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WLF URGES SUPREME COURT TO REJECT BROAD CERCLA LIABILITY

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

The Washington Legal Foundation (WLF) filed a brief this week in the U.S. Supreme Court in the consolidated cases of *Burlington Northern & Santa Fe Railway Co. v. United States* and *Shell Oil Company v. United States* urging the Court to reverse the Ninth Circuit's broad imposition of liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

The outcome of the *Burlington* case will have a tremendous impact on all businesses, which routinely are being held jointly and severally liable for cleanup costs of hazardous waste sites instead of only for a portion of the costs, based on their contribution to the waste. The outcome of the *Shell* case is important as well because the Ninth Circuit essentially held Shell liable as an "arranger" under CERCLA merely for selling chemicals or other hazardous substances to third parties, who in turn generated the waste. Unless these decisions are reversed, businesses will face huge liabilities for cleanup costs of wastes that they did not generate.

WLF's brief argued that the current method of apportioning liability under CERCLA, used by the Ninth Circuit and other circuit courts, is contrary to the intent of Congress. In particular, Congress intended that as a matter of fairness, liability should be reasonably apportioned under the common law, particularly when a party was responsible for generating only a small share of the waste. However, the courts have readily imposed joint and several liability on the parties, particularly larger businesses, rather than using the common law principles of reasonable allocation of liability. In this case, the Ninth Circuit rejected every reasonable basis of apportionment identified by the district court, namely, geographical allocation, temporal allocation, and distinctions among contaminants.

WLF's brief was drafted with the *pro bono* assistance of Lawrence A. Salibra, II, former Senior Counsel of Alcan Company in Cleveland, Ohio. The Court is likely to conduct oral arguments in the case in late February 2009.

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For further information, contact Paul Kamenar, WLF Senior Executive Counsel at 202-588-0302. A copy of WLF's brief is available on its website at www.wlf.org.