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## ***Burlington Northern and Santa Fe Railway Co. v. United States, No. 07-1601 (2009)***

In a near-unanimous decision on May 4, 2009, the U.S. Supreme Court issued the latest in a series of decisions restructuring how courts should interpret and apply the core liability provisions of the federal Superfund act, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). That decision, *Burlington Northern and Santa Fe Railway Co. v. United States*, lightens the burden on CERCLA defendants in two key ways: (1) it narrows the scope of "arranger" liability by focusing on the intent of the party alleged to be liable, and (2) it broadens the availability of cost "apportionment" as an alternative to joint and several liability. These changes create opportunities for CERCLA defendants and challenges for CERCLA plaintiffs, including the United States.

### **The New Arranger Liability Test**

*Burlington* involved a site historically used to distribute agricultural chemicals. The site was primarily owned by the distributor, which had purchased chemicals from various suppliers including Shell Oil. The lower courts found Shell liable under CERCLA on the theory that it had "arranged for disposal" of hazardous substances on site by selling products to the distributor with knowledge that chemical spills and leaks would occur. In keeping with its other recent CERCLA decisions, the Supreme Court focused on the plain statutory language and gave the word "arrange" its "ordinary meaning" – an "action directed to a specific purpose." The Court concluded that arranger liability can be imposed only when a party "takes intentional steps to dispose of a hazardous substance." Applying this test to Shell, the Court further ruled that, although Shell was aware of previous spills, it lacked the requisite intent for those spills to occur, as

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demonstrated by the precautions taken to prevent them.

### **The New Apportionment Standard**

The Supreme Court next focused on whether Burlington Northern and Santa Fe Railway Company, which had leased part of the site to the distributor, should be held jointly and severally liable. The District Court had declined to impose joint and several liability on the theory that the contamination was "divisible and therefore capable of apportionment." However, the Court of Appeals reversed that decision and imposed joint and several liability, concluding that Burlington had not met its burden of proof. By agreeing with the District Court that apportionment was proper, the Supreme Court both clarified and potentially expanded the availability of apportionment as an alternative liability approach. Specifically, the Court concluded that "apportionment is proper when 'there is a reasonable basis for determining' how each party contributed to the harm.

### **Key Implications**

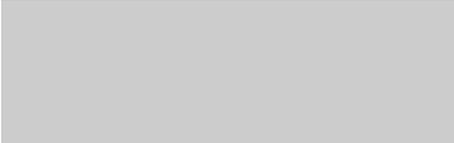
The *Burlington* decision will impact CERCLA litigation, policy and strategy in a variety of ways including:

- Parties involved in (or considering) CERCLA remediation will need to reassess their core strategic position including a basic review of whether liability exists and to what extent;
- The issues resolved in *Burlington* will quickly permeate CERCLA litigation nationwide as defendants prepare new "arranger" and "apportionment" defenses;
- By narrowing the scope of "arranger" liability, the decision may increase the burden on other categories of potentially liable parties including owners and operators;
- Parties able to use the arguments endorsed by *Burlington* will have additional leverage in negotiations with the government, likely resulting in the government ultimately bearing more responsibility for funding cleanups; and
- The increased availability of apportionment should help mitigate the impact of another recent decision by the Supreme Court allowing private parties to directly assert CERCLA §107 cost recovery claims, often thought to carry joint and several liability.

Squire Sanders environmental trial lawyers have extensive insight into the rapidly evolving world of CERCLA litigation and would be pleased to discuss the strategic implications of those changes on your business. If you have questions or concerns, please contact any of the Squire Sanders environmental lawyers listed in this Alert or the one with whom you are most familiar.

related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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