

Superfund

U.S. Supreme Court Hears Arguments

On Arranger Liability, Apportionment

The U.S. Supreme Court heard oral arguments Feb. 24 debating liability under the superfund law (*Burlington Northern & Santa Fe Railway Co. v. United States*, U.S., No. 07-1601, oral arguments 2/24/09).

The arguments focused on defining parties that arrange for the disposal of hazardous waste and on when it is appropriate to apportion liability in cost recovery actions instead of imposing joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act.

The U.S. Court of Appeals for the Ninth Circuit ruled that Shell Oil Co. was liable as a party that arranged for the disposal of hazardous waste at a contaminated site partially owned by Burlington Northern & Santa Fe Railway Co. and Union Pacific Railroad Co. in Arvin, Calif. It also ruled that apportionment of costs among Shell and the two liable railroad companies was not appropriate and imposed joint and several liability for the \$8 million in cleanup costs incurred by the federal government and California (*United States v. Burlington Northern & Santa Fe Railway Co.*, 502 F.3d 781, 64 ERC 1257 (9th Cir. 2007); [38 ER 863, 4/13/07](#)).

Arranger Liability Discussed

Kathleen M. Sullivan of Quinn Emanuel Urquhart Oliver & Hedges, LLP, in New York, N.Y., argued on behalf of Shell. Sullivan argued that arranger liability can only be imposed upon parties that intend to dispose of waste. Shell, she argued, sold a nematocide chemical to a distributor, the now-defunct Brown & Bryant Inc., that stored and distributed various pesticides to local farmers from its holding facility in Arvin. Shell's knowledge that B&B's facility leaked pesticides does not establish that Shell intended to dispose of pesticides through its transactions with B&B, Sullivan argued. Shell intended to sell B&B as a useful product, not waste to be disposed of. Justice Anthony Kennedy asked whether knowledge that the recipient will spill the useful product turns that useful product into waste.

Sullivan agreed that spills and leaks are waste under CERCLA. But for arranger liability to apply, a party must arrange for the spill or leak to occur, she said.

Justice Samuel Alito asked whether that changes if a party has a choice between companies to deliver the hazardous substances, one that spills and one that does not. Sullivan argued that this might be enough to constitute an arrangement because of the economic incentives involved, but Shell did not derive any economic benefit from the leakages at B&B.

Sullivan also argued, however, that the spilling of a useful product should not be considered waste. Her position would be supported, she said, by the cross reference in CERCLA to the definition of waste in the Solid Waste Disposal Act.

Deputy Solicitor General Malcolm L. Stewart argued that Shell was an arranger because it had control over the spills that disposed of the hazardous waste. The spills, he said, occurred in the delivery of the product, not by an end user customer. Shell hired the common carrier that delivered the nematocide and contractually required that B&B have bulk storage facilities so the nematocide would have to be pumped directly from the trucks to the facilities.

Justice Antonin Scalia said he thought it was a mischaracterization to say the spillage occurred during the process of delivery as Shell contractually arranged for ownership to transfer to B&B once the trucks arrived at the facility.

Justice John Paul Stevens asked whether title to ownership of a product is necessary to the government's theory of arranger liability.

Stewart said ownership is not necessary, and that arranger liability is designed to assign liability to parties regardless of whether they retain ownership at the time of disposal.

Justice Stephen Breyer said he thought the key question was one of intention versus purpose, whether a party arranges an action that results in a disposal or whether a party is arranging specifically for a disposal.

Stewart argued that it is not knowledge of a disposal alone but knowledge and control that are needed to make a party an arranger.

Scalia said he thought that a specific purpose to dispose of waste is necessary, not just a knowledge that waste will be disposed of.

Apportionment of Liability

Maureen E. Mahoney of Latham & Watkins LLP in Washington, D.C., argued on behalf of Burlington Northern on the issue of apportionment.

Mahoney argued that the district court properly understood the principles of common law apportionment in finding the case was subject to apportioning the costs among the parties.

When costs may be apportioned, parties are liable only for the specific costs directly attributable to their actions. When joint and several liability is imposed, a party is liable for the entire harm including the share of other parties that may not be able to pay for their own share.

Under the district court's apportionment scheme, the federal government and California would only be able to recover \$1.2 million of their \$8 million in cleanup costs due to the insolvency of B&B.

Under Section 912 of the Restatement of Torts, parties seeking apportionment must establish the harm and money sought only with "as much certainty as the nature of the tort and circumstances permit."

Mahoney argued that when CERCLA was adopted in 1980, common law apportionment had been used for more than a century to apportion costs based only on rough estimates due to the uncertain nature of evaluating pollution harms.

Chief Justice John Roberts asked about the impact of insolvency upon apportionment. Mahoney said that under comment H of Section 912, the restatement says that district courts may deny reapportionment in exceptional cases. The district court exercised its discretion in finding this was not an exceptional case, Mahoney said.

Mahoney also noted that in the Third Restatement, a comment notes that the old comment H was inconsistent with other principles of the restatement.

Stewart argued that while Shell and Burlington Northern did not waive their argument for apportionment, they did not meet their burden of proof to establish that apportionment was appropriate.

Roberts asked whether a dispute about the precision of percentages of responsibility would be enough to make apportionment inappropriate, even if solvent parties agreed to accept the high end range of their own responsibility with a built-in margin of error.

Stewart said that would not be a reason to negate apportionment, but that the district court did not have a proper basis to assign shares of responsibility to Burlington Northern and to Shell. Stewart argued that the district court based its apportionment on volumes of waste instead of on a calculus of how much it would have cost to clean up the two shares of contamination. Stewart also argued that the record did not establish that the harms were divisible.

Sullivan disagreed with Stewart and argued that there is no dispute that the harms at the Arvin site were divisible.

By John H. Stam

Text of the U.S. Supreme Court's Burlington Northern & Santa Fe Railway Co. v. United States oral argument is available at

http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1601.pdf.