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Supren Court considers who gets the tab for toxic cleanups

By SARA GOODMAN,
Published: February 24, 2009

Manufacturers of hazardous substances should not be liable for contamination that occurs after a product is sold, attorneys for Shell Oil Co. told the Supreme Court today in a case addressing two critical liability issues for toxic-waste cleanups.

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Shell, Burlington Northern Railroad and Santa Fe Railway Co. are asking the court to overturn a decision by the 9th U.S. Circuit Court of Appeals holding them jointly responsible for the cost of a Superfund cleanup at a chemical distribution plant near Bakersfield, Calif.

U.S. EPA sued the defunct chemical distributor, Brown & Bryant Inc.; Shell, which made the two chemicals that contaminated the site; and the railroads, which leased the land to Brown & Bryant.

A district court found the companies liable, but only for a small portion of the costs -- Shell at 6 percent and the railroads at 9 percent.

The government appealed, and the 9th Circuit reversed the decision, ruling that Shell and the railroads could be held liable for up to the entire cleanup bill. Cost apportionment under the Superfund law "is the exception,

available only in those circumstances in which adequate records were kept and the harm is meaningfully divisible," the court ruled.

The Supreme Court faces two questions: Can degrees of responsibility for harm caused by pollution be apportioned? And what responsibility does a manufacturer of hazardous substances have once its product is sold?

The government says Shell is responsible for the cleanup because of arranger liability. The oil company arranged for the chemical to be transported by a third party and knew spills were "inevitable" during the chemical's unloading.

Shell's attorney, Kathleen Sullivan, argued that the company should not be held liable as

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an arranger because it did not arrange for the spills. It arranged transport, not disposal, she said.

"The key for arranger liability is that you arrange for spills," Sullivan said. "Here Shell wanted every drop of D-D [one of the spilled chemicals] to be safely placed in the bulk storage tank."

Sullivan also argued that this case is the first time a company has been held responsible on arranger liability for selling a product -- as opposed to selling wastes -- because an independent buyer spilled the product.

Both the district and appeals courts held that Shell is liable as an arranger, but the justices seemed torn today over the question of liability and at what point a manufacturer is no longer responsible for the product.

Justice Stephen Breyer used the example of a computer manufacturer that makes print cartridges and writes on the box that the cartridges must be disposed of in a responsible way. Knowing many users are likely to throw them away, is that manufacturer also responsible? he asked.

Arguing for the government, Deputy Solicitor General Malcolm Stewart said that unlike the print cartridge manufacturer, Shell had control of the operation when the spills occurred because it had stipulated conditions that Brown & Bryant were required to meet, including requiring that bulk storage containers be used to store the chemical.

Justice David Souter questioned this notion of control. By hiring a third party to transport the material, he said, Shell had set up the arrangement to avoid responsibility.

"Do we have control here?" Souter asked. "It seems to me that the way Shell has set it up indicates that control has passed to somebody else at the time that the spigot starts going in the tank."

Stewart's response: "The whole point of arranger liability is to not allow the people who set in motion the process that culminates in disposal to get off the hook."

The justices also questioned the idea of apportionment and whether the harm caused by pollution can be divided to assign responsibility, especially in cases in which the primary entity has gone bankrupt.

"The party who shouldn't be left holding the bag is the public, the innocent victims of the pollution," Justice Ruth Bader Ginsburg said.

Maureen Mahoney, the attorney for the railroads, said the law says damages cannot be imposed on a defendant that is not causally linked to the pollution.

Implications

How the Supreme Court rules in the case will be closely watched by businesses. The U.S. Chamber of Commerce, the American Chemistry Council and the American Petroleum Institute filed friend-of-the-court briefs asking the justices to hear the case.

If the court affirms the appeals court ruling and finds Shell is jointly responsible for the entire cleanup tab, it could have major implications for how companies treat liability, said Gail Suchman, a New York environmental lawyer.

"This ruling is very important to watch because it will say a lot about what a manufacturer is responsible for in selling a product," Suchman said. "How responsible do you make them down the supply chain? So they're responsible for everyone messing up, whether or not they have any clue as to where the product is. That can be a real extension of liability."

The cases are *Burlington Northern v. United States*, 07-1601, and *Shell Oil v. United States*, 07-1607.

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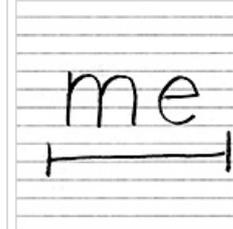
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