that Shell "entered into the sale of D-D with the intention that at least a portion of the product be disposed of during the transfer process", and thus was not liable under CERCLA. This test should offer protection to manufacturers of virgin hazardous products from liability due to mishandling of the product upon receipt by the buyer.

Joint and Several Liability or Apportionment of Liability: As the owners of the .9 acre parcel that B&B leased and contaminated, the Railroad defendants were strictly liable under CERCLA as the owner of the property at which hazardous substances were released. The question was, should the Railroad defendants be jointly and severally liable for 100% of all costs incurred by California and the EPA, or only be liable for the portion of the costs it caused. The traditional test is as follows: "when two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. *** But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm."

The Supreme Court accepted the apportionment formula used by the District Court, and its finding that the Ralroad defendants were liable only for 9% of the damages. The District Court's apportionment of liability was calculated based upon three factors, including the percentage of the total area of the site that was owned by the Railroads, the duration of B&B's operations on and off the Railroad property, and the portion of the contamination caused by the chemicals in question.

The willingness of the Supreme Court to accept what was really a rough approximation of apportionment of damages rather than impose joint and several liability provides greater leverage for defendants in cost recovery lawsuits brought by the EPA or State of New York to negotiate a fair settlement. Although a hazardous waste case, the rational for allowing apportionment of damages should be fully applicable to petroleum discharge cases as well.

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