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SUPREME COURT REJECTS BROAD LIABILITY FOR COSTS OF CLEANING UP WASTE SITES

(*Burlington Northern & Santa Fe RR v. U.S.; Shell Oil Co. v. U.S.*)

The U.S. Supreme Court yesterday rejected efforts by the federal government to impose massive environmental clean-up costs on businesses that played little or no role in necessitating the clean-up.

The decision in the consolidated cases of *Burlington Northern & Santa Fe Railway Co. v. United States* and *Shell Oil Company v. United States* was a victory for the Washington Legal Foundation (WLF), which filed a brief urging reversal of an appeals ruling that had significantly broadened the business community's potential liability for clean-up costs. The U.S. Court of Appeals for the Ninth Circuit had imposed broad liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the "superfund" law.

The Supreme Court ruled 8-1 that a company should not be held jointly and severally liable for the entire cost of cleaning a hazardous waste site when (as the district court found here) there is a reasonable basis for calculating what percentage of the environmental damage was attributable to the company's conduct. The Court agreed with WLF that the evidence demonstrated that two railroads played at most a small role in creating the hazardous waste at a site in Arvin, California, and thus that the appeals court erred in holding each of the railroads 100% responsible for clean-up costs. The Court reduced the railroads' liability to a 9% share of clean-up costs, a figure the district court determined was the railroads' contribution to the waste.

The Court also agreed with WLF that Shell Oil Co. could not be held liable as an "arranger" under CERCLA merely for selling chemicals or other hazardous substances to third parties, who in turn generated the waste at the Arvin, California site. CERCLA imposes liability on entities that "arrang[e] for" disposal of a hazardous substance at a clean-up site. The Court ruled that, to be held liable under CERCLA as an "arranger," a chemical supplier must have *intended* that some portion of its product would be disposed of at a clean-up site. CERCLA liability may not be imposed, the Court ruled, simply because Shell may have been aware that a chemical buyer was accidentally spilling some of the chemical on its own property.

WLF is a nonprofit public interest law and policy center with supporters in all 50 States. WLF devotes a significant percentage of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government, and regularly litigates in support of reasonable interpretations of federal environmental laws. WLF's brief was drafted with the pro bono assistance of Lawrence A. Salibra, II, former Senior Counsel of Alcan Company in Cleveland, Ohio.

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For further information, contact WLF Chief Counsel Richard Samp at 202-588-0302. A copy of WLF's brief is available on its website at www.wlf.org.