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Supreme Court Limits Superfund Liability – In Two Ways

The United States Supreme Court yesterday handed down its eagerly awaited opinion in the consolidated cases of *BNSF v. U.S.* and *Shell Oil Company v. U.S.*, on the issues of arranger liability and joint and several liability under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), or Superfund. On both issues, the Court ruled eight to one in favor of the potentially responsible parties, and those rulings should have positive repercussions for defendants in other cases involving these issues.

As to Shell, the issue was whether it could be held liable at all as a responsible party for having “arranged for disposal or treatment of hazardous substances” at a facility from which there was a release or threat of release of a hazardous substance. According to the Court’s opinion, Shell had sold pesticide to a customer operating an agricultural chemical distribution business, encouraged it to buy in bulk, and was aware that the customer routinely experienced minor accidental spills in its handling of the pesticide. Shell too had given directions to the customer to minimize those spills.

The Court held that for Shell to have qualified as an arranger, it must have taken “intentional steps to dispose of a hazardous substance,” that is, that Shell must have intended that a portion of the product be disposed as a result of the business arrangement. The Court found that Shell’s actions did not support such a conclusion, pointing out that the steps Shell had taken were to reduce spills. Mere knowledge that such spills occurred is not sufficient under the Court’s intentionality standard for arrangers. The Court acknowledged that a case-by-case analysis of the facts will be necessary to determine intent.

As to BNSF, the issue was whether the record supported an apportionment of liability to BNSF of a specific percentage, rather than holding it jointly and severally liable for the entire amount. The Court noted that “the courts of appeal have acknowledged that ‘[t]he universal starting point for divisibility of harm in CERCLA cases’ is Section 433A of the Restatement (Second) of Torts” and, applying the Restatement, explained that liability could be several when there is a reasonable basis for apportioning the harm among two or more responsible parties **even if the harm were singular**.

The Court agreed the burden was on BNSF to prove that the harm was divisible, but went on to hold that the facts in the trial record were sufficient to support several liability, **even in the absence of detailed records and precise calculations**, based on estimates derived from relative contributions, impacted areas, and periods of time of conduct and ownership.

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