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**ENVIRONMENTAL UPDATE****Supreme Court Opinion Impacts Recovery of Cleanup Costs**

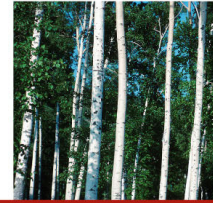
The U.S. Supreme Court on May 4 issued an important Superfund opinion. *See Burlington Northern and Santa Fe Railway Co. v. U.S., 07-1601, and Shell Oil Co. v. U.S., 07-1607* (May 4, 2009). Most significantly, the opinion finds that the Environmental Protection Agency (EPA) (the plaintiff in these original actions) cannot hold a party liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as an “arranger” **unless that party “intended” for its waste to be disposed of at the relevant site.** The Court relied on the useful product exception to CERCLA, and in this case, the evidence confirmed that although the alleged arranger knew about spills at the site, it had taken numerous steps to encourage its customer to prevent them.

Additionally, the Supreme Court concluded that **a party will not be held jointly and severally liable in a cost recovery action brought under Section 107 of CERCLA if there is a “reasonable” basis to apportion liability.** The Court clarified that a “reasonable basis” does not involve equitable factors. Instead, the party seeking to apportion liability has the burden to prove divisibility. In this case, the primary factors relating to divisibility included the lessor’s duration of the lease and the size of the leased parcel as compared to the site as a whole. The Court discussed additional factors, including whether spills of the chemicals attributable to the party advocating for divisibility contributed to overall site contamination.

This ruling came after the federal government, Shell Oil and Burlington Northern disagreed over who would pay what portion of the almost \$10 million in cleanup costs after the original chemical distributor went out of business. The Supreme Court ruling said Burlington Northern’s 9 percent share of the costs (as ordered by the lower court) was appropriate, but that Shell did not have to pay, and the United States was responsible for the 91 percent orphan share.

It is likely that these findings will be applied in the private party context as well, especially since private parties are able to use Section 107 of CERCLA as a mechanism for recovery of response costs after the *Atlantic Research* case (rather than the historical use of the contribution action available in Section 113 of CERCLA). This could mean several things:

- Parties have a reduced risk of being subject to joint and several liability as long as the party can demonstrate that its site contribution is divisible with the use of objective evidence.
- More time and dollars will be spent on gathering factual data that relates to “causation” and less time will be spent arguing the equitable factors that historically have governed allocation (rather than divisibility).



- There will be more litigation around what is a “reasonable basis” for apportionment, as well as whether a party “intended” to dispose of the relevant hazardous substance, which will be decided on a case-by-case basis.
- It is less likely that a party will voluntarily take on a site and agree to clean it up if there is a large orphan share, as the potential for recovery is now diminished.

#### **FOR MORE INFORMATION**

If you have questions or would like more information, please contact Heidi Goldstein, 216.566.5559 or [Heidi.Goldstein@ThompsonHine.com](mailto:Heidi.Goldstein@ThompsonHine.com).

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