PLEWS SHADLEY RACHER & BRAUN LLP

Date: May 15, 2009

Client Alert

Supreme Court Continues to Reshape CERCLA Liability

By: J. Michael Bowman

In *Burlington Northern & Sante Fe Railway Co. v. United States*, published May 4, 2009, the United States Supreme Court continued to redefine the relationship between cost recovery actions under CERCLA § 107(a) and contribution actions under CERCLA § 113(f). Following the *Cooper Industries, Inc. v. Aviall Services, Inc.* decision in 2004—which held a potentially responsible party has no right to contribution under § 113(f) until the PRP is or has been the subject of a cost recovery under § 107—and the *United States v. Atlantic Research Corp* decision in 2007—which ruled that a PRP may bring a cost recovery action under § 107(a) even though the PRP does not fall within the so-called "innocent landowner" exception—in *Burlington Northern* the Supreme Court adopted the Restatement (Second) of Torts analysis for determining whether § 107(a) mandates imposition of joint and several liability in a specific case. Under this analysis, "when two or more persons acting independently cause a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he himself has caused. . . . But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm." It is the defendant's burden to prove that there is a reasonable basis for dividing or apportioning the harm.

In *Burlington Northern*, none of the parties presented any arguments to help the district court equitably apportion liability between the PRPs, so the district court took it upon itself to apportion the cleanup liability based on "the simplest of considerations: percentages of land area, time of ownership, and types of hazardous products," and multiplied by 1.5 to account for calculation errors. The Supreme Court found that the district court's analysis conformed to the equitable principals in the Restatement and affirmed the allocation of 9% of the site remediation costs to the railroad.

The lesson for PRPs and their counsel is clear: advocating a "scorched earth," all-or-nothing approach to liability is a risky approach. Depending on the circumstances, the better strategy in a CERCLA § 107(a) cost recovery action may be to introduce evidence and arguments showing why the liability can and should be apportioned to other PRPs.

PH 317.637.0700 FX 317.637.0710 www.psrb.com © 2000-2009 Plews Shadley Racher & Braun, LLP All rights reserved

The Supreme Court also narrowed the scope of “arranger” liability under CERCLA. Shell Oil Co. sold a pesticide to the railroad’s tenant and apparently knew for years that pesticides spilled and leaked onto the ground during the transfer from trucks to the tenant’s tanks (which were located on property not owned by the railroad). The Court held that knowledge of the ongoing spills was not sufficient to impose “arranger” liability unless Shell had sold the pesticide with the intention that some of the product be spilled or otherwise disposed of during the transfer process, which apparently was not the case.

PH 317.637.0700 FX 317.637.0710 www.psrb.com © 2000-2009 Plews Shadley Racher & Braun, LLP All rights reserved