

THE SODERQUIST CENTER

Business Gets a Break on Superfund Liability

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U.S. businesses recently got some good news on cleaning up toxic waste sites. The Comprehensive Environmental Response, Compensation, Liability Act, or Superfund, fixes liability for costs in cleaning up toxic waste sites. Superfund makes liable as many parties as possible for cleaning up a toxic waste site to prevent U.S. taxpayers from bearing the costs.

The Superfund' application, however, is often unfair. Government and court decisions can impose multimillion dollar clean up costs on business not responsible, or only slightly responsible, for the waste site.

In June, in a case involving Shell Oil Company and two railroads, the U.S. Supreme Court gave businesses some relief from Superfund's unfair application.

Brown & Bryant (B&B), a chemical distribution company, bought pesticides wholesale from Shell. B&B conducted some of its business on land leased from Burlington Northern and Union Pacific railroad companies. When B&B received pesticide shipments it transferred the chemicals to B&B distribution trucks or storage tanks.

Despite handling instructions and warnings from Shell, B&B employees sometimes spilled pesticides during the transfers. B&B's carelessness created a toxic waste site that polluted the soil and groundwater where B&B did business. The U.S. Environmental Protection Agency ordered B&B to clean up the toxic site. When B&B went broke, the EPA went after Shell and the railroad companies for the millions of dollars in clean up costs. The companies denied responsibility.

A U.S. district court found Shell six percent liable for the site's cleanup costs and the railroad companies nine percent liable. The government, wanting Shell and the railroads to bear all the costs, appealed the district court's decision. The Ninth Circuit Court of Appeals ruled in the government's favor and the companies appealed to the U.S. Supreme Court.

Arranger liability

The Superfund holds companies liable for clean up costs that arrange for hazardous waste disposal. The district and appellate courts broadly interpreted the term “arranger” and found Shell an arranger because it sold pesticides to B&B that contributed to the toxic waste site.

Shell questioned, however, why a company is an arranger for lawfully selling a useful product that another company mishandles? Besides, Shell continuously warned B&B to be more careful in handling the pesticides.

The Supreme Court agreed with Shell and overturned the lower court decisions. The Court held an arranger is one who intentionally disposes of a hazardous substance. In a common sense ruling, the court found that selling a hazardous substance is not the same as disposing of it. The Court further held that Shell’s knowledge of B&B’s mishandling of the pesticides did not make it an arranger, especially since Shell tried to improve B&B’s handling practices.

Joint and several liability rule

The Supreme Court also softened the harsh application of the joint and several liability rule. The rule states, if multiple parties acting independently cause a single harm, each party is liable for its portion of the harm.

The district court ordered Shell to pay six percent of the toxic site’s cleanup costs based on the pesticides found at the site attributable to Shell. It based the railroads nine percent liability on the railroads’ ownership of some of the polluted land, how long B&B leased land from the railroads, and the location of most of the toxins.

But what happens when one of the parties cannot pay its share of the harm? Often in Superfund cases the party responsible for most of the harm is insolvent, which happened with B&B. In such a case, the other parties can find themselves paying for the nonpaying party’s harm, as well as their own

The court of appeals held the lower court’s calculations invalid to allot harm between the parties because the district court based its calculations on estimates. With B&B insolvent, the appellate court ordered Shell and the railroads to pay all the cleanup costs.

After declaring Shell not an arranger, the Supreme Court examined the district and appellate courts’ applications of the joint and several liability rule. The Court reversed the Ninth Circuit’s ruling. The Court held that, only if a court cannot reasonably allot harm between the parties, is each party liable for the entire harm. The Court found the district court’s calculations using estimates reasonable and sufficient to allot harm.

Because the railroads owned some of the polluted property, Superfund’s application prevented them from completely escaping liability for cleanup costs. The Supreme Court, however, did apply the district court’s calculations in holding the railroads only nine percent liable.

The Supreme Court's decision provides at least some relief for businesses from the often crippling costs associated with cleaning up toxic waste sites. The Supreme Court tightened the arranger definition and clarified the joint and several liability rule's application in toxic waste site cleanups. It is unfortunate, however, that landowners with toxic waste sites found on their property continue to be liable for clean up costs, even if they knew nothing about the site or contributed to it.