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**Burlington Northern & Santa Fe Railway Co.  
v. United States, No. 07-1601, (U.S. 2009).**

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*I. Background*

From 1960 to 1989, Brown & Bryant, Inc. (B&B), distributed agricultural chemicals, some of which came from Shell. *Burlington Northern & Santa Fe Railway Co. v. United States*, No. 07-1601, at 2 (U.S. Feb. 24 2009). With its own equipment, B&B applied these chemicals to farms. *Id.* at 2. B&B operated on a 3.9 acre parcel of land in Arvin, CA. *Id.* at 2. In 1975, it expanded and began using an adjacent .9 acre piece of land owned jointly by the Burlington Northern and Santa Fe Railway Co. (Railroads). *Id.* at 2. The combined 4.8 acres was graded toward a sump and drainage pond at the far corner of the property. *Id.* at 2. The sump and drainage pond contributed significant contamination to the land and ground water below. *Id.* at 2.

Three chemicals are at issue here: Dinoseb, D-D, and Nemagon. *Id.* at 2. Shell provided the D-D and Nemagon, but not the Dinoseb. *Id.* at 2. The chemicals were initially stored in 55 or 30-gallon drums, but at some point in the mid-1960's, Shell changed its policy and began to require B&B to use bulk storage instead. *Id.* at 2. The delivery process allocated all risk and expense to the seller, Shell, until the product reached its destination. *Id.* at 3. Leaks and spills were a regular part of the process used to transfer the chemicals from one storage unit to another. *Id.* at 3. Aware of this, Shell took action to encourage safe handling of the chemicals. *Id.* at 3. Although B&B took steps to follow Shell's advice, it was a "sloppy operator." *Id.* at 3.

In 1983, the Environmental protection Agency (EPA) and California Department of Toxic Substances Control (DTSC) investigated B&B for soil and ground water contamination. *Id.* at 4. Some of the pollution threatened potential drinking water supplies. *Id.* at 4. B&B took some steps to address the issues but became insolvent and shut down in 1989. *Id.* at 4. Soon after, the facility was added to the National Priority List so the DTSC and EPA could

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clean the site. *Id.* at 4. By 1998, \$8 million was spent by the agencies to clean the site. *Id.* at 4.

In 1991, the EPA ordered the Railroads to clean the portion of the site on their land. The Railroads did so at an expense of \$3 million. *Id.* at 4. They then brought suit for recovery of that sum against B&B in the United States District Court for the Eastern District of California. *Id.* at 5. That suit was later consolidated with two suits by the agencies against Shell and the Railroads. *Id.* at 5. The District Court found both Shell and the Railroads liable, but, instead of imposing joint and several liability, it apportioned liability based on the percentage of the contaminated area that was owned by the Railroads, the duration of B&B's lease of that property, and the Court's determination that only two of the three chemicals spilled there. *Id.* at 5. As a result of the court's calculations, the Railroads were to be held liable for 9% of the cleanup cost and Shell was held liable for 6%. *Id.* at 5.

Both agencies and Shell appealed the decision. *Id.* at 6. The Ninth Circuit Court of Appeals ruled that Shell was properly held liable, but overturned the apportionment scheme implemented by lower court. *Id.* at 6-7. Finding that the burden of proof for apportionment, which had not been met, rested with Shell and the Railroads, the Court of Appeals imposed joint and several liability upon both parties. *Id.* at 7. The Supreme Court granted certiorari to determine: 1) whether Shell had "arranged" for the disposal of the chemicals; and 2) whether joint and several liability was properly imposed. *Id.* at 7.

## *II. Qualification as Potentially Responsible Parties*

The first issue tackled by the Court was whether Shell and the Railroads properly indentified as Potentially Responsible Parties (PRP) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *Id.* at 8. Identification as a PRP carries the consequences of bearing responsibility for cleaning contaminated areas or reimbursing the government for cleanup costs. *Id.* at 8. The Court found no issue with the classification of the Railroads as a PRP. *Id.* at 9. As an owner of the facility where hazardous substances were disposed of they fell squarely within two classes of PRP defined by CERCLA under 42 U.S.C. §§9607(a)(1) and 9607(a)(2). *Id.* at 8-9.

The Court spent the bulk of its time examining whether Shell qualified as a PRP under §9607(a)(3) which defines a class of PRP as "any person who by contract, agreement, or otherwise *arranged for disposal* or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous

substances owned or possessed by such person, by any other party or entity, at any facility ... containing such hazardous substances." *Id.* at 8. Finding that the determination of whether one is an "arranger" must consider a wide range of activity from simple sales of hazardous chemicals that do not contemplate their disposal to explicit contracts for the sole purpose of hazardous waste disposal, the Court explained that, looking beyond the parties' characterization of the applicable arrangements, this determination can must "discern whether the arrangement was one Congress intended to fall within CERCLA's strict liability provisions." *Id.* at 9-10. Because Congress did not define the term "arranger" in CERCLA, the Court "gave the phrase its ordinary meaning." *Id.* at 10. "In common parlance, the word "arrange" implies action directed to a specific purpose." *Id.* at 10. The Court refined this to say that a party "may qualify as an arranger when it takes intentional steps to dispose of a hazardous substance." *Id.* at 11.

The Government's main argument against Shell was that interpretation of the phrase "arrange for disposal" should focus on the definition for "disposal." Section 6903(3) of CERCLA defines "disposal" as the "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste into or on any land or water." *Id.* at 11. The agencies contend that by including unintentional acts such as spilling or leaking, Congress had it in mind to impose liability on any party that engaged in sales knowing that spillage could occur in the process of the sale. *Id.* at 11. Since Shell knew spillage was an unavoidable part of its transaction, it would be liable under the government's reading of CERCLA. *Id.* at 11. The Court rejected this reading because knowledge of spillage does not prove that Shell intended to dispose of the product. "In order to qualify as an arranger, Shell must have entered into the sale of D-D with the intention that at least a portion of the product be disposed of during the transfer process..." *Id.* at 12. The facts on record do not demonstrate that Shell had any such intent. *Id.* at 12. To the contrary, they show that Shell took steps to prevent spillage by providing safety manuals, mandating maintenance of storage facilities, and rewarding operations that took safety precautions with discounts. *Id.* at 12. Based on this, the Court held that Shell was not liable as an arranger under §9607(a)(3). *Id.* at 12.

### *III. Apportionment for the Railroads*

The Court began its analysis of the apportionment question by observing that although CERCLA imposes strict liability on offenders, it does not require joint and several liability for every case. *Id.* at 13. It found that Congress

intended for the degree of liability to be consistent with current interpretations of the common law. *Id.* at 13. Looking to §433A(1)(b) of the Second Restatement of Torts, the Court found that "apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm." *Id.* at 14 (quotation omitted). CERCLA places the burden for demonstrating the suitability of apportionment on defendants. *Id.* at 14. Because it is undisputed that the cleanup cost is capable of apportionment, the question is whether the District Court's methodology of apportionment was reasonably supported by the record. *Id.* at 15.

Both the government and the Railroads took extreme positions on potential liability. *Id.* at 15-16. Since neither party briefed the District Court on apportioning liability, the presiding judge took it upon himself to determine the proper apportionment. *Id.* at 15-16. He did so by calculating the proportion of contaminated surface area of the contaminated facility owned by the Railroads, the relative period of time during which B&B operated on the Railroads' property, and the proportion of chemicals that contributed to the contamination. *Id.* at 16. The District Court then plugged these calculations into a formula that resulted in 6% liability to the Railroads. *Id.* at 16. It figured for a 50% error in calculations and adjusted the figure upward to 9%. *Id.* at 16.

The Court of Appeals assailed this methodology because the essential factors in the equation were not capable of providing a reliable measure of contribution to the contamination. *Id.* at 17. The Supreme Court found that despite these inaccuracies, the District Court's determination was reasonable because 90% of the pollution at the plant occurred at the sump or other locations which were relatively distant from the Railroads' property. *Id.* at 17. Additionally, the 50% margin of error factored in by the District Court should make up for any other inaccuracies in the calculations. *Id.* at 18. The Court overturned the Court of Appeals because it found that the evidence supported the District Court's apportionment methodology, which comported with common law principles of apportionment. *Id.* at 18-19.

#### *IV. Dissenting Opinion by Justice Ginsburg*

Justice Ginsburg accepted the Governments' definition of "arranger" and found that Shell would qualify as an arranger because of its intense involvement in the chemical delivery and storage processes. *Burlington Northern & Santa Fe Railway Co. v. United States*, No. 07-1601, at 1 (U.S. Feb. 24 2009) (Ginsburg, J. dissenting). Its role went beyond knowledge because of the high degree of control it exercised in the process. *Id.* at 2.

Regarding the apportionment of damages, Justice Ginsburg questioned the District Court's decision to pursue that avenue *sua sponte*. She accepts the Governments' argument that they were unaware such a course of action would be taken and therefore were "deprived ... of a fair opportunity to respond" that they would have had if apportionment were advanced in petitioners' arguments.

Id. at 3. Based on this position, Justice Ginsburg would have returned the cases to the District Court so all parties could weigh in on the question of apportionment. Id. at 4.