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Environmental LAW

Superfund's a little less super

Congress passed the Comprehensive Environmental Response, Compensation and Liability Act — commonly known by its acronym CERCLA, or even more widely as Superfund — in 1980.

Soon after enactment, CERCLA began to change the landscape, both figuratively and literally. Organized around the principles that hazardous contamination of soil and water should be cleaned up, and that those responsible for the pollution should foot the bill, CERCLA quickly gained respect as an enforcement tool of enormous clout.

In large part, that clout resulted from early court decisions that held, in most if not virtually all cases, liability for responsible parties should be “joint and several.” That is, from the enforcer’s perspective, one or a few parties could be forced to pay for entire cleanups, even if those bearing the greatest responsibility were bankrupt or simply could not be found.

The ever-present threat of joint and several liability gave EPA and DEC — and their legal support at the Department of Justice and the New York State Attorney General’s Office — enormous leverage and made CERCLA both powerful and Draconian in its scope. Although joint and several liability has dominated CERCLA enforcement for nearly 30 years, cracks and tremors were beginning to appear as several courts questioned whether joint and several liability really was appropriate in all cases.

Those tremors generated an earthquake that has profoundly altered the legal landscape.

Last week, in *Burlington Northern & Santa Fe Railway Co. v. U.S.*, No. 07-0601, the U.S. Supreme Court held in an 8-1 decision delivered by Justice John Paul Stevens that responsible parties at a multi-party Superfund site are not jointly and severally liable if a reasonable basis exists to apportion their liability. Moreover, where a portion of the liability — in *Burlington* it was 91 percent — is attributable to defunct or bankrupt parties, the government will have to absorb those parties’ “orphan shares.”

The *Burlington* case arose out of the operations of a small company that repackaged and distributed agricultural chemicals, on property that was both owned and leased from the railroad. Numerous spills, leaks and sloppy handling of chemicals through the years resulted in contamination that eventually cost more than \$11 million to remediate. The company went

out of business in 1988, and the EPA and the state of California performed most of the work, and ultimately sued the landlord (Burlington) and a chemical supplier (Shell Oil) to recover their costs.

In a 185-page opinion, the district court determined on its own motion that the defendants were responsible, but that the damages could be apportioned, and that the government agencies should absorb the orphan share allocated to the operator.

The U.S. Court of Appeals for the Ninth Circuit agreed with the concept of apportionment, but held that the burden to prove a basis for apportioning liability was on the defendants, and that the evidence was not sufficiently clear to justify apportionment.

The Supreme Court last week did two things that will reverberate through the CERCLA enforcement systems for some time: For the first time in a CERCLA-related case, the court embraced the concept of divisibility of liability through the application of Section 433A of the Restatement (Second) of Torts, which states apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm.

Secondly, the court overruled the Ninth Circuit and embraced the discretion of the district judge to apply the principles of apportionment. Deferring to the judgment of the trial court, the Supreme Court declined to indulge in too exacting an examination of the facts and concluded that the trial judge should be upheld because the record “reasonably supported the apportionment of liability.”

In New York, where the attorney general relies heavily on CERCLA as a primary enforcement tool, the Supreme Court’s decision will provide responsible parties with something they have lacked — leverage in negotiations — and a strong argument not to assume responsibility for orphan shares.

The implications of *Burlington*, which also circumscribed the government’s power to pursue suppliers of chemicals and hazardous materials as responsible parties, will take some time to sort out. It is indisputable, however, that it’s good news for responsible parties, who now have a fighting chance to limit their liability to an equitable share of the overall costs relating to their own contribution to the contamination on a site. That means more public money will be spent on cleanups,



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and the likelihood that those tax dollars will be recovered from responsible parties will be reduced. Given the current restraint on public spending, increased reliance on public money to fund investigations and cleanups may slow the number and pace of cleanups at state and federal Superfund sites. In turn, the DEC may have new incentive to use the Brownfield program to attract private investors to clean contaminated sites.

The DEC has fought to control eligibility into the Brownfield program, but limiting the scope of CERCLA's threat of joint

and several liability could alter the dynamics and make Brownfields' cooperative model a stronger alternative to Superfund coercion.

At the very least, there will be more litigation in the district courts as to what constitutes a reasonable basis for apportionment, and less uniformity in results given the Supreme Court's deference to the trial courts' discretion to find and apportion liability.

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