BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. UNITED STATES

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I. Background

After 28 years of "sloppy" operation, pesticide distributor Brown & Bryant, Inc. ("B&B") went bankrupt, leaving behind a plume of contaminated groundwater.[1] The U.S. Environmental Protection Agency ("EPA") and the California Department of Toxic Substances Control ("DTSC") spent millions remediating the site in order to protect drinking water,[2] and sued several potentially responsible parties for cost recovery. Last term, the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. United States* held that the supplier of some of the chemicals that polluted B&B's site was not liable for response costs.[3] In addition, the Court held that the responsible parties should not have been subject to joint and several liability, instead endorsing a rough estimate approach to cost apportionment.[4] *Burlington Northern* will make it more difficult for plaintiffs to seek recovery of the costs they have incurred cleaning up hazardous waste sites.

B&B owned 3.8 acres in Arvin, California and leased an adjacent 0.9 acre parcel from two railroad companies for a portion of its time in operation.[5] B&B purchased some of its pesticides from the Shell Oil Company ("Shell"). Shell initially supplied one corrosive pesticide, D–D, in 55-gallon drums.[6] Later, Shell required its distributors to use bulk storage tanks even though use of the tanks increased environmental releases.[7] D–D corroded storage tanks and valves and spilled when transferred from trucks to the tanks.[8] Shell was aware of the leaks and spills and took measures to reduce them, publishing a safety manual, requiring safety inspections, and providing rebates to distributors who improved their facilities.[9]

Entities who "arranged for disposal or treatment . . . of hazardous substances" are one class of potentially responsible parties liable for hazardous waste site response costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[10] In *Burlington Northern*, EPA and DTSC brought recovery actions against Shell and the

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[1] *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1875–76 (2009).

[2] *See id.* at 1876.

[3] *See id.* at 1879.

[4] *See id.* at 1882–83.

[5] *See id.* at 1874.

[6] *See id.* at 1875.

[7] *See id.*; *id.* at 1885 (Ginsburg, J. dissenting).

[8] *See id.* at 1875 n.1 (majority opinion).

[9] *See id.* at 1875.

[10] 42 U.S.C. § 9607(a)(3) (2006).

railroads.[11] After a six-week bench trial, the district court held that Shell and the railroads were both responsible parties, Shell as an arranger and the railroads as landowners.[12]

The district court also found that the harm caused by the contamination was divisible. Developing its own theory of apportionment, the court apportioned the railroads' liability according to the percentage of the facility owned by the railroads, the term of B&B's lease compared to the total duration of B&B's operations, and the fact that only two of three polluting chemicals were spilled on the railroads' property.[13] Adding in a 50% margin of error, the court concluded that the railroads were responsible for 9% of the total harm.[14] The court also apportioned about 6% of the harm to Shell.[15]

The Ninth Circuit affirmed the district court's determination that Shell was an arranger. Shell's knowledge that leaks would occur, plus its control over the transaction, were sufficient to establish that Shell arranged for disposal of a hazardous substance every time it sold D–D to B&B.[16] Noting that there was "no dispute" that the harm was divisible, the Ninth Circuit held that the district court nonetheless erred in finding that the record supplied an adequate basis for apportionment.[17] By arguing exclusively for no liability, Shell and the railroads had failed to carry their burden of presenting causation evidence to the court, so the court lacked adequate information to apportion reasonably.[18] Because Shell and the railroads did not supply a reasonable basis for apportionment, the Ninth Circuit applied joint and several liability to them both.[19] Justice Stevens, writing for the Supreme Court, reversed, holding that Shell did not qualify as an arranger and that the district court's calculations provided a reasonable basis for apportionment.[20]

II. Arranger Liability

In *Burlington Northern*, Justice Stevens reasoned that arranger liability forms a spectrum. At one extreme, entities selling useful products without

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[11] United States v. Atchison, Topeka & Santa Fe Ry. Co., Nos. CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228 OWW, 2003 WL 25518047 (E.D. Cal. July 15, 2003).

[12] *See Burlington Northern*, 129 S. Ct. at 1876. The railroads' liability as owners was not challenged in the Supreme Court.

[13] *See id.* at 1876–77.

[14] *See id.*

[15] *See Atchison, Topeka & Santa Fe Ry. Co.*, 2003 WL 25518047, at *95–96. The district court held that Shell was liable for slightly less than 6% because it found that Shell was not responsible for cleanup costs originating from a separate hot spot of a pesticide provided by a different chemical company.

[16] United States v. Burlington N. & Santa Fe Ry. Co., 479 F.3d 1113, 1142 (9th Cir. 2007), *amended by* 502 F.3d 781 (9th Cir. 2007).

[17] *See id.* at 1133, 1138.

[18] *See id.* at 1133.

[19] *See id.* at 1142.

[20] *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1878 (2009). Justice Stevens was joined by Chief Justice Roberts, and Justices Alito, Breyer, Kennedy, Scalia, Souter, and Thomas.

knowledge of the products' future improper disposal are clearly not responsible parties under CERCLA.[21] At the other extreme, entities entering into transactions "for the sole purpose of discarding a used and no longer useful hazardous substance" are clearly within the class of potentially responsible arrangers.[22] The Ninth Circuit had reasoned that entities in the middle of the spectrum with knowledge of disposal but no purpose to dispose should be liable as arrangers based on the fact that CERCLA defines disposal to include unintentional releases, such as leaks and spills.[23] In contrast, the Supreme Court focused not on CERCLA's definition of disposal, but on the phrase "to arrange for."[24] Because the phrase "to arrange for" ordinarily implies purposeful action, a person who arranges for disposal of a hazardous waste must intend to dispose of the product. Shell cannot be liable as an arranger, Justice Stevens concluded, because Shell did not intend for the leaks to occur.[25]

Justice Ginsburg dissented, agreeing with the lower courts that Shell should have been liable as an arranger.[26] Shell's knowledge of the spills, plus its control over the method of transport and delivery, should have been sufficient to establish that Shell "arranged" for the disposal.[27] Furthermore, Justice Ginsburg reasoned that allowing Shell to escape arranger liability was inconsistent with CERCLA's purpose.[28] Because Shell profited from the chemicals that contaminated the site, Shell, not the taxpayers, should be responsible for the response costs.[29]

The Supreme Court took a moderate approach in construing the word "arrange" to require purposeful disposal. The Court could have foreclosed arranger liability for leaks of useful products entirely by ruling that such leaks did not qualify as wastes.[30] Nonetheless, the holding is a departure from the way some circuit courts have resolved the question.

Like all circuit courts, the Supreme Court adopted a form of the useful product doctrine, that sellers of useful products are not liable as arrangers. Prior to *Burlington Northern*, federal case law had clearly established that manufacturers who sell a useful product to a consumer are not liable as arrangers when the consumer later improperly disposes of waste related to the product.[31] The rule established in this line of cases has been labeled the

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[21] *See id.*
[22] *See id.*
[23] *See Burlington N. & Santa Fe Ry. Co.*, 479 F.3d at 1139.
[24] *See Burlington Northern,* 129 S. Ct. at 1879.
[25] *See id.* at 1880.
[26] *See id.* at 1884–85 (Ginsburg, J., dissenting).
[27] *See id.* at 1885.
[28] *See id.*
[29] *See id.*
[30] *See* Transcript of Oral Argument at 12–13, *Burlington Northern*, 129 S. Ct. 1870 (Nos. 07-1601, 07-1607).
[31] *See* Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160, 164 (2d Cir. 1999); AM Int'l, Inc. v. Int'l Forging Equip. Corp., 982 F.2d 989, 992, 999 (6th Cir. 1993); Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990).

useful product doctrine.[32] It is helpful to describe the facts of two such cases, in order to get an idea of the doctrine's scope. In *Florida Power & Light Co. v. Allis Chalmers Corp.*, the Eleventh Circuit held that a manufacturer of transformers could not be considered an arranger for selling the transformers to a utility.[33] After using the transformers for "an extensive length of time," the utility sent them to a recycling facility.[34] Neither the utility nor the recycler was aware that the transformers contained polychlorinated biphenyls ("PCBs"), and contamination resulted from the recycling process.[35] The Eleventh Circuit reasoned that the transaction between the manufacturer and the utility was merely a sale, and there was no evidence to suggest that the manufacturer intended to dispose of the PCBs by selling the transformers.[36]

The Second Circuit followed the Eleventh Circuit's reasoning in a similar case, *Freeman v. Glaxo Wellcome, Inc.*[37] There, a chemical manufacturer sold new chemicals to a maker of vitamin concentrates. The vitamin company intended to use some of the chemicals and resell others. Unable to sell the chemicals for a suitable price, the vitamin company stored them for twenty years, at which time EPA determined that the stored chemicals represented a threatened release of a hazardous substance.[38] The Second Circuit reasoned that the chemicals were not waste at the time of the sale, so the transaction was merely a sale, rather than an arrangement for disposal. *Freeman* and *Florida Power & Light* represent clear examples of the useful product doctrine because the seller had no knowledge that improper disposal would occur, and the disposal took place long after the sale.

In sales of materials that are waste-like, courts have held sellers liable as arrangers without considering their intent to dispose. For instance, in *Louisiana-Pacific Corp. v. ASARCO, Inc.*, a copper smelter sold slag to a log yard for $3.50 per ton.[39] The log yard used the slag to add traction to its dirt road surface, and eventually disposed of the slag in a landfill.[40] The slag contaminated the log yard and the landfill with heavy metals.[41] Because the slag was a by-product of the smelting process that the smelter "had to get rid of," the Ninth Circuit held that a jury reasonably found the smelter to be liable as an arranger.[42] Interestingly, in *ASARCO* there is no mention of the smelter's state of mind. The fact that the slag was clearly within the ordinary

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[32] *See, e.g.*, Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 508 F.3d 930, 933 (9th Cir. 2007).
[33] *See* 893 F.2d at 1318.
[34] *Id.* at 1319.
[35] *See id.* at 1315.
[36] *See id.* at 1319.
[37] 189 F.3d 160 (2d Cir. 1999).
[38] *See id.* at 162.
[39] 24 F.3d 1565, 1575 (9th Cir. 1994).
[40] *See id.* at 1570–71.
[41] *See id.*
[42] *Id.* at 1575 n.6.

conception of waste was enough to satisfy the court that the smelter arranged to dispose of the slag by selling it to the log yard. After *Burlington Northern*, cases such as *ASARCO*, in which the defendant is disposing of waste by selling a marginally useful "recycled" or "reclaimed" product, will likely still be decided in favor of the plaintiff. Courts will be able to discern a purpose to dispose of the waste from the inherently waste-like nature of the material, the fact that the defendant had previously dumped the material,[43] or from the defendant's statements that it should properly dispose of the material.[44] I predict that *Burlington Northern* will be distinguished as a case involving the sale of a new useful product.

Although *Burlington Northern* will not impact cases involving the sale of inherently waste-like "products," it will unify the divergent tests for arranger liability applied in the circuit courts. The Supreme Court clearly repudiated both the Ninth Circuit's knowledge test[45] and the Third Circuit's ownership plus control or knowledge test.[46] The Supreme Court's test is also clearly stricter than the Eleventh Circuit's case-by-case approach, in which intent to dispose and ownership of the waste are relevant to arranger liability but not dispositive.[47] However, the Supreme Court's test is the same as that applied by the Seventh Circuit in *Amcast Industrial Corp. v. Detrex Corp.*,[48] and the Sixth Circuit in *United States v. Cello-Foil Products, Inc.*[49] There, the Sixth Circuit stated "that the requisite inquiry is whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances. The intent need not be proven by direct evidence, but can be inferred from the totality of the circumstances."[50] The Supreme Court similarly looked at the defendant's actions for evidence of intent, concluding that Shell's actions limiting leaks and spills indicated a

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[43] *See id.* at 1575 (noting that defendant had previously disposed of the material by dumping it in the bay).

[44] *See, e.g.*, United States v. Gen. Elec. Co., No. 1:06-cv-00354-PB, 2007 WL 4674520 (D.N.H. Oct. 26, 2007).

[45] *See* United States v. Burlington N. & Santa Fe Ry. Co., 479 F.3d 1113, 1138–39 (9th Cir. 2007), *amended by* 502 F.3d 781 (9th Cir. 2007).

[46] *See* Morton Int'l v. A.E. Staley Mfg. Co., 343 F.3d 669, 677 (3d Cir. 2003).

[47] *See* S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 406–07 (11th Cir. 1996).

[48] 2 F.3d 746, 751 (7th Cir. 1993). The Seventh Circuit did hold, however, that the seller was liable as an owner/operator.

[49] 100 F.3d 1227, 1231 (6th Cir. 1996).

[50] *Id.* at 1231. In *Cello-Foil*, the Sixth Circuit held that the district court erred in granting summary judgment to the defendants because there was a genuine issue of material fact regarding the defendants' intent to dispose: "The district court employed an overly restrictive view on what is necessary to prove intent, state of mind, or purpose, by assuming that intent could not be inferred from the indirect action of the parties." *Id.* at 1233. The defendants were purchasers of solvent who had returned mostly empty drums to the solvent company, which dumped residues on the ground, eventually contaminating a public drinking water source with volatile organic compounds. *See id.* at 1229–30. The United States argued that in returning the drums, the defendants were arranging to dispose of the remaining solvent in the drums, which varied from one-half of a gallon to ten gallons. *See id.* at 1233.

purpose to avoid disposal.[51] In some circuits, therefore, *Burlington Northern*'s purpose test for arranger liability represents at least an incremental change making it more difficult for plaintiffs to establish liability. This shift will have practical effects; after *Burlington Northern,* entities that sell or arrange for transport of hazardous useful products will almost never be held liable as arrangers because they rarely intend to dispose of the products they sell.

Although the Court did not cite any policy arguments, it may have been animated by the feeling that it was unfair and ineffective to pin liability on makers of useful products for the mistakes of their customers.[52] By requiring that the supplier of a useful product show a purpose to dispose, the Court avoids this dilemma because suppliers would rarely intend for their customers to spill or leak useful products. By finding that Shell's efforts to reduce spills of its products constituted evidence of its intent that the spills not occur, *Burlington Northern* may create incentives for manufacturers of hazardous substances to implement similar spill reduction programs.

However, programs designed to encourage customers to use hazardous substances properly will not adequately protect the public from the risks of environmental contamination, as this case demonstrates. Despite Shell's intention not to dispose of D–D through leaks, the environment was contaminated with Shell's products. Why should the railroads, which leased land to B&B as a parking lot, be pinned with more liability than the supplier of the hazardous chemicals? Arguably, Shell profited more from the hazardous substance business as compared to the railroads, which probably received the same rent as they would have from any business occupying that plot of land.

If the Court had concluded that Shell's knowledge of the leaks was adequate grounds for arranger liability, the Court could have required the makers of hazardous substances to internalize some of the environmental and human health costs of their products in the form of CERCLA liability. The risk of liability for cleanups might have encouraged some industries to move away from producing hazardous substances. It would also have created an incentive for suppliers of hazardous chemicals to enforce proper safety practices among their customers.[53]

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[51] Shell's actions can also be read to suggest a purpose to dispose. Shell chose to continue the spills that are explicitly within CERCLA's definition of disposal. Shell knew that its methods of shipment and transfer caused disposal but decided not to return to a method of shipment that would prevent disposal.

[52] *See* Transcript of Oral Argument, *supra* note 30, at 29–31.

[53] For further analysis of incentives created by alternative tests of liability for CERCLA cleanups, see KATHERINE N. PROBST & PAUL R. PORTNEY, ASSIGNING LIABILITY FOR SUPERFUND CLEANUPS: AN ANALYSIS OF POLICY OPTIONS 45–47 (1992). *See generally* Rena I. Steinzor & Linda E. Greer, *In Defense of the Superfund Liability System: Matching the Diagnosis and the Cure*, 27 Envtl. L. Rep. (Envtl. Law Inst.) 10,286 (1997).

III. Reasonable Basis for Apportionment

While the Supreme Court focused on the ordinary meaning of CERCLA's language in analyzing the arranger liability question, it focused on the facts when analyzing the apportionment question. Cementing a long-established approach, the Supreme Court in *Burlington Northern* recognized that CERCLA is based on a system of tort liability.[54] By endorsing *United States v. Chem-Dyne Corp.*, which adopts the principles of the Restatement (Second) of Torts, the Court confirmed that joint and several liability should be applied where multiple defendants are responsible for a single indivisible harm.[55] However, under the Restatement if "there is a reasonable basis for determining the contribution of each cause to a single harm," costs are apportioned.[56]

Although the United States asserted that the railroads had failed to prove that the harm was divisible,[57] the Court refrained from addressing that question, stating only that the court of appeals and the district court agreed that the harm was divisible.[58] The Court only confronted the issue of whether the district court's factors constituted a reasonable basis for apportioning nine percent of the harm to the railroads.[59] Without clearly articulating a new standard for what types of facts supply a reasonable basis for apportionment, the Court held that the district court did not err in apportioning on the basis of the factors it considered.[60] These factors were "the simplest of considerations:" the size of the parcel, the duration of the lease, and the number of contaminants spilled on the parcel out of the total number of contaminants.[61]

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[54] *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983); *see also In re* Bell Petroleum Svcs. Inc., 3 F.3d 889 (5th Cir. 1993); United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992); O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989); United States v. Monsanto Co., 858 F.2d 160, 171–72 (4th Cir. 1988).

[55] *See* Restatement (Second) of Torts § 433A (1976); Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1881 (2009).

[56] Restatement (Second) of Torts § 433A(1), § 433A(1) cmt. d (1976).

[57] *See* Transcript of Oral Argument, *supra* note 30, at 52–56.

[58] *See Burlington Northern*, 129 S. Ct. at 1881. The parties disagreed about the proper focus of the second question presented. The United States focused on whether the defendants satisfied their burden of providing a reasonable basis for apportionment, while defendants focused on the Ninth Circuit's conclusion that liability should be joint and several even though the district court found a basis for divisibility. *Compare* Brief for the United States at I, *Burlington Northern*, 129 S. Ct. 1870 (Nos. 07-1601, 07-1607), *with* Brief for Petitioner at i, *Burlington Northern*, 129 S. Ct. 1870 (Nos. 07-1601, 07-1607).

[59] *See Burlington Northern*, 129 S. Ct. at 1883–84. Because the railroads argued that they should not be subject to any liability, they did not present a theory at trial of how their contribution to the harm should be calculated. The district court developed its own theory based on facts in the record. *See* United States v. Atchison, Topeka & Santa Fe Ry. Co., Nos. CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228 OWW, 2003 WL 25518047 (E.D. Cal. July 15, 2003).

[60] *See Burlington Northern*, 129 S. Ct. at 1881–82.

[61] *Id.* at 1883.

In dissent, Justice Ginsburg did not dispute the reasonableness of the factors considered by the district court, but explained that she would have remanded the apportionment question for additional fact finding regarding the nature of the spills on the railroads' land.[62] Because the railroads had not developed a record with apportionment in mind, the trial court developed its own theory of apportionment — a theory that was not subjected to adversarial testing.[63] As a result, the government was unable to rebut the assumptions underpinning the district court's apportionment calculation.[64]

The Supreme Court's holding departs from precedent by failing to mention the burden of proof. Based on the Restatement (Second) of Torts, the circuit courts of appeals have established that the responsible party bears the burden of proving that there is a reasonable basis for apportionment.[65] Plaintiffs will likely argue that the Supreme Court implicitly endorsed this burden of proof by endorsing *Chem-Dyne*. But if the Court had taken the burden of proof seriously, it would have remanded because the railroads had not presented any theory of apportionment. This contrasting approach is best illustrated by *United States v. Alcan Aluminum Corp*.[66] In that case, Alcan introduced no evidence to establish that the harm was divisible because Alcan argued that the waste disposed was not hazardous. Noting that Alcan failed to carry its burden of proof, the Second Circuit remanded for rehearing to allow Alcan a chance to attempt to establish that the harm was divisible and that a reasonable basis for apportionment existed.[67]

The Court's endorsement of the rough estimate factors used by the district court signals a shift from the way many courts of appeals have viewed a reasonable basis for apportionment in the CERCLA context. Circuit courts have been reluctant to apportion costs,[68] in part because apportionment potentially allows polluters to escape all liability if they can show that their pollution activities did not cause the harm, a result incompatible with a strict liability statutory scheme.[69] Unlike tort liability, CERCLA does not require

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[62] *See id.* at 1886 (Ginsburg, J., dissenting).

[63] *See id.*

[64] *See id.*

[65] *See* United States v. Hercules, Inc., 247 F.3d 706, 717 (8th Cir. 2001); United States v. Twp. of Brighton, 153 F.3d 307, 318 (6th Cir. 1998); O'Neil v. Picillo, 883 F.2d 176, 182 (1st Cir. 1989); United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988); RESTATEMENT (SECOND) OF TORTS §433B cmt. d (1976).

[66] 964 F.2d 252, 257 (3d Cir. 1992).

[67] *See id.* at 271.

[68] *See* United States v. Capital Tax Corp., 545 F.3d 525, 535 (7th Cir. 2008) (noting that joint and several liability is the rule, while apportionment is an exception). The Fifth Circuit had adopted a broader view of apportionment, stating that for damages to be apportioned, the defendant need only show that its portion of the damages can be reasonably estimated. *See In re* Bell Petroleum Svcs. Inc., 3 F.3d 889, 904 (5th Cir. 1993).

[69] *See Township of Brighton*, 153 F.3d at 318 (explaining that allowing for divisible harms undermines CERCLA's strict liability scheme: "[D]efendants who can show that the harm is divisible, and that they are not responsible for any of the harm, have effectively fixed their own share of the damages at zero. No causation means no liability, despite § 9607(a)'s strict liability scheme."); *see also* United States v. Cello-Foil Products, Inc., 100 F.3d 1227, 1232

any demonstration of causation. Even if a landowner had no knowledge of any disposal occurring on her land, she would be a responsible party under CERCLA. In contrast, she could not be liable in a tort suit, unless the plaintiff could prove that the landowner's negligence caused the harm to the plaintiff. This difference, courts have reasoned, necessitates a narrow application of apportionment in CERCLA cases, so that the strict liability nature of the statutory regime is preserved.[70]

In a case analogous to *Burlington Northern* the Third Circuit held that the percentage of land owned by a responsible party was not a reasonable basis for apportionment because it "says nothing about what portion of harm may fairly be attributed" to that party.[71] Circuit courts have apportioned costs only where the defendant could clearly show that some distinct portion of the harm was unrelated to their actions. For instance, the Seventh Circuit has explained that a defendant could establish a reasonable basis for apportionment by showing that the contamination was geographically divisible because it was located on non-contiguous sites and not co-mingled.[72] The site in *Burlington Northern* was contiguous, and it was unclear what volume of pesticide had been spilled or leaked on the railroad parcel as opposed to the rest of the Arvin site. However, the ultimate impact of the apportionment holding will be limited by the small number of cases in which the contamination is as simple as it was at the Arvin site. Many sites involve large numbers of contaminants with diverse toxicities, different migration potentials, and complex synergistic effects.

As a result of *Burlington Northern*, courts will apportion harm in more cases. Where defendants had previously settled with the government in order to avoid joint and several liability, they will be more likely to take their chances at trial.[73] With fewer settlements, and more apportionment at trial, the number of Superfund site cleanups that are funded by responsible parties will decline. This case illustrates the problem. B&B, clearly the party most responsible for the contamination, went bankrupt long ago.[74] As Shell was not liable, and the railroads were held liable for only 9% of the costs, the

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(6th Cir. 1996); United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993). For an in-depth analysis of the way causation requirements influence CERCLA suits "through the backdoor," see generally John Copeland Nagle, *CERCLA, Causation and Responsibility*, 78 MINN. L. REV. 1493 (1994).

[70] *See* United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989) (citing a string of cases holding that CERCLA is a strict liability regime).

[71] United States v. Rohm & Haas Co., 2 F.3d 1265, 1280 (3d Cir. 1993), *overruled on other grounds by* United States v. E.R. DuPont De Nemours & Co., 432 F.3d 161, 162–63 (3d Cir. 2005) (en banc).

[72] *See Capital Tax Corp.*, 545 F.3d at 535.

[73] EPA is directed to settle whenever possible by CERCLA § 122: "Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation." 42 U.S.C. § 9622(a) (2006).

[74] *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1875–76 (2009).

government will be left holding the bill for 91% of the cleanup. When the government must fund some or all of the response costs, fewer sites can be restored. The government fund set up to cover such costs has been depleted[75] and is unlikely to be replenished by Congress in this difficult fiscal climate. If the tort law analogy is extended to its logical end, the Supreme Court's determination that the costs can be apportioned on the basis of rough estimates means that the government here is a tort plaintiff who has not been made whole.

[75] *See* Charles W. Schmidt, *Not-so-Superfund: Growing Needs vs. Declining Dollars*, 111 ENVTL. HEALTH PERSP. 162, 164–65 (2003). The taxes used to fund cleanups expired in 1995. As a result far fewer funds are available for cleanups now. *See* U.S. GEN. ACCOUNTING OFFICE, GAO-08-841R, SUPERFUND: FUNDING AND REPORTED COSTS OF ENFORCEMENT AND ADMINISTRATION ACTIVITIES 6-7 (2008).