

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BURLINGTON NORTHERN AND :

4 SANTA FE RAILWAY :

5 COMPANY, ET AL., :

6 Petitioners :

7 v. : No. 07-1601

8 UNITED STATES, ET AL. :

9 - - - - - x

10 and

11 - - - - - x

12 SHELL OIL COMPANY, :

13 Petitioner :

14 v. : No. 07-1607

15 UNITED STATES, ET AL. :

16 - - - - - x

17 Washington, D.C.

18 Tuesday, February 24, 2009

19 The above-entitled matter came on for oral
20 argument before the Supreme Court of the United States
21 at 10:15 a.m.

22 APPEARANCES:

23 KATHLEEN M. SULLIVAN, ESQ., New York, N.Y.; on behalf of
24 the Petitioner in No. 07-1607.

25 MAUREEN E. MAHONEY, ESQ., Washington, D.C.; on behalf of

1 the Petitioners in No. 07-1601.
2 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
3 Department of Justice, Washington, D.C.; on behalf of
4 the Respondents.

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P R O C E E D I N G S

(10:15 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in case 07-1601, Burlington Northern and Santa Fe Railway Company et al. v. United States.

Ms. Sullivan.

ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

ON BEHALF OF THE PETITIONER

IN NO. 07-1607

MS. SULLIVAN: Mr. Chief Justice, and may it please the Court:

The court of appeals in this case untethered CERCLA liability for response costs from the plain statutory language of CERCLA section 107(a)(3), and in so doing also imposed potentially crippling liability on entities with only the most attenuated connection to any harm. 107(a)(3), which is reprinted in the petition appendix in 1607 on page 266a, provides that among the potentially responsible parties under CERCLA are so-called arrangers; that is, those persons who by contract, agreement, or otherwise arranged for disposal of hazardous substances.

The paradigmatic case, of course, would be a generator of hazardous waste calls up "Waste Co." and

1 asks Waste Co. to take those substances to a landfill or
2 to otherwise dispose of them. Where CERCLA does not
3 define a statutory term -- and there's no definition of
4 "arrange" -- this Court has long said, for example in
5 United States against Bestfoods, that we look to the
6 ordinary meaning of the language, and the plain meaning,
7 the ordinary meaning, of "arrange for" is to make plans
8 or preparations to do something. The ordinary meaning
9 of the word "for" is to refer to a purpose or goal. And
10 the ordinary meaning of "to dispose" is to discard or to
11 throw away. So --

12 CHIEF JUSTICE ROBERTS: What if your shipper
13 here knew that every time he delivered one of these
14 truckloads of the chemical, one-third of it would end up
15 on the ground and seeping through the ground, and no
16 doubt about it, he knew that, and yet they kept sending
17 it? Wouldn't that be arranging for the disposal of at
18 least a third of the shipment?

19 MS. SULLIVAN: No, Your Honor. That's not
20 our facts, of course, but even if there -- there had
21 been knowledge here, knowledge is not sufficient to give
22 rise to the specific intent required by the statute.
23 Just as in the criminal law, we wouldn't infer in a
24 specific intent case that one is presumed to know the
25 natural consequences of one's acts. What is required

1 here is an actual plan to dispose. And --

2 JUSTICE KENNEDY: Well, suppose that it's
3 Shell's truck -- that isn't this case, but suppose it's
4 Shell's truck, and every time they make a delivery the
5 driver catches the waste in a can, four or five gallons,
6 and dumps it in the creek. Is Shell liable there under
7 the statute?

8 MS. SULLIVAN: Justice Kennedy, Shell might
9 well be liable there, but not under 107(a)(3), rather
10 under 107(a)(2).

11 JUSTICE KENNEDY: I mean, hasn't it arranged
12 for the disposal of the --

13 MS. SULLIVAN: You wouldn't reach arranger
14 liability there, Your Honor, because as in the Amcast
15 case, when Judge Posner said the truck is a facility,
16 the truck would be a facility that Shell owns or
17 operates in that instance. But in this case, of course,
18 Shell was hiring independent contractor truckers to ship
19 the waste.

20 JUSTICE KENNEDY: Well, I'm -- I'm not sure
21 that I agree with your answer. Can you give me an
22 example under this statute where Shell might be an
23 arranger -- give me some hypothetical in which Shell
24 would be an arranger?

25 MS. SULLIVAN: Well, Your Honor, we believe

1 under arranger liability shell would never be an
2 arranger here. The only thing --

3 JUSTICE SOUTER: What if Shell went out of
4 business and it had some stuff left in the tanks? At
5 that point, they might very well hire somebody to do
6 exactly what you're saying.

7 MS. SULLIVAN: That's correct, Your Honor.

8 JUSTICE SOUTER: That would be an eccentric
9 situation, but it could happen.

10 MS. SULLIVAN: Justice Souter, if Shell had
11 residual waste product that it was seeking to dispose,
12 then the natural reading of 107(a)(3) would apply
13 because that would be waste product.

14 JUSTICE KENNEDY: Why isn't that the case in
15 my hypothetical -- it's just a hypothetical -- where the
16 driver catches the five gallons that spills out of the
17 hose every week and dumps it in the creek?

18 MS. SULLIVAN: Your Honor --

19 JUSTICE KENNEDY: That's really the same as
20 the question you answered Justice Souter, and that's an
21 arranger under (3).

22 MS. SULLIVAN: Your Honor, the key
23 difference in the two hypotheticals that you've posed is
24 that Shell is the owner and operator of the disposal of
25 waste there, and therefore it would be a 107(a)(2) case,

1 not an arranger case. The arranger liability is
2 designed for --

3 JUSTICE GINSBURG: Ms. Sullivan, would it be
4 altogether different if, instead of the FOB destination
5 term, Shell continued as owner of the product until it
6 had gone from the hose or whatever delivers it, so that
7 there is no transfer of ownership until the delivery is
8 complete?

9 MS. SULLIVAN: Yes, Justice Ginsburg, that
10 would be a different case. That would be a case like
11 the so-called formulator cases, of which United States
12 against Aceto from the 8th Circuit is paradigmatic. And
13 in that case the key is that the company arranging --
14 the company was held liable for arranging to dispose of
15 waste where it owned the product throughout a
16 manufacturing process, sent it out to a formulator, but
17 got it back as its own product, knowing that inherent in
18 the formulation process was the creation of waste
19 material. So Shell would have been the owner of the
20 waste.

21 JUSTICE GINSBURG: The problem I have with
22 that line you're pursuing is the FOB destination term is
23 an eminently fixable connection, and CERCLA is -- can be
24 a punishing statute, but the one thing that was not
25 intended was for the parties to arrange themselves out

1 of arranger liability by providing neatly that the
2 moment the product reaches a destination there's no
3 continuing responsibility on the part of the seller.

4 MS. SULLIVAN: Justice Ginsburg, that is
5 correct with respect to arranging for the disposal of
6 waste. One couldn't evade one's responsibility for
7 arranging for the disposal of waste products. If you're
8 shipping sludge or discarded materials or spent battery
9 casings or waste oil, if you're shipping waste then you
10 can't get out of your obligations by simply arranging
11 for someone else to collect the waste FOB destination.
12 But the difference here is that this is not a waste
13 case. This is a --

14 JUSTICE KENNEDY: Isn't it waste when it
15 spills? You deliver -- you're supposed to deliver 100
16 gallons, 5 gallons spills; isn't that waste?

17 MS. SULLIVAN: Justice Kennedy, it only
18 matters for 107(a)(3) if we arrange for it to spill.
19 And as Judge Posner said in Amcast, no one arranges for
20 an accident except in the --

21 JUSTICE KENNEDY: They know that --
22 hypothetical. They know that in the course of delivery
23 you're always going to spill about five gallons. That's
24 waste.

25 MS. SULLIVAN: Well, Justice Kennedy, the

1 district court found in this case that Shell had
2 knowledge of spills at the site of the bulk unloading.
3 These were minute spills, only 80 gallons, 80 gallons a
4 year out of 123,000, or .07 percent.

5 JUSTICE KENNEDY: All I'm talking about is
6 just a hypothetical definition of waste.

7 MS. SULLIVAN: Your Honor, even if the
8 spills are waste, the key for arranger liability, the
9 key for arranger liability is that you arrange for
10 spills.

11 JUSTICE KENNEDY: But we were talking about
12 waste, and I just wanted to get your agreement -- maybe
13 you won't agree -- that when the product is delivered
14 and 5 percent of it spills, that is waste, and we can
15 talk about the other parts of it later.

16 MS. SULLIVAN: Your Honor, the statute
17 CERCLA, by cross-reference to the Solid Waste Disposal
18 Act, does include spills and leaks as possible waste,
19 and the natural application of that definition would be
20 to spills or leaks in a waste disposal. If a landfill
21 operator spills or leaks waste, then obviously that's
22 waste. But even if you treat drips of a useful product
23 -- and there's no dispute here that the D-D shipped to
24 the agricultural facility was a useful product, shipped
25 for commercial use for application in the fields. Even

1 if you view it as a spill of that product if a little
2 bit falls out of the hose upon delivery at the bulk
3 storage tank, it does not entail that Shell was an
4 arranger for the disposal of hazardous waste.

5 JUSTICE ALITO: What if Shell had a choice
6 between two companies to do the delivery. One would
7 deliver it with no spillage whatsoever, but the other
8 would deliver it with a certain amount, a small amount
9 of spillage. And Shell chose the latter because it was
10 cheaper. Would it not be arranging under those
11 circumstances?

12 MS. SULLIVAN: It might well be because
13 there would be an economic benefit to Shell from the
14 arrangement for shipment in the leaky truck. That would
15 be quite a different case from this one. There was no
16 economic benefit to Shell from the leaks here. In fact,
17 Shell did everything possible, so far as the record
18 shows, to prevent spills.

19 JUSTICE SOUTER: But I thought your
20 definition of -- of disposal implied the disposition of
21 something whose use had, in effect, been exhausted, so
22 that I would have thought your answer to Justice Alito's
23 question would have been different because even in the
24 case in which they hired a sloppy delivery, they're not
25 getting rid or the deliverer is not necessarily getting

1 rid of a product whose use has been exhausted.

2 MS. SULLIVAN: That is correct, Your Honor.

3 We believe the --

4 JUSTICE SCALIA: I would have thought you
5 would have similarly answered Justice Kennedy's question
6 differently and would have said that just because
7 something's wasted doesn't mean that it is waste. I
8 mean, you may waste part of what is delivered, but what
9 is spilled is -- it doesn't seem to me to be waste.

10 MS. SULLIVAN: Justice Kennedy and Justice
11 Souter an easy way to hold this case and to reverse the
12 court of appeals would be simply to hold that when a
13 useful product is spilled it is not waste. And the
14 cross-reference to the Solid Waste Disposal Act would
15 support that interpretation because in 42 U.S.C. Section
16 6903(3) Congress defined "hazardous waste" as that
17 material which is discarded. It analogize it to sludge.
18 This is not a case about sludge or waste material.

19 CHIEF JUSTICE ROBERTS: But your argument
20 assumes a sharp distinction between useful product and
21 waste. Yet it's quite common to talk about there being
22 waste associated with a useful product. When you use up
23 so much of this, there's going to be a certain
24 percentage of waste.

25 MS. SULLIVAN: Correct, Your Honor. But the

1 -- so even if you don't draw the line simply at the
2 useful product-waste distinction, we still do not
3 qualify as an arranger under 1007(a)(3) because we did
4 not arrange for the spill, we did not arrange for the
5 waste.

6 The government relies on facts in the record
7 to suggest that we had some special knowledge or special
8 responsibility, and of course the government's argument
9 that mere knowledge of a third-party's spills would
10 create arranger liability would disrupt commerce across
11 a range of industries. It would mean that the chlorine
12 company is liable when the pool supply store spills a
13 few drops of chlorine and the place becomes a facility.
14 It would mean that the maker of perchloroethylene is
15 liable when the dry cleaning establishment spills dry
16 cleaning fluid near the dry cleaning machine, even if
17 they had nothing to do with it.

18 CHIEF JUSTICE ROBERTS: That's making it too
19 easy for you. It would mean all of those people would
20 be liable when in the course of delivering stuff they
21 know there's going to be a certain amount that's going
22 to spill, and even, perhaps the Justice Alito
23 hypothetical, they could have easily chose the truck
24 that causes more spill rather than the one that causes
25 less. It's not simply here's the product, we're gone,

1 see you later, and all of a sudden there's a spill.

2 MS. SULLIVAN: Your Honor, there's no
3 suggestion in the record here that we're in Justice
4 Alito's example. The district court found that spills
5 --

6 CHIEF JUSTICE ROBERTS: No, no, i know. But
7 I'm trying to reach the extent of your argument. So in
8 that type of a case would there be arranger liability?

9 MS. SULLIVAN: There -- we believe there
10 would not be because spilling a useful product while
11 it's being delivered should not count as waste. But
12 even if you treated that as waste within the meaning of
13 the statute or even if you treated that as a discard of
14 a hazardous substance, there still should not be
15 arranger liability based on mere knowledge. There has
16 to be knowledge of a third party's spills.

17 The difference from Justice Alito's example
18 is that Shell there would be invested in the spillage as
19 part of its own economic transaction, as in formulator
20 cases, where you send a material out to a manufacturer
21 intending for it, expecting for it to spill in the
22 process, you know you're going to get 98 percent back.
23 That's not this case. Shell sought here, as most
24 routine commercial sellers and shippers do, to get a
25 third-party truck to take all of the stuff to B&B and

1 have it used for its commercial application as pesticide
2 in the field. There was no built-in here, no effort to
3 build in here any benefit for Shell in the leaky truck,
4 Quite distinguishing Justice Alito's example. The
5 government --

6 JUSTICE GINSBURG: Well, one benefit would
7 be avoiding CERCLA liability through a means other than
8 what I call the fixable connection. Is this the first
9 occasion on which Shell because of its sales of D-D has
10 been charged with CERCLA liability? Is this a case of
11 first impression, or have there been other instances in
12 which Shell did very much the same thing, delivered the
13 D-D FOB destination?

14 MS. SULLIVAN: Your Honor, this is the first
15 and only case in the nation that has held that arranger
16 liability applies to a mere sale of a useful product
17 because a third-party purchaser after acquiring
18 possession and control spilled the product. So there's
19 no other case I am aware of in which it's been
20 adjudicated that there is any liability under these
21 facts.

22 But the key distinction here is that even if
23 you don't distinguish between the useful product and
24 waste and even if you go with Justice Kennedy's idea
25 that spilling a useful product could be waste, it still

1 is not arranging for the disposal of that substance
2 unless there's an intent to dispose. Here Shell wanted
3 every drop of D-D to be safely placed in the bulk
4 storage tank.

5 JUSTICE STEVENS: Ms. Sullivan, can I
6 interrupt you? Because I'm still puzzled by your answer
7 to Justice Alito. Are you conceding that if in this
8 case Shell had an alternative carrier who would not have
9 spilled a bit, that then there would be liability?

10 MS. SULLIVAN: No, we are not, Justice
11 Stevens.

12 JUSTICE STEVENS: I thought you did in your
13 answer to Justice Alito. Why wouldn't that be? Explain
14 your answer a little more fully?

15 MS. SULLIVAN: Justice Stevens, we concede
16 that if there is a waste product that leaves Shell and
17 Shell deliberately arranges for a leaky carrier, there
18 would be no issue. That would be 107(a)(3). Even if --
19 and we concede there might be a possible case in which
20 Shell deliberately chooses to send a useful product in a
21 way that it leaks. It puts the product into leaky
22 containers when it leaves the shop. Then there might be
23 some case in which you might attribute knowledge, infer
24 intent from knowledge.

25 But this is not that case because here the

1 transfer to the third party -- the transfer to the third
2 party occurs at tender of delivery under ordinary UCC
3 principles. The -- the transfer to the third-party
4 purchaser occurs, and that's when the spillage occurs.

5 JUSTICE GINSBURG: I thought there was as
6 part of this picture that Shell had a manual which told
7 its purchasers how to handle this material, and that
8 Shell was well aware that B&B was not following the
9 precautions laid out in the manual.

10 MS. SULLIVAN: Justice Ginsburg, two points:
11 The manual comes out only in 1978, and a Shell
12 representative visits the site only in 1979. That
13 leaves 19 years of liability unaccounted for on that
14 period.

15 But, more important, it would be terribly
16 impractical and terribly perverse in relation to the
17 purposes of the environmental laws that Congress passed
18 to penalize a manufacturer for telling a third-party
19 purchaser how to handle a product more safely. So to
20 use the manual issued in 1978 or the inspection in 1979
21 as evidence that Shell knew there were spills and,
22 therefore, was an arranger would be perverse in relation
23 to the environmental statutes.

24 If there are no further questions, I would
25 like to reserve the balance of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Ms. Mahoney.

3 ORAL ARGUMENT OF MAUREEN E. MAHONEY

4 ON BEHALF OF THE PETITIONERS

5 IN NO. 07-1601

6 MS. MAHONEY: Mr. Chief Justice, and may it
7 please the Court:

8 I would like to start with section 912 of
9 the Restatement because I think it really helps to
10 demonstrate that the trial court fully understood and
11 properly applied the common law standards that govern
12 the determination of apportionment in a pollution case.
13 That section provides that when a party bears the burden
14 of proof, they have to establish the extent of harm and
15 the amount of money with, quote, "as much certainty as
16 the nature of the tort and circumstances permit," end
17 quote.

18 At the time that CERCLA was adopted in 1980,
19 common law courts for more than a century had been using
20 that standard to apportion damages and harm in pollution
21 cases based on essentially rough estimates because the
22 nature of the tort, pollution, and the circumstances
23 don't allow for the kind of precision that we might
24 require in some other settings such as proof of -- of
25 fault, for instance.

1 And the United States, they say that the
2 district court departed from those common-law standards,
3 but it's telling: They don't cite a single common-law
4 case decided before CERCLA in their entire brief. If
5 you were to look at section 840(e) of the Restatement,
6 which governs nuisance cases and apportionment -- it's
7 an application of the section 433(a) standards -- they
8 cite -- the Restatement cites approximately 50 cases. I
9 don't think there's a single one where a court denied
10 apportionment for a nuisance for a harm such as this one
11 that is theoretically capable of apportionment.

12 JUSTICE GINSBURG: This court -- - this
13 court, Ms. Mahoney, didn't deny apportionment.
14 Apportionment was never requested. The court said:
15 "I'm going to have to figure this out on my own." In
16 fact, the court deplored the parties for following what
17 he called a "scorched-earth tactic."

18 So the apportionment is not something that
19 has been denied to the PRPs in this case. It's
20 something that the court thought was proper and fair,
21 but it didn't deny any request made by parties, isn't
22 that so?

23 MS. MAHONEY: Your Honor, in note 16 of the
24 Ninth Circuit's opinion it actually rejects that
25 argument by the government and says that apportionment

1 was pled throughout the case; that the government was on
2 notice. That's note 16. The trial court very
3 specifically rejected the government's claims of waiver
4 saying, yes, apportionment was at issue here throughout
5 the case, both in terms of --

6 JUSTICE GINSBURG: Can you point to me the
7 part of the district court opinion that conflicts with
8 the part that I remember so well? He is saying, this is
9 a really tough assignment; I have to figure it out.

10 MS. MAHONEY: Oh, he does say that, Your
11 Honor. But what he says is that the theory of
12 apportionment that was offered by the railroad, the
13 argument that it made -- they offered an expert -- that
14 gave substantial precision about how to allocate harm
15 among the different chemicals on the site -- he doesn't
16 accept that approach. He accepts a different approach.

17 But at 252(a) he says -- he confirms --
18 there is, quote, "considerable evidence of the relative
19 levels of activities and number of releases on the two
20 parcels" that allow him to find a basis of -- for making
21 a reasonable estimate of the apportionment, which was
22 his responsibility as the factfinder. In addition, Your
23 Honor --

24 JUSTICE GINSBURG: Is it -- is it a judge's
25 responsibility, no matter what evidence may be in the

1 record from which one could make a finding, when a
2 finding hasn't been sought?

3 MS. MAHONEY: Well, Your Honor, the finding
4 of apportionment was sought. The trial court -- and,
5 again, note 16 of the -- of the Ninth Circuit's opinion
6 makes clear -- and the government doesn't say otherwise
7 -- that the railroads had requested apportionment. The
8 issue was whether or not they had argued the precise
9 theory, and the factfinder certainly has the authority
10 to choose the theory that it thinks best approximates
11 what is a reasonable estimate.

12 And in fact, Your Honor, the theory that the
13 trial court seized upon was actually suggested by the
14 government's own expert on cross-examination in the
15 transcript at -- at 4077 to '78.

16 And in addition, Your Honor, when it was
17 time for closing argument, which was September 28th,
18 1999, at the very beginning of the transcript, page 4,
19 the trial court said to the government -- it said to the
20 parties at the beginning of the closing argument, here's
21 what I want to know about. I want you to address
22 yourselves to whether or not I can apportion this harm
23 based upon the relative area on the site and the
24 relative time. He put the government on notice.

25 When the findings of fact came out, Your

1 Honor, the government could have filed a motion to amend
2 under Rule 52. They in fact filed a motion. They could
3 have asked to submit additional evidence if they somehow
4 thought that this had been unfair. They didn't do that.
5 Shell did it for other reasons, but the government
6 elected not to.

7 JUSTICE KENNEDY: And I suppose the district
8 court, if it wanted additional evidence, could have
9 said, I want additional evidence on this point.

10 MS. MAHONEY: It absolutely could have. And
11 so that argument of waiver was rejected by two courts
12 below, both by the district court in denying the motion
13 to amend -- it granted it in certain respects, but
14 rejected waiver, and then by the Ninth Circuit --

15 CHIEF JUSTICE ROBERTS: What if -- what if
16 you have a situation where it's clear under
17 apportionment one party is liable for one-tenth and the
18 other is liable for nine-tenths, but one-tenth is enough
19 to pollute the -- the water. Do you have apportionment
20 in that situation?

21 MS. MAHONEY: It depends, but generally yes.
22 And the reason, if it, as here -- the cost of the remedy
23 is driven by the mass of the contamination -- and it was
24 undisputed that that was the case here -- then the costs
25 have gone up based upon the aggregate harm.

1 CHIEF JUSTICE ROBERTS: Well, I assume it's
2 not a linear, if that's the right word, progression,
3 because once you've got to start a clean-up, you've got
4 to start a clean-up, whether it's, you know, caused by
5 one-tenth or -- or nine-tenths.

6 MS. MAHONEY: But it's that the whole cost
7 -- the question under apportionment is: Are all of the
8 damages attributable to the harm that was caused by the
9 defendant? And if they're not, then apportionment is
10 appropriate. And here --

11 JUSTICE GINSBURG: But that hasn't been --
12 that hasn't been the position of most courts under
13 CERCLA. I thought they -- I thought that there had been
14 relatively few cases where apportionment, when
15 requested, was even allowed because the theory is the
16 act provides for contribution. One PRP can go after
17 another, but the party who shouldn't be left holding the
18 bag is the public, the innocent victims of the
19 pollution.

20 MS. MAHONEY: Well, Your Honor, under -- the
21 government has acknowledged that the apportionment
22 standards from the Restatement apply under the -- under
23 CERCLA. And cases, as I indicated, the cases under
24 840(e) almost always allowed apportionment for
25 pollution, even though it meant that a farmer or a

1 rancher or a grower was left holding with harm that was
2 caused by another defendant. But the law has always
3 said you can't impose damages on a defendant that had no
4 causal responsibility.

5 Here what we're talking about, under the
6 Ninth Circuit's holding, that they -- they didn't
7 question the district court's factfinding at 248a that
8 it is indisputable that the overwhelming majority of
9 hazardous substances were released by B&B on its own
10 parcel, on its own land, not on the railroad's land.
11 Its own operations on its own --

12 JUSTICE GINSBURG: I thought -- I thought --
13 and tell me if my recollection of the facts is
14 incorrect, that the -- the newer parcel that enabled B&B
15 to expand its operation, the waste went into a pond,
16 what was called South, that was on the other side, that
17 was on the original B&B parcel. So you had the waste
18 flowing from one part to the other.

19 MS. MAHONEY: The trial court found that it
20 was plausible that some leakage, some spills on the
21 railroad parcel, during the 13 years of the lease made
22 it into the groundwater by traveling nearly two football
23 fields in an area that hardly has any rain, but said
24 that 9 percent was the maximum of damages that could
25 possibly be attributable to this.

1 What the Ninth Circuit really says is that,
2 even though B&B began dumping thousands of gallons of
3 chemical rinsate in 1960, which was 36 years before this
4 case was filed, 15 years before the lease was ever
5 entered into, that all of that harm that was caused by
6 B&B has to be paid by the railroads, because they can't
7 -- that's almost \$40 million now -- because they can't
8 prove with precision whether their share of the damages
9 might be zero or one million or nine million.

10 And so what, in essence, the Ninth Circuit
11 did was said that because there weren't adequate records
12 to prove what amount of dumping was going on in 1960
13 when there wouldn't have been any reason to keep those
14 records, that as a default matter 100 percent of the
15 harm has to be allocated by the railroads, even though
16 it's not -- they didn't question the district court's
17 finding that it's indisputable that the overwhelming
18 majority was by B&B on its own land. And the court has
19 to --

20 CHIEF JUSTICE ROBERTS: What about the issue
21 of insolvency? You have talked about the Restatements.
22 There's the comment H to one of the Restatement
23 provisions that says you don't apportion if one of the
24 other parties is insolvent.

25 MS. MAHONEY: Actually, that's -- Your

1 Honor, what it actually says is that the district court
2 in exceptional cases may deny apportionment due to
3 insolvency. And here the district court at 248a found
4 this was not such a case, exercised its discretion to
5 say no.

6 And in addition, Your Honor, there are no
7 cases cited in that section of the Restatement where
8 this was actually done. And the Third Restatement in
9 section 28, comment C, says that that comment was
10 actually inconsistent with section 433(a) principles.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Stewart.

14 ORAL ARGUMENT OF MALCOLM L. STEWART

15 ON BEHALF OF THE RESPONDENTS

16 MR. STEWART: Mr. Chief Justice, may it
17 please the Court:

18 If I could begin with the issue of arranger
19 liability. The Ninth Circuit distinguished what it
20 referred to as the useful product cases and made it
21 clear that it would not impose arranger liability on
22 Shell simply under the theory that Shell had sold a
23 useful product that was later disposed of in a way that
24 contaminated the environment.

25 Rather, the Court of Appeals and the

1 district court emphasized both that Shell had control
2 over the delivery process and that Shell knew that, as
3 the district court put it, leaks and spills were
4 inherent in the chosen method.

5 JUSTICE BREYER: How does that differ from
6 you using your printer, there's an ink cartridge and you
7 replace them after a while, and mine has a little thing
8 attached that says don't put it in your ordinary garbage
9 bin because it's dangerous or whatever it is, put it in
10 this envelope and do something?

11 Now, I'm sure that HP makes those and knows
12 that several million people won't do it. They will
13 throw it in the garbage bin, and they ship to it me.
14 All right. Are they now arrangers?

15 MR. STEWART: No, I don't think they
16 would -- they -- I don't think they would be arrangers
17 for the disposal.

18 JUSTICE BREYER: Because?

19 MR. STEWART: Because even though they might
20 foresee that in some --

21 JUSTICE BREYER: Oh, some? No, probably
22 millions. I don't know anybody who does put it in the
23 right garbage can.

24 (Laughter.)

25 MR. STEWART: But -- first, I think under

1 ordinary tort law principles a seller's knowledge that a
2 certain percentage of its product would be misused would
3 not be sufficient to give rise to liability --

4 JUSTICE BREYER: Then how is that then
5 different from Shell? Shell here knows that to some
6 degree their people are going to spill this. And, of
7 course, shell arranged the transport. And in my
8 imaginary hypothetical -- I don't really know -- so does
9 HP.

10 MR. STEWART: There are two differences.
11 The first is that while HP might know that some
12 percentage of its customers would dispose of the
13 material improperly, here the district court found that
14 Shell knew that spills and leaks occurred with every
15 delivery. And the second --

16 JUSTICE BREYER: Well, now maybe HP knows
17 that there is a particularly bad customer like Breyer
18 who --

19 (Laughter.)

20 -- because I foolishly admitted at dinner
21 that I dispose of them all improperly. Now are they
22 Shell?

23 MR. STEWART: The second difference here is
24 that Shell arranged for the delivery and controlled the
25 circumstances under which the delivery would be made.

1 That is, Shell hired the common carrier and Shell
2 required that B&B have bulk storage facilities so that
3 the D-D would have to be pumped from the delivery truck
4 into the bulk storage.

5 JUSTICE BREYER: So then, suddenly if HP, in
6 fact, uses -- I guess they lease -- you know, they have
7 a common carrier, imagine -- or suppose it's car
8 batteries, same problem. They have their own trucks,
9 and they -- or they use Fed Ex; I don't know. And they,
10 in fact, put in an instruction, which says: Really do
11 it; really put it in the special now.

12 MR. STEWART: Again, at a certain point,
13 once the product has been used by the customer --

14 JUSTICE BREYER: I'm trying to find that
15 point. And what I have found you so far to say from the
16 briefs is that what Shell here did -- I'm not saying it
17 easy -- but what they did was they arranged the
18 transport, that seems to me to be common, and they put
19 some instructions in which said the right way to dispose
20 of it. Well, doesn't everybody do that?

21 MR. STEWART: No, because the fact
22 circumstance here was not that Shell or the common
23 carrier transferred control of the D-D to B&B with
24 instructions as to how it was to be used at a later
25 date, and the customer then violated those instructions.

1 The fact pattern here is that the spills occurred during
2 the process of delivery.

3 And to return to Justice Alito's
4 hypothetical, you asked what if Shell deliberately chose
5 a particular delivery company that it knew would result
6 in spills, but did so for economic advantage, that's
7 exactly the case here. That is, at a prior time the D-D
8 had been shipped to B&B's facility in sealed drums, so
9 whatever the possibility that it might be misused later,
10 it wouldn't be spilled or leaked during the process of
11 delivery and transfer. But Shell decided that it was to
12 its economic advantage to require bulk storage of D-D.

13 JUSTICE SCALIA: Excuse me. You say in the
14 process of delivery. I thought that this material
15 became the property of the buyer when the truck arrived.
16 Are you saying it only -- it only became the property of
17 the buyer when it was unloaded from the truck?

18 MR. STEWART: The district court
19 specifically declined to make a finding there. That
20 is --

21 JUSTICE SCALIA: What does "FOB" normally
22 mean?

23 MR. STEWART: It says "FOB delivery or place
24 of delivery." And the district court found that B&B
25 acquired what it called stewardship over the property at

1 the time that the truck entered the premises, but that
2 it --

3 JUSTICE SCALIA: I think -- I think it's
4 something of a misdescription to say that this spillage
5 is occurring in the course of delivery.

6 MR. STEWART: But the district court --

7 JUSTICE SCALIA: I think as far as Shell was
8 concerned, delivery had been made when the truck pulled
9 up.

10 MR. STEWART: Well, the district court
11 specifically declined to find -- to make a finding as to
12 who owned the D-D at the time it was spilled.

13 JUSTICE SCALIA: You're making it.

14 MR. STEWART: We don't think that our
15 argument is dependent upon the question of ownership,
16 because Shell undeniably had ownership and possession of
17 the D-D at the time the arrangement was made, and --

18 JUSTICE STEVENS: Independent of the time of
19 control.

20 JUSTICE BREYER: Independent but not at the
21 time of the spill.

22 MR. STEWART: That's correct. But that
23 would be true in the paradigmatic arranger case, where
24 one company has generated waste and hires a hauler to
25 pick it up and take it away. Those parties could easily

1 provide by contract that title would pass to the hauler
2 at the time the garbage --

3 JUSTICE BREYER: Then in your view what it
4 is is a company arranges with a transporter for disposal
5 when the company knows that the transporter on arrival
6 may spill some of the product?

7 MR. STEWART: It's more than --

8 JUSTICE BREYER: I guess then every oil
9 company -- well, I mean, every liquid product company in
10 the United States is going to be -- fall within that
11 because a lot of people do spill things.

12 MR. STEWART: Knowledge might well be
13 sufficient, but here we have more than knowledge, we
14 have control.

15 JUSTICE SOUTER: But why do we -- I mean, do
16 we have control? Shell says to its buyer, see that the
17 delivery is made in the following way, so it doesn't
18 spill all over the place. If Shell did control, it
19 wouldn't have to say that to the buyer. In effect it
20 could either order the buyer, as a condition of receipt
21 of the product, or it could require that as part of the
22 -- its terms with the - with the deliverer. It seems to
23 me that the way Shell has set it up indicates that
24 control has passed to somebody else at the time that the
25 spigot starts going in the tank.

1 MR. STEWART: Well, as Ms. Sullivan said,
2 the instructions were given in 1978, fairly far into the
3 period of contamination. But Even before that date
4 Shell had control in the sense that it required bulk
5 storage on the B&B facility.

6 JUSTICE SOUTER: He says, we won't sell you
7 to unless you -- you -- you have these tanks, correct?

8 MR. STEWART: And its contract with the
9 common carrier required that the common carrier have
10 particular equipment for pumping the D-D out of the
11 truck and into the bulk storage facility.

12 JUSTICE SOUTER: Okay, so what is your -- no
13 question, those are -- those are terms of their
14 willingness to deal. But what is your basis for saying
15 that when the truck pulls up and they -- the hose is
16 turned on to deliver, that at that point Shell is
17 controlling the process?

18 MR. STEWART: They have -- they have control
19 of the process in the sense of defining the way it is to
20 be done. You're correct that the actual process of
21 unloading is being done by employees of the common
22 carrier and employees of B&B rather than employees of
23 Shell. But again, the whole point of arranger liability
24 is to not allow the people who set in motion the process
25 that culminates in disposal to get off the hook.

1 JUSTICE SOUTER: So you don't -- but maybe
2 you do claim, I'm not sure -- that Shell actually could,
3 in effect get damages from its deliverer as a result of
4 the -- the deliverer's incidental spillage. Is that
5 your position?

6 MR. STEWART: That is --

7 JUSTICE SOUTER: That is, that the spillage
8 is a breach of the contract between the transporter and
9 Shell?

10 MR. STEWART: Well, I think if -- if Shell
11 had pursued such a cause of action, then the delivery
12 company might well have argued that these -- this was
13 foreseeable and that there was --

14 JUSTICE SOUTER: But do you have any basis
15 for saying that if it had pursued that course of action,
16 Shell would have succeeded?

17 MR. STEWART: No. And --

18 JUSTICE SOUTER: Then why is Shell in
19 control?

20 MR. STEWART: I mean, that's my point.
21 Shell would not have succeeded in such a suit, because
22 the delivery company would have argued successfully this
23 was known to be an inherent consequence of the delivery
24 process that Shell has chosen.

25 JUSTICE SOUTER: Well, yes, but you're

1 saying that the delivery company would have had a
2 defense, but you are -- are saying that Shell would have
3 had at least a theoretical right under its actual
4 contract with the deliverer to assert the -- the control
5 over the manner of delivery that would have prevented
6 the spill; is that what you're saying?

7 MR. STEWART: Well, it certainly insisted by
8 contract on the use of the pumping equipment of -- to
9 pump the D-D from the truck into the bulk storage
10 facility. And that was --

11 JUSTICE SOUTER: That's the only way they
12 could do it if the buyer did have bulk storage, isn't
13 that correct?

14 MR. STEWART: That's correct.

15 JUSTICE SOUTER: Okay.

16 MR. STEWART: So -- and to use an analogy --

17 JUSTICE STEVENS: May I ask, is it essential
18 to your theory that Shell had title to the material
19 until delivery?

20 MR. STEWART: It's not essential to our
21 theory. That is, the point of the arranger liability
22 provision is to get at situations in which one person
23 sets in motion a --

24 JUSTICE STEVENS: What if it were a fungible
25 product and the purchaser just agreed to take either

1 some product of this -- this quantity and quality and so
2 forth, but they could substitute other -- other goods
3 from another source? Would Shell still be liable?

4 MR. STEWART: I mean, I guess I would have
5 to know more about the hypothetical in -- as to the
6 circumstances in which the disposal occurred.

7 JUSTICE STEVENS: Well, Shell gave all the
8 same instructions they gave here, but they just didn't
9 insist that it be their product rather than somebody
10 else's, another oil company's product.

11 MR. STEWART: I guess I just -- I don't
12 really understand the hypothetical, because I don't
13 understand the situation in which Shell would be
14 indifferent as to whether its product was being bought
15 or the product of a competitor was being bought.

16 JUSTICE SOUTER: Mr. Stewart, could I go
17 back to a -- we have been arguing about details. Can I
18 go back to the -- to the broader question? What is your
19 best response to the argument that Ms. Sullivan makes
20 that "arrange for disposal" implies something
21 significantly different from "arrange for transfer,"
22 "arrange for release," "arrange for delivery" -- that
23 the -- that the combination of arrangement as an
24 intentional act and disposal, as opposed to one of these
25 -- these other processes, implies that the, in effect,

1 the use of the product intended has become exhausted and
2 that one in getting rid of waste as distinct from merely
3 wasting something. What is -- what is your best answer
4 to that?

5 MR. STEWART: We agree that the term
6 "arrange for" connotes intentionality, and we think it's
7 satisfied here because Shell intentionally set in motion
8 the process of delivery. It insisted upon the delivery
9 being done in a particular fashion, and it knew that
10 spills and leaks were inherent in that process. To use
11 an analogy --

12 JUSTICE SCALIA: Excuse me.

13 JUSTICE SOUTER: But if we're not arguing
14 about that, what you are arguing about, then, is the --
15 is the implication of disposal, as opposed to a more
16 neutral term like transfer or delivery or what-not.
17 What's your answer to that?

18 MR. STEWART: The further point I would make
19 is that the term "disposal" is specifically defined to
20 include spilling and leaking.

21 JUSTICE SOUTER: Oh, but those are certainly
22 ways in which disposal can occur, as I -- I think came
23 out in the argument. If the -- if Waste Management
24 spills things along the highway on the way to the dump,
25 it may be leakage, but a disposal is going on because in

1 fact it is a way of getting rid of something that no
2 longer has any use.

3 So I -- I can -- I don't think the -- the
4 inclusion of leakage within the definition answers the
5 question whether disposal is something different from
6 transfer.

7 MR. STEWART: To use a couple of analogies,
8 I think if I know that my car leaks oil whenever it's
9 operated and I choose to drive it on the public highway,
10 I think I could naturally be said to have intentionally
11 discharged oil onto the highway. It may be --

12 JUSTICE SOUTER: Well you have discharged,
13 but you -- the question is whether it's disposal.

14 MR. STEWART: Well --

15 JUSTICE SOUTER: "Discharge" is a more
16 neutral term.

17 MR. STEWART: Well again, the term
18 "disposal" is specifically defined to include spilling
19 and leaking. You're right that one --

20 JUSTICE SOUTER: No, but I mean, that --
21 that -- that begs the question. Because in the course
22 of disposing, in the sense that she argues for, there
23 can be leakage.

24 MR. STEWART: That's true, but --

25 JUSTICE SOUTER: The question is disposal

1 versus transfer or some more neutral term.

2 MR. STEWART: If you had a situation, for
3 instance, where the trash company was hauling waste and
4 intended to dispose of it in a more classic sense by
5 dumping it at a landfill, but along the way the truck
6 leaked, and some of the items spilled out --

7 JUSTICE SOUTER: When?

8 MR. STEWART: -- I think everybody
9 acknowledges that there is disposal there, and I think
10 we would also say that a company that contracted with
11 that trash hauler, knowing that the vehicle tended to
12 leak trash on -- on every delivery, could be said to
13 have arranged for not only the ultimate disposal, but --

14 JUSTICE BREYER: No that's at that point,
15 because I think you're focusing on the word. You don't
16 use the word "for" disposal, and I think that is the key
17 word, and the question is intention versus purpose.

18 So that in your trash hauler case, it seems
19 to work pretty well for me that when we say that that
20 trash truck of course intended in the sense that it was
21 its purpose to dispose of the trash when it got to the
22 dump, but the leakage along the way, it was not its
23 purpose.

24 So how do we deal with that? The statute
25 tells us that they are an owner of a facility or a

1 vessel that leaks, and therefore they are liable that
2 way. Now, that seems to work.

3 So we get your example. What doesn't seem
4 to work is when you import the notion of intention in
5 the sense of knowing that to the arranger provision,
6 because at that point I don't see how -- and I have to
7 buy that to get your argument. At that point I do not
8 see how you get every thing of Clorox on the shelf on
9 the shelf in the supermarket and don't put Clorox right
10 in the arranger provision and lots of other companies
11 that shouldn't be held as arrangers. That's my problem.
12 Are you following that?

13 MR. STEWART: I am following that, but I
14 think that the court of appeals dealt with this and
15 said: Our holding does not suggest that every
16 manufacturer of a useful product is liable down the road
17 if the customer ultimately disposes of it --

18 JUSTICE BREYER: It does say that, but my
19 problem is I can't find in the distinctions that they
20 made useful distinctions that will do that. It will say
21 "many," but it won't say, for example, the car battery
22 manufacturer who sends his car batteries out in his own
23 trucks to places where people will get them, and he
24 knows that they're not going to do it properly no matter
25 how hard he tries.

1 Well, he's not an arranger. He didn't
2 arrange the transport for disposal; he arranged the
3 transport for sale.

4 MR. STEWART: I mean, I think in a sense the
5 argument for liability there would depend in part on an
6 assumption that people will systematically violate the
7 law, like it would be an easy thing for the Court to say
8 we will not assume and we will not impose liability on
9 the basis of the assumption that battery customers will
10 systematically violate the law.

11 But the second thing that would be missing
12 in that hypothetical, even if the battery manufacturer
13 were assumed to know that every one of his customers
14 would dispose of them ultimately in an improper way, is
15 that the battery manufacturer would not be in control of
16 that process.

17 The manufacturer's control over the use of
18 the batteries and their ultimate disposal would be
19 severed once he turned them over, and that was not the
20 case here. And again I think to return to the purposes
21 of the arranger liability provision, the operator
22 liability provision deals very well with the people who
23 undertake the actual disposal, but Congress evidently
24 thought that that was not enough.

25 JUSTICE KENNEDY: Well, is Shell liable

1 because it -- it knew of the transportation
2 arrangements?

3 MR. STEWART: I think it is a combination of
4 knowledge and control. Knowledge might be sufficient,
5 but knowledge and control together form a basis for
6 arranger liability. Again, if I know that the
7 particular common carrier uses a truck, to use a variant
8 of my earlier hypothetical, if I know that a particular
9 common carrier uses a truck that leaks oil whenever it's
10 operated on the highway and I contract with that carrier
11 and ask it to haul goods, I think I can naturally be
12 said to have arranged for the discharge of oil on --

13 JUSTICE SOUTER: Yes, but you -- in that
14 case, you have knowledge but you don't have control
15 because you're using a common carrier.

16 MR. STEWART: I have -- I have control in
17 the sense that I have deliberately selected a mode of
18 delivery, a particular common --

19 JUSTICE SOUTER: Then you mean simply
20 control over your own choice process?

21 MR. STEWART: Well --

22 JUSTICE SOUTER: Not control over the
23 behavior of your hauler?

24 MR. STEWART: Not -- not control in the
25 sense of using my own personnel to drive the truck.

1 JUSTICE KENNEDY: Whether you have -- you
2 might have knowledge that one chemical broker is more
3 careless than another in the way the product was
4 ultimately sold, I don't see why your theory doesn't
5 make the seller liable as an arranger if it knows or
6 ought to know that at some point in the distribution
7 process there is likely to be spillage which will enter
8 the waters of the United States. I think that's what
9 your argument implies. I just don't see that in the
10 statute.

11 MR. STEWART: Again, because here Shell had
12 control over the very aspect of the process that
13 resulted in spills and leaks.

14 JUSTICE SCALIA: You mean it could have --
15 could have adopted some other means?

16 MR. STEWART: Not only --

17 JUSTICE SCALIA: That's all you mean by
18 having control over it.

19 MR. STEWART: Not only that it could have
20 adopted some other means, but that it insisted upon the
21 particular means --

22 JUSTICE SCALIA: All right. So all you're
23 requiring is knowledge that using this means will --
24 will result in a spill. I don't think knowledge alone
25 is enough for -- I think you need purpose. If you

1 arrange for disposal, I think you have to have a
2 purpose. It -- it has to be your object to have the oil
3 leaking along the highway as you go. Merely knowing
4 that it's going to be leaking, I mean, there may be some
5 other way under the statute that you can find liability
6 on the part of the shipper, but not, it seems to me, on
7 the -- on the ground that the shipper arranged for this
8 leak. He didn't want the leak. He knew it was
9 happening, but that was not the object of the transport.

10 MR. STEWART: Clearly, if the Court reads
11 the term "arrange for" to require purpose, we lose in
12 this case --

13 JUSTICE SCALIA: All right.

14 MR. STEWART: -- because that was not the
15 purpose of the transaction. But here there was both
16 knowledge and control.

17 And in terms of fairness to Shell, I think
18 it is worth noting that in the typical arranger setting,
19 where a person asks a trash hauler to come pick up my
20 trash and deposit it in an appropriate place, that the
21 arranger's ultimate liability may be determined very
22 substantially by steps that the hauler takes afterwards;
23 that is, if the arranger believes that the trash is
24 going to be disposed of safely, but in fact the hauler
25 dumps it in a way that will contaminate the environment.

1 The arranger was --

2 JUSTICE ALITO: Can I ask you a question
3 about your argument that the Petitioners waived their
4 apportionment argument? Aren't there many pages of the
5 district court record in which the parties address
6 apportionment? For example, in the government's
7 response to the Petitioners' apportionment argument,
8 don't you have more than 20 pages of findings of fact
9 and conclusions of law on the issue of apportionment?

10 MR. STEWART: We haven't used the word
11 "waiver" in our brief and -- but we concede that the
12 railroads and Shell, at least in a cursory way, raised
13 the issue of apportionment at trial, and the Ninth
14 Circuit found that was sufficient to preserve it. In
15 our view, this is like any case in which a party with
16 the burden of proof on a particular issue asserts that a
17 particular proposition is true but fails to introduce
18 sufficient evidence to carry its burden. You wouldn't
19 speak of that as waiver, but it's still a failure of the
20 party to come forward with enough to carry the day. And
21 you --

22 CHIEF JUSTICE ROBERTS: On the question of
23 apportionment, is it really your position that because
24 of the precision you would require, that if there's a
25 big fight over whether it's 10 percent responsibility or

1 30 percent and there's no way to tell, that if the
2 parties said, look, we'll take 40 percent, that that's
3 no good?

4 MR. STEWART: No, I think that would be an
5 acceptable approach. I think that --

6 CHIEF JUSTICE ROBERTS: Isn't that what
7 happened here? I mean, whatever -- I guess the
8 railroads said 6 percent, and the district court said,
9 well, just to be on the safe side, we'll give them 9
10 percent.

11 MR. STEWART: Well, I guess we would have
12 two responses. The first is, although the district
13 court certainly believed that he was -- the district
14 judge believed he was building in a margin of safety, in
15 our view it's still speculative as to whether the
16 railroad's share of the contamination exceeded or was
17 less than 9 percent.

18 But the more fundamental point is the one
19 that you raised in one of your questions; that is, the
20 ultimate harm to the government in a practical sense is
21 the incurrence of response costs, and in general that's
22 the way that damages are measured in a CERCLA case. You
23 don't ask, what threat -- what was the degree of public
24 -- of threat to the public safety that was posed by the
25 contamination? You ask, how much did it cost to clean

1 it up? And it --

2 JUSTICE ALITO: Do you dispute what Ms.
3 Mahoney said, that it costs a great deal more to clean
4 up some of the other chemicals than the ones that the
5 railroad was responsible for?

6 MR. STEWART: Well, I think -- I don't think
7 that the record kind of establishes the relative costs
8 of different contaminants. What I understood Ms.
9 Mahoney to say --

10 JUSTICE ALITO: The volume, the volume.

11 MR. STEWART: What I understood her to say
12 was that the cost of the remedial action is proportional
13 to the mass of chemicals to be removed, and we do
14 dispute that proposition. The railroad's expert, Dr.
15 Kalinowski testified about the remedial action that the
16 government at that time was contemplating, and it was
17 what was referred to as "a pump-and-treat system," where
18 water would be pumped out of the aquifer and it would be
19 treated with granular-activated carbon, or GAC, and that
20 was a method of removing the contaminants so that the
21 water could be pumped back in. And Dr. Kalinowski said
22 the amount of GAC that would be needed to implement that
23 remedy would be proportional to the mass of the
24 chemicals involved, but that the crucial point for these
25 purposes is the treatment with GAC is only a small

1 portion of the pump-and-treat remedy; that is, it's
2 essential to drill wells, pump the water out, then treat
3 it, and then under the prior remedial approach, pump it
4 back in. And then --

5 CHIEF JUSTICE ROBERTS: But that still
6 doesn't address the question, if you have varying
7 degrees of whatever you want to call it -- fault or
8 causal relationship -- that that's a sensible way to
9 apportion the liability.

10 MR. STEWART: I think the first preliminary
11 point is there's no reason to think that the cost of the
12 remedy as a whole would be proportional to the mass of
13 the contaminants because you have very substantial fixed
14 costs, but the other point I would make is this is where
15 the insolvency of B&B really seems to us to become
16 crucial because, if you had all solvent defendants and
17 the evidence showed that the remedy the government
18 implemented would have been more or less the same if it
19 had only been 10 percent of the contamination, 30
20 percent of the contamination, or 100 percent of the
21 contamination, that so much of the costs were fixed
22 costs that reducing the volume was really not going to
23 affect the cost in any meaningful way -- if you had all
24 solvent defendants, it might still be the case that
25 dividing the costs up in proportion to the contamination

1 they caused would do rough justice.

2 CHIEF JUSTICE ROBERTS: Well, what -- what
3 about Ms. Mahoney's three answers, when I asked that
4 question of her?

5 MR. STEWART: Well, I believe her first
6 answer was the cost of the remedy would be proportional
7 to the amount of contamination, which we disagree with,
8 and we don't think Dr. Kalinowski's testimony bears that
9 out, because all he said was the amount of
10 granular-activated carbon that would be necessary is
11 proportional to the mass of contaminants. And that --

12 CHIEF JUSTICE ROBERTS: She also said that
13 the Restatement comment h that you rely on cites no
14 cases, and the Third Restatement backs away from that
15 comment.

16 MR. STEWART: Well, as to the first point,
17 the comment h, you're right, doesn't cite cases, and it
18 does say that this -- the insolvency of the defendant
19 need not prevent apportionment, only that it would
20 provide a basis for doing so in exceptional cases. But
21 in our view, the exceptional case would be one in which
22 the ultimate determination was that the cost of the
23 remedy, the amount of the relevant harm, would be more
24 or less the same even if only one defendant's
25 contamination were at issue, that it --

1 CHIEF JUSTICE ROBERTS: So you don't think
2 that the insolvency should prevent apportionment if you
3 have a situation where a party is 1 percent responsible
4 and the 99 percent responsible party is insolvent?

5 MR. STEWART: Well, we would say even as to
6 10 or 20 percent, if it were established that the remedy
7 the government would have been required to implement,
8 had the only source of contamination been leakage on the
9 railroad parcel -- if it were established that the
10 government could have cleaned that up at 10 percent or
11 20 percent of the cost of the remedy that was actually
12 chosen, then there might be a sound basis for
13 apportionment despite the insolvency of B&B.

14 But our big point is, at the very least, the
15 government should not be left holding the bag for costs
16 that it would have been required to incur if the
17 railroad parcel had been the only source of
18 contamination, because --

19 CHIEF JUSTICE ROBERTS: And what do we have
20 in the way of findings on that question?

21 MR. STEWART: We don't have findings either
22 way. That is, the district court framed the relevant
23 inquiry as what percentage of the contamination was
24 attributable to the railroad parcel, to the
25 Shell-controlled deliveries, and to the B&B parcel. But

1 it made no finding one way or the other as to what the
2 cost of the remedy would have been if only the -- the
3 only source of contamination had been the railroad
4 parcel.

5 And certainly the -- the primary equitable
6 thrust of the argument on the other side is it's unfair
7 to make us pay for somebody else's contamination. But
8 to the extent that the government would have been
9 required to implement a remedy this costly or even 60
10 percent this costly had the railroads or Shell been the
11 only source of contamination, by imposing at least that
12 amount of liability, we're not asking for them to pay
13 for B&B's contamination. We're simply asking for them
14 to pay for the response costs that their own --

15 CHIEF JUSTICE ROBERTS: But is that right?
16 I mean doesn't it -- aren't you challenging the whole
17 basis for apportionment? I mean there is -- I don't
18 think when you're apportioning responsibility, you
19 allocate whether or not the actors independently caused
20 the harm. I thought the assumption was, yes,
21 everybody's -- all of this group has contributed to the
22 harm, but now we're going to apportion their
23 responsibility.

24 MR. STEWART: Well, indeed, the second
25 restatement says as a categorical matter that if either

1 of two causes would have been independently sufficient
2 to bring about the result, then there's joint and
3 several liability. The example that the restatement
4 gives is two merging fires that destroyed a building.

5 And so I think it is established in -- in
6 the second restatement that the -- there is no
7 apportionment if either of two causes would have brought
8 about the -- the feared harm.

9 With -- with respect to the third
10 restatement, I would say that at least in the case of --
11 you're -- you're right. There is no exact counterpart
12 to comment (h) in the third restatement. But at least
13 as to indivisible harms -- and I think this is
14 potentially an indivisible harm that the government
15 would have been required to undertake more or less the
16 same response action regardless of the source of
17 contamination.

18 At least as to individual harms, the third
19 restatement gives a variety of approaches that a local
20 jurisdiction could take. There's joint and several
21 liability, pure several liability, and then there are
22 several permutations. And the third restatement is --

23 JUSTICE SCALIA: Is that a finding? Do we
24 have to take it as a given that this was an indivisible
25 harm?

1 MR. STEWART: I don't know that -- I think
2 you should take it as a given because it was the
3 defendant's burden to prove different divisibility. But
4 I think if you don't regard the defendants as having the
5 burden, I don't think there is an evidentiary basis for
6 feeling confident one way or the other as to whether the
7 harm was indivisible. But with respect to --

8 JUSTICE ALITO: What is the basis for
9 thinking that every little detail in the latest
10 restatement, including comments, is binding in a CERCLA
11 case?

12 MR. STEWART: I don't think so, and this
13 Court in Norfolk and Western -- it was dealing with a
14 different statute, but it said when you're looking at
15 the restatement, it's more important what the state of
16 the law was when Congress enacted the statute rather
17 than what the common-law principles are now. And as
18 we've said in our brief, we think for that reason the
19 second restatement is the more crucial document.

20 But if you were to look at the third
21 restatement, one of the things you would find is that
22 the drafters, as to indivisible harms, identified a
23 variety of approaches that a local jurisdiction could
24 take -- expressly decline to choose a preferred one
25 among them, but said the most important determinant in

1 choosing between them is how will the risk that a
2 particular defendant be insolvent will be allocated.

3 So the drafters of the third restatement
4 certainly didn't treat insolvency as a factor that
5 should be ignored in citing questions of an
6 apportionability.

7 JUSTICE GINSBURG: May I -- may I just ask
8 one question about the -- the situation of -- of these
9 two potentially responsible parties? They are the only
10 ones left, right? Because B&B is bankrupt, and there's
11 nobody else that has been identified.

12 MR. STEWART: That's correct.

13 JUSTICE GINSBURG: So it's only those two.
14 And one question about the arranger liability -- well,
15 first on the apportionment. Assuming we don't accept
16 your entire position, would a remand so that proof could
17 be put in by both sides focusing on the issue of
18 apportionment be appropriate? You questioned the
19 district, even -- even if apportionment were possible,
20 you questioned how he arrived at it.

21 MR. STEWART: I guess that's true. To the
22 argument that I've just been sketching out, that -- that
23 the crucial question is what response costs the
24 government would have been required to bear if -- if
25 only the railroad parcel's contamination had been at

1 issue, our argument is that the -- the railroads failed
2 to prove divisibility. But another option would be to
3 remand for factual proceedings to address that question.

4 JUSTICE GINSBURG: And is it true, as Ms.
5 Sullivan said, that there is no other arranger case like
6 this one where the, quote, "arranger" is the seller of a
7 product?

8 MR. STEWART: I think there is no "arranger"
9 case going in either direction that is on all fours with
10 this one where there is the sale of a useful product
11 during the course of a delivery that the seller arranged
12 -- that the seller controlled.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Ms. Sullivan, we will give you five minutes.

15 REBUTTAL ARGUMENT OF KATHLEEN M. SULLIVAN

16 ON BEHALF OF THE PETITIONER

17 IN NO. 07-1607

18 JUSTICE KENNEDY: Ms. Sullivan, just on the
19 apportionment point, do you agree that it is your burden
20 to show that this is a divisible harm, and can you tell
21 me how you showed that?

22 MS. SULLIVAN: Yes, Justice Kennedy. The --
23 there is no dispute in this case that this was a
24 divisible harm. Mr. Stewart answered Justice Scalia's
25 question incorrectly.

1 The district court found and the circuit
2 court also found -- the circuit court's finding is on
3 page 36-A of the Petitioner's appendix -- that there is
4 no dispute that the harm here is divisible; that is,
5 there -- the -- the harm here is capable of
6 apportionment. That is not disputed before this Court.

7 What is disputed is whether at the second
8 stage of analysis the railroads and Shell met our burden
9 -- and we agree it is our burden under restatement
10 principles -- of showing the -- the quantum of division,
11 the reasonable basis for how the shares were allocated
12 by the District Court. And Justice Alito is correct.
13 There are meticulous findings, 20 pages of findings,
14 based on record evidence from the government's witnesses
15 and from the extensive expert testimony that both Shell
16 and the railroads put in that went to the apportionment
17 issue. Shell argued --

18 CHIEF JUSTICE ROBERTS: I'm not sure I know
19 what it means to say it's a divisible harm.

20 MS. SULLIVAN: It's capable of
21 apportionment. The restatement suggests in the cases
22 applying this -- it says you ask at the first stage: Is
23 the harm capable of apportionment as a matter of law?
24 And then as a matter of --

25 CHIEF JUSTICE ROBERTS: So that means that

1 whatever percentage of responsibility the parties have,
2 that's the percentage of cost that they --

3 MS. SULLIVAN: They should bear. But then
4 they -- it's up to the parties to prove a reasonable
5 basis for apportionment. But both Shell and the
6 railroads did argue, Justice Ginsburg -- put into
7 evidence and argued at the district court that there
8 should be apportionment --

9 CHIEF JUSTICE ROBERTS: So does that mean
10 that, let's say, the -- how does that work when it costs
11 \$2 million to sort of start a clean-up, no matter who,
12 and then, you know, the more stuff there is, the extra
13 million it is? Is that -- is -- is the initial cost a
14 divisible harm?

15 MS. SULLIVAN: Well, Mr. Chief Justice, the
16 district court here was conservative. It allocated all
17 of the costs, fixed and specific, to the parties. So
18 the conservative estimate of six percent for Shell, nine
19 percent for the railroads, was based on the heroic
20 assumption that a few drops spilled two football fields
21 away of a volatile substance that evaporates twice as
22 fast as water would be picked up by a rainfall that
23 could happen at the relevant quantities only once every
24 ten years according to our expert, once every seven
25 years according to the government's expert -- on the

1 heroic assumption that all of those drips reached the
2 pond which created a single plume of contamination.
3 Assuming that, then we award six percent or nine percent
4 of liability.

5 But the point is there was record evidence,
6 Justice Ginsburg -- and there is no need for a remand on
7 this. There was ample evidence for which the six
8 percent and the nine percent could be -- we -- and we
9 didn't object and say we --

10 JUSTICE GINSBURG: That's not normally how
11 -- when -- when someone has a burden of proof, it's a
12 burden of coming forward. And the one thing that we do
13 know from this district judge is he's saying, I was left
14 largely to make it up. What he -- the components of his
15 allocation did not come from -- yes, there is some
16 evidence in the record. But ordinarily when you talk
17 about a party who has a burden of proof, we don't mean
18 they put in a piece here and a piece there and left it
19 to the district judge to figure out.

20 MS. SULLIVAN: Justice Ginsburg, there is no
21 question that both the railroads and Shell argued for
22 zero percent liability. But the same evidence that we
23 put in and the proposed findings of fact -- for example,
24 if you want to look at Docket Nos. 1317 and 1318,
25 Shell's proposed findings of fact did suggest a basis

1 for apportionment. So we met our burden of production
2 as well as proof. But the -- to return to the question
3 --

4 JUSTICE KENNEDY: I'm really concerned about
5 the time and the white light, but I'm -- I'm not sure
6 you answered the Chief Justice's hypothetical about \$2
7 million, which is an initial clean-up that has to be
8 expended no matter how large the -- the spill was. How
9 did you discharge your burden of proof to show that that
10 is not the case here or that that is divisible?

11 MS. SULLIVAN: Justice Kennedy, here -- and
12 I refer you to the Petitioner's appendix at page -- I'm
13 sorry, to the joint appendix at page 288, to the expert
14 Kalinouski who described it as a single mass removal
15 scheme.

16 This is not a case like a toxic soup case in
17 a landfill with 238 different chemicals that require
18 different extraction procedures. This is a case in
19 which two chemicals reached the ground water and were to
20 be removed by a single mass extraction scheme, a single
21 -- what the expert called at joint appendix 288 a mass
22 removal scheme. It was not disputed or argued on appeal
23 that there was a single remediation process. So this is
24 a simple case in which we are relying --

25 JUSTICE BREYER: Well, we don't suppose that

1 that cost -- that single thing cost \$2 million, and you
2 will have to hire that \$2 million machine even if there
3 is one drop. So for the cost of that machine it
4 couldn't matter if your client put in one drop and
5 nobody else put in any, or the others put in 40 billion
6 drops. Can you allocate it? It would seem fair to
7 allocate it, but I guess maybe in the restatement there
8 is some law somewhere saying you can't, because it's
9 just one single cost that takes place regardless.
10 What's the state of the law on that? How do you --

11 MS. SULLIVAN: May I answer? A reasonable
12 basis is all that's required. A practical approximation
13 is appropriate here. Here the court did not distinguish
14 between fixed capital costs and operating costs that
15 might matter in a different case. But the key point
16 here is that you should affirm as a matter of Federal
17 common law that restatement 433(a) provides only a
18 demand for a reasonable basis and not exactitude. Thank
19 you very much.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 11:19 a.m., the case in the
23 above-entitled matter was submitted)

24
25

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