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DOES THE SUPREME COURT'S *BURLINGTON NORTHERN* DECISION REQUIRE RECONSIDERATION OF THE *ACETO* LINE OF "ARRANGER" LIABILITY CASES?

Aaron Gershonowitz†

The Comprehensive Environmental Response, Compensation and Liability Act of 1980¹ (CERCLA or the Superfund Law) states that a person who "arranged for disposal" of hazardous substances may be liable for remediation costs at an inactive hazardous waste site.² Courts have generally interpreted "arranged for disposal" broadly to include anyone who had responsibility for the hazardous substances.³ The Eighth Circuit's decision in *United States v. Aceto Agricultural Chemicals Corp.*⁴ represents perhaps the most expansive reading of arranger liability, holding that a corporation can be liable even though the corporation never possessed the waste and made no decisions regarding disposal.⁵ The *Aceto* theory of arranger liability has been followed by several other federal circuit courts of appeals.⁶

In *Burlington Northern & Santa Fe Railway Co. v. United States (Burlington Northern)*,⁷ the Supreme Court addressed an arranger liability issue that is, on its face, unrelated to the *Aceto* line of cases. The issue was whether a seller of chemicals could be held liable as an arranger when chemicals it sold accidentally spilled on delivery.⁸ The Ninth Circuit Court of Appeals held that the seller could be liable as an arranger.⁹ The Supreme Court reversed, and limited arranger

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1. 42 U.S.C. §§ 9601–9675 (2006).

2. *Id.* § 9607(a)(3) (imposing liability on "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances").

3. *See, e.g., United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989).

4. *Id.*

5. *See infra* Part II (discussing the *Aceto* decision).

6. *See infra* Part II.B (discussing the court of appeals decisions that have followed the *Aceto* theory of liability).

7. 129 S. Ct. 1870 (2009).

8. *Id.* at 1878.

9. *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 930 (9th Cir. 2008).

liability to actions intended to dispose of hazardous substances because “arrange” means to make a plan, and one cannot make a plan accidentally.¹⁰

This article will assess whether the Court’s reasoning in *Burlington Northern* limits the scope of arranger liability so much that the *Aceto* line cannot survive. In particular, it will examine whether the *Burlington Northern* Court meant that all arrangers must intend to arrange for disposal or whether the decision should be read more narrowly to conclude that a seller of a useful non-waste product can only be liable as an arranger if he or she intends a disposal.

I. BACKGROUND

A. *Development of the Arranger Concept*

The Superfund Law does not define *arrange* or include any discussion of what it means to arrange for disposal.¹¹ There is no legislative history directly addressing the meaning of arranger liability.¹² The only legislative history that might suggest a meaning for the arranger concept is the legislative history that identifies the concepts Congress discussed, rejected, and replaced with the arranger concept.¹³

One bill that preceded the Superfund Law provided that a waste generator is liable for remediation costs.¹⁴ Generator, unlike arranger, was a familiar environmental law concept because the

10. *Burlington N.*, 129 S. Ct. at 1879.

11. See 42 U.S.C. §§ 9601, 9607 (2006).

12. A number of courts have noted that CERCLA was hurriedly put together and passed with very little debate so that the legislative history provides little help in understanding the phrase. See, e.g., *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039–40 (2d Cir. 1985).

13. See ALLAN J. TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE § 1.1, at 4–5 (West Publ’g Co. 1992) (“[T]here are no committee or conference reports addressing the version of the legislation that ultimately became law” and “reports pertaining to the prior version of the legislation are of little value.”); see also Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982); *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1465–66 (1985–1986) [hereinafter *Developments in the Law*].

14. See H.R. REP. NO. 96-1016, pt. 1, at 29 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6132 (“Subsection (b) [of section 3041] defines the term ‘responsible party’ to mean any person who . . . generated or disposed of a substantial portion of the hazardous waste treated, stored or disposed of at the inactive site.”).

Resource Conservation and Recovery Act (RCRA)¹⁵ already imposed significant waste management obligations on the waste generator.¹⁶ A competing bill did not impose liability on generators or arrangers, but instead used a causation concept—the person who caused or contributed to the contamination would be liable for the cleanup costs.¹⁷

Because the debate between generator liability and causation liability seems to have resulted in arranger liability, a closer look at those concepts may shed light on the intended scope of arranger liability. The primary difference between RCRA and CERCLA is that RCRA regulates hazardous waste activities¹⁸ while CERCLA provides a liability system for inactive hazardous sites—places where waste was disposed of in the past.¹⁹ The key regulated party under RCRA is the waste generator.²⁰ Anyone who has a manufacturing or industrial process that results in the creation of hazardous waste is the generator of that waste, and RCRA tells that person how to store, handle, and dispose of hazardous waste.²¹ CERCLA, on the other hand, describes how to clean up inactive hazardous waste sites²² and

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15. 42 U.S.C. §§ 6901–6992k (2006). Generator is defined in § 6903(6).
 16. *Id.* § 6922 (discussing standards for generators of hazardous waste).
 17. H.R. REP. NO. 96-1016, pt. 1, at 14–15, 68 (stating that basing liability on causation would be more fair than imposing liability on generators because mere generation of waste does not cause a release to the environment).
 18. 42 U.S.C. §§ 6921–6939e (dealing with hazardous waste management). See § 6921 for the definition of hazardous waste, § 6922 for standards for generators of hazardous waste, and § 6923 for standards for owners and operators of hazardous waste treatment, storage and disposal facilities.
 19. See Sen. Robert T. Stafford, *Why Superfund Was Needed*, 7 EPA J. 8, 9–10 (1981) (discussing the goals of CERCLA); see also TOPOL & SNOW, *supra* note 13, § 2.1, at 24–25 (noting that Superfund primarily addresses present conditions that are the result of past acts).
 20. See 40 C.F.R. § 262 (2010). RCRA generators must identify which of their wastes are hazardous, see *id.* § 261 (addressing waste identification), handle them in a manner that reduces exposure, see *id.* § 262, pt. C (addressing packaging, labeling, and other pre-transport requirements), and document proper disposal, see *id.* § 262, pt. B (dealing with waste tracking).
 21. See 42 U.S.C. § 6903(6) (defining “hazardous waste generation” as “the act or process of producing hazardous waste”); *id.* § 6992(a).
 22. *Id.* § 9605 (requiring the preparation of a National Contingency Plan that “shall establish procedures and standards for responding to releases of hazardous substances”).

states who can be held liable for the cleanup costs.²³ It does not regulate business activities.²⁴

With that difference in mind, Congress considered whether the person with the waste handling and disposal obligations under RCRA should also be a person who is liable for the remediation of inactive hazardous waste sites.²⁵ The generator was a good candidate for liability for several reasons. If liability was to be imposed on those who benefited economically from the disposal of the waste, the generator fit the bill because it engaged in the business activity that created the waste.²⁶ If the liability system was intended to serve as a deterrent to the creation of new inactive hazardous waste sites, making the generator a liable party also made sense because the generator is the first person to have control of the waste and therefore has the ability to control how to dispose of the waste.²⁷

The alternative considered by Congress followed more of a tort model that imposed liability on all who caused or contributed to the contamination without regard to how the waste came into existence.²⁸ If the problem being addressed by Congress was the presence of inactive hazardous waste sites,²⁹ it made sense to place responsibility for the problem on those who caused the existence of the inactive hazardous waste sites.³⁰ Tort law has long provided strict liability for those involved in ultra-hazardous or unreasonably dangerous activities.³¹ Some courts have included the handling of hazardous substances as such an activity.³² Thus, liability for all who cause or

23. *Id.* § 9607 (describing who can be liable for the costs of responding to the release of hazardous substances).

24. See Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW. 923, 924 (1989-1990) (stating that CERCLA authorizes governments and private parties to cleanup toxic substances and recover their costs).

25. Keith M. Lyons, Jr., Comment, *Everyone Pays to Clean Up America: A Discussion of CERCLA Section 107(a)(3) and the Term "Arranged for Disposal,"* 28 WILLAMETTE L. REV. 589, 597 (1992).

26. See *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 732-34 (8th Cir. 1986) (discussing the legislative history of CERCLA and stating that Congress intended to impose the costs on "those parties who created and profited from the sites").

27. See *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983).

28. *Ne. Pharm. & Chem. Co.*, 810 F.2d at 733 (noting that Congress imposed liability "upon those who created and profited from the sites").

29. See Stafford, *supra* note 19, at 9; see also Lyons, *supra* note 25, at 597.

30. *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1072 (D. Colo. 1985).

31. See RESTATEMENT (SECOND) OF TORTS §§ 519, 520, 520 cmt. h (1976).

32. See, e.g., *Yommer v. McKenzie* 255 Md. 220, 257 A.2d 138 (1969) (storage of flammable materials); *Luthringer v. Moore*, 190 P.2d 1 (Cal. 1948) (cyanide gas).

contribute to the contamination at an inactive hazardous waste site would not have been a significant change in existing law.³³

Both the generator and causation concepts are inadequate for the job intended by Congress. Generator is too limited a concept because Congress decided not to limit the Superfund Law to remediation of hazardous waste.³⁴ Many of the sites that needed to be cleaned up were contaminated with hazardous substances that might not meet the RCRA definition of hazardous waste.³⁵ Because the RCRA generator concept relates to waste and not to substances, generator was too limited a concept to describe all of the persons that Congress intended to be liable for remediation costs.³⁶

While the generator concept was too limited because it did not include all the types of sites Congress intended to address, it may also have been too broad from a fairness perspective.³⁷ If a company generated the waste but played no role in the decision to dispose of it at a particular facility, should they have liability? For example, Company A generates waste, which it determines can be reused, and it sells the waste to Company B, who intends to reuse it. Company B reuses some of it and disposes of the rest. Is there any reason that Company A, the waste generator, should be responsible for Company B's disposal?³⁸

Causation was a familiar tort concept and a logical candidate for the source of liability.³⁹ If the goal is to determine who should clean

33. See RESTATEMENT (SECOND) OF TORTS §§ 519, 520, 520 cmt. h (1976).

34. CERCLA uses the phrase “hazardous substances,” and the definition of hazardous substance includes hazardous waste as a subset of hazardous substance. 42 U.S.C. § 9601(14) (2006).

35. The RCRA regulations identify many hazardous wastes based on the process that created them. See 40 C.F.R. § 261.32 (2010). At many inactive hazardous waste sites, there was a mixture of substances whose origin or prior use was difficult to determine. See *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 260–61 (3d Cir. 1992). Additionally, spills or releases of virgin chemicals (not waste) could create the same dangers as hazardous waste. See *id.* Thus, the need to clean up a mess should not be dependent on whether the mess is hazardous waste. See *id.* (discussing Congress's intent regarding the difference between hazardous waste and hazardous substances).

36. See *Alcan*, 964 F.2d at 260 (discussing Congress's intent regarding why the CERCLA definition of hazardous substances is broader than the RCRA definition of hazardous waste).

37. See H.R. REP. NO. 96-1016, pt. 1, at 68 (1980).

38. See *id.* (stating that basing liability on “causation” would be fairer because “[t]he mere fact of generating a hazardous waste should not make the generator liable” for its release).

39. See *id.*

up the mess, then how the mess was created is very important. Indeed, one could make the case that how the waste got there is more important to the liability issue than who created the waste.⁴⁰ The focus on causation, however, suggests that the person is liable because they have done something wrong. Congress was careful not to base Superfund Law liability on the notion of wrongdoing.⁴¹ For example, the owner and operator of the facility are liable for remediation costs without regard to whether they ever had anything to do with hazardous substances.⁴² Additionally, most of the hazardous substances that needed to be remediated were disposed of legally.⁴³ The responsible parties were often engaged in the ordinary course of business at a time when environmental regulations did not exist.⁴⁴ Congress did not want to indicate that what most corporations were doing was tortious.⁴⁵ Therefore, they set up a system of liability without fault—the message is that the waste has to be cleaned up regardless of how it got there.

The bill that became the Superfund Law did not contain generator liability and did not provide for liability based on causation.⁴⁶ Instead, it contained this arranger concept.⁴⁷ As one court described it, “Congress did not, to say the least, leave the flood lights on to illuminate the trail to the intended meaning of arranger status.”⁴⁸ Nevertheless, the arranger concept is generally seen as some

40. *See id.* at 69.

41. *See* TOPOL & SNOW, *supra* note 13, § 4.2, at 337–38 (stating that courts have “unanimously concluded that the appropriate standard under CERCLA is strict liability,” citing two pages worth of cases).

42. *See* 42 U.S.C. § 9607(a)(1) (2006) (providing liability for the “owner or operator of a vessel or facility”); *id.* § 9607(a)(2) (providing liability for “any person who at the time of disposal of any hazardous substance[s] owned or operated any facility at which such substances were disposed of”).

43. *See Developments in the Law, supra* note 13, at 1467–70 (describing the lack of federal regulation over hazardous waste disposal until the risks associated with improper disposal became evident in the 1960s and 1970s).

44. *See id.* at 1462 (discussing the creation and disposal of hazardous waste by various industries prior to the enactment of CERCLA).

45. *See* 42 U.S.C. § 9607 (imposing liability without fault).

46. *See id.* For an explanation of how new concepts could be found in the final version without explanation, see TOPOL & SNOW, *supra* note 13, § 1.1, at 5 (describing “last minute, unrecorded compromises and acceptance of deliberate ambiguity in some of the bill’s more controversial provisions”); *see also* United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983) (“Even the legislative history must be read with caution since last minute changes in the bill were inserted with little or no explanation.”).

47. 42 U.S.C. § 9607(a)(3).

48. United States v. New Castle Cnty., 727 F. Supp. 854, 871 (D. Del. 1989).

combination of the generator and causation concepts.⁴⁹ When a person causes waste to be disposed of, the person has arranged for disposal of the waste. Similarly, because RCRA defines waste as something that is to be discarded, once hazardous waste is generated, there is little one can do with it other than arrange to have it discarded; when you arrange to have it discarded, you have arranged for its disposal.⁵⁰

B. *Early Arranger Cases Emphasized Generator Status Over Causation*

The early arranger cases were primarily generator cases. It quickly became clear that generators of hazardous waste are liable as arrangers.⁵¹ Indeed, the early cases discuss generator liability as if the statute said generator instead of arranger.⁵² Among the issues that were litigated were several that addressed whether one could be liable as an arranger without having caused or contributed to the contamination or the cleanup costs.⁵³

In *United States v. Wade*,⁵⁴ for example, generator defendants argued that to prove arranger liability, the Government needed to prove that a defendant’s disposal of waste at the site caused the incurrence of cleanup costs.⁵⁵ The defendants relied heavily on the legislative history of the bill that would have based liability on

49. See Aaron Gershonowitz, *Superfund “Arranger” Liability: Why Ownership of the Hazardous Substances Matters*, 59 S.C. L. REV. 147, 154 (2007) (discussing arranger liability as “generator plus”).

50. *Id.*

51. See, e.g., *United States v. Hardage*, 761 F. Supp. 1501, 1511 (W.D. Okla. 1990) (citing 42 U.S.C. § 9607(a)(3)) (noting that generator liability is imposed on one who arranged for disposal of hazardous waste); *United States v. Bliss*, 667 F. Supp. 1298, 1306 (E.D. Mo. 1987) (imposing liability on parties for arranging for disposal of hazardous substances and finding that the arranger concept includes generators); *Violet v. Picillo*, 648 F. Supp. 1283, 1288 (D.R.I. 1986) (noting that generator liability is imposed on one who arranged for disposal, treatment, or transport to hazardous waste facility), *overruled on other grounds by* *United States v. Davis*, 794 F. Supp. 67, 71 (D.R.I. 1992).

52. See *Picillo*, 648 F. Supp. at 1289–90 (citing many other cases for the proposition that the first element of proving “arranger” liability is “that the generator disposed of hazardous substances”).

53. See, e.g., *Bliss*, 667 F. Supp. at 1310.

54. 577 F. Supp. 1326 (E.D. Pa. 1983).

55. *Id.* at 1331–32 (describing the defendants’ argument as raising the question of whether traditional notions of proximate causation applied to CERCLA while the Government argued that all that it was required to prove was that defendants’ waste was disposed of at the site).

causation.⁵⁶ The court noted that the problem with that argument is that the provision enacted did *not* contain the causation language.⁵⁷ Instead, the statute “specifies certain groups which [sic] will be held liable.”⁵⁸ Thus, causation is not a required element of arranger liability.

In *United States v. Ward*,⁵⁹ the court addressed whether a generator could be liable as an arranger when that generator did not take the time or effort to make any arrangements regarding disposal. The defendant argued that he sold waste oil to a party, who then made the decision to dispose of it.⁶⁰ The court concluded that such generators must be liable as arrangers because we should not “allow generators of hazardous wastes to escape liability under CERCLA by closing their eyes to the method in which their hazardous wastes were disposed of.”⁶¹ It must be noted, however, that while Mr. Ward did not know how or where his waste was disposed of, he did pay someone to “get rid of” the waste and could therefore be seen as having arranged for disposal.⁶²

Generators are liable even if they did not cause the waste to be shipped to the site that is being remediated (and therefore did not cause the contamination).⁶³ In *United States v. Hardage*,⁶⁴ for example, the court held that the generator could be liable even if the generator did not know that the waste was sent to the site and even if the generator intended the waste to be disposed of elsewhere.⁶⁵ Thus, generators of waste are liable as arrangers even if they did not arrange to have the waste disposed of at the remediated site.

Based on the early cases, if asked whether the generator concept or the causation concept best explained arranger liability, the answer would have to be the generator concept.⁶⁶ The generators of a

56. *Id.* at 1332–33.

57. *Id.* at 1334 (“The problem with the generator defendants’ reliance on this report, however, is that the liability provision ultimately enacted bears no real resemblance to the House-passed bill to which the report refers.”).

58. *Id.*

59. 618 F. Supp. 884 (E.D.N.C. 1985).

60. *Id.* at 895.

61. *Id.*; see also *United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1985) (noting that it would be anomalous to hold liable those who designate a destination for their waste, but not those who ignore what happens to their waste).

62. *Ward*, 618 F. Supp. at 895 (concluding that what defendant described as sale of a product was in fact disposal of a waste).

63. See *United States v. Hardage*, 761 F. Supp. 1501, 1511 (W.D. Okla. 1990).

64. 761 F. Supp. 1501.

65. *Id.* at 1511.

66. See discussion *supra* Part I.B.

hazardous waste necessarily have that waste in their possession and control at some point in time. If the waste is then disposed of, that disposal must have been the result of some action by the generator, if only the act of releasing it to someone for transport or disposal. Causation, however, was not a requirement.⁶⁷ The generator was held liable even if the waste was disposed of somewhere other than where the generator intended and even if the generator’s waste did not cause the response costs.⁶⁸

II. *UNITED STATES V. ACETO AGRICULTURAL CHEMICALS CORP.*

A. *Cause but Not Generator*

Aceto was very different from the generator cases because the defendants did not generate the waste or make any waste-related decisions.⁶⁹ The case arose out of contamination at a site owned and operated by Aidex Corporation, a pesticide formulator.⁷⁰ Industry practice in the pesticide industry was for pesticide manufacturers to contract with formulators to mix the pesticide ingredients to produce commercial-grade products for the manufacturer.⁷¹ Pesticide manufacturers provided Aidex with ingredients and directions for formulation.⁷² Aidex processed the ingredients and returned commercial-grade product to the manufacturers.⁷³

The United States Environmental Protection Agency (EPA) sought to hold six pesticide manufacturers liable for “arranging for disposal” of hazardous substances at the Aidex site.⁷⁴ The EPA’s theory was as

67. See, e.g., *United States v. Wade*, 577 F. Supp. 1326, 1331–34 (E.D. Pa. 1983).

68. See, e.g., *id.* at 1332.

69. See *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1375–76 (8th Cir. 1989).

70. See *id.* (noting that Aidex had operated the site from 1974 until 1981, when it went bankrupt).

71. *Id.* The court noted that that the “complaint alleges it is common practice in the pesticide industry for manufacturers of active pesticide ingredients to contract with formulators such as Aidex to produce a commercial grade product.” *Id.*

72. *Id.* at 1375. There may have been some dispute as to Aidex’s actual role, but the case reached the Court of Appeals after the District Court denied the defendants’ motion to dismiss. *Id.* Thus, the court took the facts in the complaint as given. *Id.*

73. *Id.* (noting that the defendants argued that they should not be liable because they hired Aidex to formulate, not to dispose).

74. *Id.* at 1376–78. Eight pesticide manufacturers were named as defendants, but the complaint alleged causes of action under RCRA against all eight of them and causes of action under CERCLA against six of them. *Id.*

follows: (1) the manufacturers owned the ingredients that contained the hazardous substances that were released or disposed of at Aidex⁷⁵ and (2) the manufacturers knew that the formulation process would result in the creation of hazardous waste.⁷⁶ Therefore, the manufacturers arranged for disposal of the waste disposed of by Aidex at the Aidex site.⁷⁷

The court began its analysis by rejecting the defendants' argument that based on the dictionary definition of *arrange*, the defendants could only be liable if they intended to dispose of waste.⁷⁸ Next, the court reviewed the legislative history of the Superfund Law and concluded that "Congress intended that those responsible for the problem caused by disposal of chemical poisons bear the costs."⁷⁹ The court reasoned that this goal would be thwarted if persons could contract away their liability.⁸⁰ The defendants argued that they had no control over Aidex operations and therefore could not have played a role in causing the disposal.⁸¹ The court responded to this argument by noting that each manufacturer maintained ownership of the chemicals, which meant they had authority to control what happened with those chemicals and could thus have caused the disposal.⁸²

The causation argument addressed by the *Wade* court is very different from the causation argument made by the *Aceto* court. The

75. *Id.* at 1378. Indeed, the complaint alleged that the defendants owned the chemicals provided to Aidex, the work in progress, and the resulting commercial grade product. *Id.*

76. *Id.* at 1379. The complaint alleged that generation of hazardous wastes was an inherent part of the formulation process. *Id.*

77. *Id.* (noting that the district court relied on the principle that CERCLA should be interpreted broadly).

78. *Id.* at 1380. The court noted that Congress intended a broad reading of "arranged for disposal." *Id.*

79. *Id.* The court noted that S. 1480, the "Environmental Response Act," contained language that would have imposed liability on all who "caused or contributed to" the release of hazardous substances and that a Senate Committee had changed the language to "arranged for" disposal. *Id.* The court noted that the reasons for the change were "not easy to divine," but did not see the change in language as reflecting a change in policy. *Id.*

80. *Id.* at 1381. The court cited *New York v. Gen. Elec. Co.*, 592 F. Supp. 291, 297 (N.D.N.Y. 1984) and *United States v. A & F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984) for the proposition that CERCLA liability could not be "circumvented" by calling a disposal a sale and that persons could not "contract away" their liability. *Id.*

81. *Id.* (noting that defendants contended that they should escape liability because they lacked control over Aidex).

82. *Id.* The court noted that "it is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme." *Id.* at 1381-82.

Wade defendants argued that they could not be liable because neither their activities nor their waste caused the response costs (the CERCLA equivalent of damages).⁸³ In a sense, their argument was that they were not responsible for the costs because those costs would have been incurred even if their waste were not at the site. In *Aceto*, on the other hand, the issue was who caused the contamination, not who caused the need to clean up.⁸⁴ The court understood the phrase “arranged for disposal” to mean “is responsible for this waste being here.”⁸⁵ While the manufacturers may not have made any waste-related decisions, their business activities were, to a large extent, a cause of the creation of the contaminated site.⁸⁶

Ownership of the hazardous substances also played a role in the *Aceto* decision regarding whether the arrangement was an arrangement for disposal.⁸⁷ The court noted that ownership implied the ability to control disposition of the chemicals, and the ability to control is the key to arranger liability.⁸⁸ The court based its decision, to a large extent, on the Court of Appeals decision in *United States v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO)*.⁸⁹ *NEPACCO* is a generator case. The issue was whether corporate officers of a generator could be held liable as arrangers.⁹⁰ The *NEPACCO* court held that such individuals can be held liable as arrangers because they had authority to control the waste prior to disposal.⁹¹ The *Aceto* court reasoned that if there could be liability in *NEPACCO*, where defendants did not own the hazardous substances, then there should be liability for the *Aceto* defendants who did own the hazardous substances.⁹²

While the *Aceto* court attempted to align its decision with the generator cases such as *NEPACCO*, the concern addressed by the *Aceto* court is fundamentally different from the concern addressed by

83. *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983).

84. *See Aceto*, 872 F.2d at 1375.

85. *See infra* Part II.B.

86. *See Aceto*, 872 F.2d at 1384.

87. *Id.* at 1379.

88. *Id.* at 1381–82 (noting that there was no transfer of ownership of the hazardous substances).

89. 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

90. *Id.* at 743.

91. *Id.* at 743–44. The defendants argued that only persons who owned or possessed the hazardous substances could be liable under § 9607(a)(3), and the court rejected that notion, concluding that persons with authority to control could be liable even without ownership or possession. *Id.*

92. *Aceto*, 872 F.2d at 1382.

NEPACCO. In *NEPACCO*, the concern was that those who controlled the waste could avoid liability by ignoring what happened to the waste they controlled.⁹³ In *Aceto*, the defendants never controlled the waste.⁹⁴ The court's concern was that one could set up an elaborate set of contractual arrangements whereby one controls the process that creates the waste and thereby causes the site to be contaminated, but is nonetheless insulated from the liabilities related to the generation of the waste.⁹⁵ The court was concerned that someone could cause the problem but avoid liability by hiring someone else to be the generator of the waste.⁹⁶

Was the use of Aidex as a formulator in *Aceto* a subterfuge to avoid CERCLA liability? No. The court's concern, however, was that if there was no liability for the *Aceto* defendants, the court would have written the blueprint for such a subterfuge.⁹⁷

B. Appellate Court Interpretations of *Aceto*

The Second Circuit Court of Appeals interpreted *Aceto* in *General Electric Co. v. AAMCO Transmissions, Inc. (AAMCO)*⁹⁸ as an application of the traditional tort concept of duty. In *AAMCO*, the plaintiff alleged that a group of oil companies that sold petroleum products to service stations and had some ability to control activities at those service stations were liable as arrangers for the disposal of waste-petroleum products at the service stations.⁹⁹ The court rejected that argument and distinguished the *AAMCO* case from *Aceto* because in *Aceto*, the defendants controlled the process that generated the hazardous waste, whereas the *AAMCO* defendants merely had limited ability to control the process.¹⁰⁰ That difference, the court reasoned, imposed a duty on the *Aceto* defendants with regard to proper disposal of the waste but did not impose a duty on the *AAMCO* defendants.¹⁰¹

93. *NEPACCO*, 810 F.2d at 743-44.

94. *Aceto*, 872 F.2d at 1375, 1379.

95. *Id.* at 1381.

96. *Id.* at 1381-82.

97. *Id.* at 1382.

98. 962 F.2d 281 (2d Cir. 1992).

99. *Id.* at 283.

100. *Id.* at 287 (citing *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1319 (11th Cir. 1990) (declining to hold a seller liable as an arranger when the seller could, by use of economic power, have forced its purchasers to properly dispose of waste)).

101. *Id.* at 286 (distinguishing between the obligation to control and the mere opportunity to control).

The *AAMCO* court further explained that Congress relied on “traditional notions of duty and obligation” in determining which parties would be liable under CERCLA.¹⁰² Thus, the obligation to control makes one an arranger while merely having the ability to control does not.¹⁰³ The court did not specify what “traditional notion of duty” obligated a contracting party to control the waste handling of another party. That “obligation” appears to be unique to CERCLA and unique to the *Aceto* court’s view of CERCLA.¹⁰⁴

Traditional concepts of duty sound very much like negligence. Thus, the *AAMCO* court is showing support for the tort-based understanding of arranger liability that grows out of the Senate bill’s attempt to base liability on causation.¹⁰⁵ While no one would suggest that the *Aceto* defendants had a negligence-type duty to prevent Aidex from polluting, the *AAMCO* court was taking the position that the *Aceto* decision means that when Congress used the “arranger” language, it intended to impose liability on anyone whose relationship with the transaction that led to the creation of the waste or to the contamination of the site was such that it could be seen as a cause of the contamination.¹⁰⁶

The *Aceto* theory was further explained by the Ninth Circuit Court of Appeals in *United States v. Shell Oil Co.*¹⁰⁷ (*Shell*), where oil companies claimed that the United States government had sufficient control over their facilities during World War II to be held liable as arrangers for the waste generated at those facilities.¹⁰⁸ The oil companies interpreted *Aceto* to mean that where a party has control of a manufacturing process that generates hazardous waste, that party has an obligation to control the disposal of the hazardous waste generated by the process.¹⁰⁹

102. *Id.* (noting that it is the obligation to exercise control that triggers liability).

103. *Id.*

104. *See id.* at 286–87 (noting that while most courts have premised a defendant’s liability on some level of actual involvement in the disposal process, the *Aceto* court found the contracting defendants liable for the waste handling of a third-party company).

105. *See id.* at 287 (suggesting that arranger liability must be based on some level of causation).

106. *See id.* at 286 (noting that in order to assign arranger liability under CERCLA, the defendant must either be actually involved in the disposal process or have an obligation to arrange for or direct the disposal).

107. 281 F.3d 812 (9th Cir. 2002).

108. *Id.* at 816 (describing the degree of involvement the United States government had in the production of avgas during World War II).

109. *Id.* at 823 (the court described this as the broader arranger liability theory and discussed the applicability of *Aceto*).

The *Shell* court accepted that definition but disagreed with the oil companies regarding the level of control exercised by the government. The court noted that in *Aceto*, the manufacturers owned the products that Aidex was working on and controlled the process employed by Aidex.¹¹⁰ That process necessarily included the generation of hazardous waste. In such circumstances, the person who owns the products and directs the processing has an obligation to take responsibility for the results of that process.¹¹¹ On the other hand, the government in *Shell* never owned the raw materials; it was merely a purchaser of finished products.¹¹² Unlike the *Aceto* defendants, it did not contract out the waste-generating step and then try to disclaim responsibility for the waste.¹¹³ It was not, therefore, a cause of the contamination.¹¹⁴

The *AAMCO* and *Shell* courts both understood *Aceto* to be based on the causation model of arranger liability, reasoning that Congress intended persons to be liable as arrangers if their relationship to a transaction resulting in contamination was such that they should have taken steps to prevent the contamination.¹¹⁵ The contrast between the cases, however, is important. The oil companies were suppliers who had some ability to control what their purchasers did.¹¹⁶ The government in *Shell*, on the other hand, was a purchaser who had some element of control over what its supplier did.¹¹⁷ In *Aceto*, the defendants were both the suppliers of raw materials and the purchasers of the finished product.¹¹⁸ Possibly, being on both sides of the transaction and controlling what happens in between by providing specifications for the processing includes the level of control that amounts to control of the waste.¹¹⁹

110. *Id.* (noting that the government never owned any of the raw materials).

111. *Id.*

112. *Id.* (following through with the attempted *Aceto* analogy, the court said that the government was more like a purchaser of pesticides than a pesticide manufacturer).

113. *Id.* (noting that the government did not “contract out . . . a crucial and waste-producing intermediate step in the manufacturing process, and then seek to disclaim responsibility”).

114. *See id.* at 824–25.

115. *See id.* at 825; *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992).

116. *AAMCO*, 962 F.2d at 287.

117. *Shell*, 281 F.3d at 816–17.

118. *See United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1375 (8th Cir. 1989).

119. *Compare Shell*, 281 F.3d at 823, 826 (holding that a mere purchaser possessing the ability to control some supplier conduct was not an arranger), and *AAMCO*, 962 F.2d at 287–88 (holding that mere suppliers possessing the ability to control some purchaser conduct were not arrangers), with *Aceto*, 872 F.2d at 1375, 1384 (holding

The Sixth Circuit applied the *Aceto* theory in *GenCorp, Inc. v. Olin Corp.*,¹²⁰ where the defendant appeared to be on both sides of the transaction.¹²¹ The contamination was the result of a joint venture between Olin and GenCorp.¹²² The facility was jointly operated, and when Olin was held liable for waste sent off-site, it sued GenCorp and claimed that GenCorp was liable for the same waste as an arranger.¹²³

The Sixth Circuit cited *Aceto* for the idea that courts should look beyond the parties’ characterization of the transaction to see if the transaction was, in fact, an arrangement for disposal.¹²⁴ The court recognized that intent is important because the word *arrange* means to make a plan.¹²⁵ GenCorp claimed it never owned or possessed the waste nor made any decisions regarding arrangement for disposal.¹²⁶ The court found those facts not necessarily relevant because GenCorp *did* knowingly participate in a transaction that included an arrangement for disposal.¹²⁷ The court did not examine whether GenCorp provided raw materials, purchased output, or controlled the process. None of that was necessary because GenCorp operated the facility that generated the waste.¹²⁸ The court’s focus was on how to characterize the transaction—whether it was a sale of a product or a

that a firm supplying raw materials, receiving finished product, and controlling some aspects of processing was an arranger).

120. 390 F.3d 433 (6th Cir. 2004).

121. *Id.* at 438–39.

122. *Id.* at 438–40.

123. *Id.* at 438–41. The relationship between the parties was more complex than in *Aceto* because in addition to joint ownership and operation of the facility, the purpose of the facility was to produce toluene di-isocyanate, which was a critical ingredient in GenCorp’s manufacture of urethane. Compare *id.* at 438–39 (noting the joint operation and needs of urethane manufacture), with *Aceto*, 872 F.2d at 1375 (noting that the end product was sold to consumers, not used in the defendants’ facilities). Thus, GenCorp was funding the manufacture of a product it would purchase from the facility for use of its facilities. See *GenCorp*, 390 F.3d at 438.

124. *GenCorp*, 390 F.3d at 446 (noting that looking beyond the parties’ characterization of the transaction required a fact-driven inquiry).

125. *Id.* at 445–46 (quoting Webster’s New College Dictionary for its definition of *arrange*).

126. *Id.* at 446.

127. *Id.* (noting that *arrange for disposal* did not require an intent to dispose of waste; it required an intent to engage in a transaction that included the disposal of hazardous substances).

128. *Id.* at 439.

transaction that included disposal.¹²⁹ If the transaction included the generation and disposal of hazardous waste, each party to that transaction arranged for disposal.¹³⁰

The Eleventh Circuit gave limited approval to the *Aceto* theory in *South Florida Water Management District v. Montalvo*.¹³¹ The issue in *Montalvo* was whether farmers and ranchers who contracted for the aerial spraying of pesticides and herbicides on their properties could be liable as *arrangers* for the contamination at the air strip owned by the party who did the spraying.¹³² The sprayers tried to analogize their case to *Aceto*.¹³³ The farmers owned the pesticides and knew that spillage was a necessary part of the application process.¹³⁴ If not for the process required by the farmers, there would have been no contamination.¹³⁵ Thus, the farmers were, effectively, the cause of the contamination.¹³⁶

The court rejected that analogy, concluding that the relationship between the sprayers and the farmers bore little resemblance to *Aceto*.¹³⁷ In *Aceto*, the manufacturers provided the chemicals, specified what chemicals to mix, and retained ownership of the chemicals throughout.¹³⁸ From that, the court noted that “it was possible to infer that the manufacturers exercised some control over the formulator’s mixing process.”¹³⁹ Additionally, while in *Aceto* the

129. *Id.* at 446 (listing numerous facts that led the district court to correctly conclude that the transaction GenCorp participated in was not merely the purchase of a product but also included preparations for waste disposal).

130. *See id.*

131. 84 F.3d 402, 408 n.9 (11th Cir. 1996) (noting that reference to *Aceto* in prior Eleventh Circuit decisions “cannot be interpreted as a wholesale adoption of *Aceto* as the law of this circuit”).

132. *Id.* at 404–06. The Government sued the sprayers and the sprayers brought a third-party action against the farmers. *Id.* The theory underlying the third-party complaint was that the sprayers’ use and handling of hazardous substances was solely for the benefit of the farmers and the farmers knew that hazardous waste was a byproduct of the sprayers’ activities. *Id.* Therefore, the farmers arranged for disposal of waste. *Id.*

133. *Id.* at 408 (noting that the sprayers argued that the farmers controlled the spraying).

134. *Id.* at 407.

135. *Id.* at 409.

136. *Id.* at 407 (assessing the sprayers’ argument that the farmers should be liable on a common-law agency theory). The court cited *Aceto* for the proposition that common-law agency theory can be relevant to determining who is an arranger but concluded that, in this case, the sprayers were not the agents of the farmers for purposes of waste disposal. *Id.* at 407 n.8.

137. *Id.* at 407–08 (noting several factual distinctions between the case at bar and *Aceto*).

138. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1375 (8th Cir. 1989).

139. *Montalvo*, 84 F.3d at 408 (citing *Aceto*, 872 F.2d at 1381–82) (noting that the key difference is that in *Aceto* it was possible to infer that the manufacturers exercised

mixing process “inherently’ involved the creation of hazardous waste,” the service contracted for by the farmers did not necessarily include the creation of hazardous wastes.¹⁴⁰ While the sprayers alleged that waste was a necessary part of the process, the court noted that there was no reason to believe the farmers knew this.¹⁴¹ The court recognized the need to look beyond the way the parties had characterized their transaction to determine whether the facts indicate an arrangement for disposal.¹⁴² In this case, however, the facts indicate that the farmers had merely contracted for a service.¹⁴³

The *GenCorp* and *Montalvo* courts understood *Aceto* differently than the *AAMCO* and *Shell* courts did. The *AAMCO* and *Shell* courts saw *Aceto* as representing the concept that one’s relationship to the transaction that created the waste or the contamination can impose an obligation or responsibility regarding waste disposal.¹⁴⁴ In *GenCorp* and *Montalvo*, on the other hand, *Aceto* stands for the proposition that a court must look beyond the parties’ characterization of the transaction to determine the true intent of the transaction—regardless of what the parties say, was this transaction an arrangement for disposal of hazardous waste?¹⁴⁵

Thus, depending on what circuit you are in, *Aceto*-type liability means (1) arranger liability based on being party to the type of transaction that would impose a duty to assure that waste resulting from the transaction is taken care of properly or (2) arranger liability based on having been a party to a transaction that, regardless of how the parties characterize the transaction, was, in fact, an arrangement for the disposal of hazardous waste.

If we compare these descriptions of *Aceto* we see that they directly address whether Congress intended arranger liability to be based

some control of the formulator’s process, while that control was not present in this case).

140. *Id.* The court dealt with this issue in two ways. First, the court stated that spraying “does not obviously involve the creation and disposal of hazardous waste.” *Id.* Then, noting that plaintiffs had alleged that creation of hazardous waste was inherent in the process and on a motion to dismiss; the court was to accept the facts as pled, the court stated that the sprayers never alleged that the farmers knew this. *Id.* at 407–08.

141. *Id.* at 408–09 (citing *Aceto* for the importance of this knowledge).

142. *Id.* at 408 n.9 (citing *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1318 (11th Cir. 1990)).

143. *Id.* at 408–09.

144. *See United States v. Shell Oil Co.*, 281 F.3d 812, 822 (9th Cir. 2002); *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286–87 (2d Cir. 1992).

145. *See GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 446 (6th Cir. 2004); *Montalvo*, 84 F.3d at 408 n.9.

primarily on causation or whether Congress intended it to be based primarily on the generator concept.¹⁴⁶ The Second Circuit's view based on duty takes the position that even though Congress did not include causation language, it intended essentially a tort-based concept.¹⁴⁷ The Sixth Circuit's rule is essentially based on generator liability.¹⁴⁸ Regardless of how the parties characterize their position, was the defendant, in fact, someone whose status was that of a generator?

The question of how to characterize the transaction is further developed in the line of cases that address whether the seller of a useful product can have arranger liability.

III. SALE OF A USEFUL PRODUCT AS A DEFENSE TO ARRANGER LIABILITY

A number of courts have recognized a defense to arranger liability where the defendant can successfully argue that it was not the generator of waste who arranged for its disposal or treatment but instead the *seller* of a product that contained hazardous substances, which were later disposed of or released by someone else. In *Freeman v. Glaxo Wellcome, Inc.*,¹⁴⁹ the Second Circuit explained why sellers of useful hazardous substances do not have *arranger* liability. Glaxo, upon closing a facility, sold chemical reactants used in its facility to Freeman Industries, Inc. (FII) for use in FII's business.¹⁵⁰ FII used some of the chemicals in its business, stored some of them, and sold some of them. The stored chemicals became the source of a remedial action by the EPA at the FII facility, and the EPA sued Glaxo and claimed Glaxo had arranged for disposal of its chemicals at the FII facility.¹⁵¹ Glaxo's defense was that it merely sold the chemicals.¹⁵²

After going through the long list of cases holding that one cannot circumvent the Superfund Law by characterizing disposal as a sale,¹⁵³

146. Compare *Shell*, 281 F.3d at 822, and *AAMCO*, 962 F.2d at 286–87, with *GenCorp*, 390 F.3d at 446, and *Montalvo*, 84 F.3d at 408.

147. See *AAMCO*, 962 F.2d at 286.

148. See *GenCorp*, 390 F.3d at 445–46.

149. 189 F.3d 160 (2d Cir. 1999).

150. *Id.* at 162. Mr. Freeman inspected the chemicals and purchased them “both for use in the Freeman laboratories and for resale.” *Id.*

151. *Id.* at 163. Glaxo moved for summary judgment and the district court granted the motion. *Id.*

152. *Id.* at 164 (noting that “it is uncontroverted” that Glaxo merely sold chemicals).

153. *Id.* (citing *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769 (4th Cir. 1998); *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313

the court noted that Glaxo had sold valuable products to FII for use or resale. These were virgin chemicals, not waste.¹⁵⁴ Arrangement for disposal requires the presence of waste.¹⁵⁵ Therefore, Glaxo did not arrange for disposal at the FII facility.¹⁵⁶

In *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*,¹⁵⁷ the Fourth Circuit provided further analysis of how to determine whether a transaction is a “sale” or an arrangement for disposal. The court explained that to determine “whether a transaction was for the discard of hazardous substances or for the sale of valuable materials,” the key factors to examine are the intent of the parties and the usefulness of the product.¹⁵⁸

The transaction in *Pneumo* was the sale of used bearings to be processed into new bearings.¹⁵⁹ The processing generated waste, but the court found that the essence of the transaction was payment in exchange for bearings, not an attempt to dispose of unwanted metal.¹⁶⁰ Thus, the seller did not arrange for disposal.

The Sixth Circuit in *United States v. Cello-Foil Products, Inc.*,¹⁶¹ addressed a more complex transaction in which there were elements of both the sale of a useful product and disposal of waste.¹⁶² The court recognized that if the material at issue (the subject of the transaction) is waste, the transaction is an arrangement for disposal;

(11th Cir. 1990); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989)).

154. *Id.*

155. *Id.* (“Because the definition of ‘disposal’ refers to ‘waste,’ only transactions that involve ‘waste’ constitute arrangements for disposal . . .”).

156. *Id.*

157. 142 F.3d 769 (4th Cir. 1998).

158. *Id.* at 775 (noting that whether the materials were to be reused in their entirety played a role in determining intent and the value of the goods sold plays a role in determining whether the materials are, in fact, waste).

159. *Id.* at 772–73 (noting that the “conversion agreements” provided that used journal bearings were shipped to Pneumo’s foundry for processing and the seller of the used bearings received a credit against the purchase price of new bearings based on the weight of the bearings).

160. *Id.* at 775 (citing several cases that examined what was being sold as the means to determine the intent of the parties and noting that the waste generated by the reclamation of the bearings was incidental to the reclamation of the bearings and not the essence of the transaction).

161. 100 F.3d 1227 (6th Cir. 1996).

162. *Id.* at 1230. The defendants were purchasers of solvents in a transaction that was the sale of a useful product, but the transaction required the defendants to return the used drums to the seller. *Id.* This return of the used drums with some waste residue was alleged to be the arrangement for disposal. *Id.*

and conversely, if the material at issue is a useful product, the transaction is not arrangement for disposal.¹⁶³

In *Cello-Foil*, the defendants were purchasers of solvents.¹⁶⁴ The contract of sale provided that Thomas Solvents, the seller, would deliver solvents in reusable drums, and the price included a drum deposit.¹⁶⁵ The purchasers used the solvents and returned the drums to Thomas, who cleaned and reused the drums.¹⁶⁶ The Government argued that the arrangement was impliedly an arrangement for disposal of waste because the drums that were returned contained some solvent residue, which was the source of the contamination at the Thomas facility.¹⁶⁷ The defendants argued that they could not be liable because they lacked the intent to dispose of the waste.¹⁶⁸

The court began its analysis by noting that the legislation does not define the phrase “arrange for.”¹⁶⁹ The court noted that the Seventh Circuit had defined “arrange for” to include an element of intent in *Amcast Industrial Corp. v. Detrex Corp.*,¹⁷⁰ where Judge Posner reasoned that the phrase “arrange for disposal” contemplates a case in which a person wants to get rid of something.¹⁷¹ Thus, if the defendant did not intend to get rid of a hazardous substance, there has been no arrangement for disposal.¹⁷² The *Cello-Foil* court expanded on this concept, concluding that intent is a requirement because arrangement embraces concepts similar to contract and agreement.¹⁷³ To arrange means to “‘make preparations’ or ‘plan,’” both of which are actions that include an intent requirement.¹⁷⁴ Thus, what the

163. *Id.* at 1232 (citing *AM Int’l, Inc. v. Int’l Forging Equip. Corp.*, 982 F.2d 989, 999 (6th Cir. 1993)).

164. *Id.* at 1230 (describing the terms of the defendants’ purchase of solvents).

165. *Id.* When purchasers returned the used drums and purchased more solvent, the deposit was credited against the purchase price. *Id.*

166. *Id.* (noting that the contents of the returned drums varied, with some as empty as possible and some containing as much as fifteen gallons of solvent).

167. *Id.* (noting that this arrangement resulted in the contamination at issue whereby reusable drums were used and returned to the seller with some remaining solvent that the seller disposed of or released to the environment).

168. *Id.*

169. *Id.* at 1231.

170. 2 F.3d 746 (7th Cir. 1993).

171. *Id.* at 751 (concluding that Detrex arranged for transport of hazardous substances but did not arrange for them to spill).

172. *See id.*

173. 100 F.3d at 1231 (noting that the statute connects *arranged for disposal* with the phrase “by contract, agreement, or otherwise”).

174. *Id.* at 1232 (quoting *Amcast*, 2 F.3d at 751) (noting that an intent requirement is not inconsistent with strict liability because intent only determines whether the person is a potentially responsible party, and if he or she is, then strict liability applies).

parties intended can determine how the transaction will be characterized.¹⁷⁵

To determine what the parties intended, courts look to the totality of the circumstances, not to how the parties characterize their transaction.¹⁷⁶ Thus, in *Cello-Foil*, the court noted that by leaving solvents in the drums, which the defendants knew Thomas would take away and dispose of, one could infer the intent to dispose of those solvents.¹⁷⁷ In *Amcast*, on the other hand, the court found that when a seller of solvents gives the solvents to a transporter to deliver to a user, the seller has not arranged for disposal of solvent accidentally spilled by the transporter.¹⁷⁸ The transaction was a sale of a useful product and did not include intent to dispose of anything.¹⁷⁹

The key difference between *Amcast* and *Cello-Foil* is what was being transferred. In *Cello-Foil*, the defendant transferred waste, and based on that, the court found that the transaction could be considered an arrangement for disposal.¹⁸⁰ In *Amcast*, on the other hand, the material was not waste, and therefore, the transaction was not an arrangement for disposal.¹⁸¹ The principle underlying both cases is that if the subject matter of the transaction is waste, the transaction is more likely to be seen as an arrangement for disposal.¹⁸²

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

A. *The Court's Decision*

Burlington Northern is the first Supreme Court decision addressing the definition of “arrange for disposal.” The case arose out of contamination at a site owned and operated by Brown & Bryant, Inc.

175. *Id.* at 1233–34 (concluding that defendants are not liable under § 107(a)(3) of CERCLA without a showing that they intended to dispose of hazardous substances).

176. *See, e.g., id.* at 1232–34.

177. *Id.* at 1233–34 (denying the defendants’ motion for summary judgment because issues of fact existed regarding whether there was an intent to dispose of waste).

178. *Amcast*, 2 F.3d at 751.

179. *Id.*

180. *Cello-Foil*, 100 F.3d at 1233–34.

181. *Amcast*, 2 F.3d at 751.

182. *Compare Cello-Foil*, 100 F.3d at 1233–34 (stating that the issue of whether waste was involved was relevant to liability), *with Amcast*, 2 F.3d at 751 (stating that if a shipper arranges for the delivery of a useful product, the shipper cannot be held liable under CERCLA for a carrier’s mishap).

(B&B), a small chemical distributor.¹⁸³ Shell sold a number of products to B&B, including pesticides known as D-D and Nemagon.¹⁸⁴ Various spills and releases at the B&B site resulted in contamination of the soil and groundwater.¹⁸⁵ The State of California and EPA undertook remedial efforts at the site,¹⁸⁶ and after B&B went out of business, the State named Shell and Burlington Northern as responsible parties.¹⁸⁷ Shell was alleged to have arranger liability because chemicals it sold to B&B were allegedly spilled on delivery.¹⁸⁸ The Government alleged that Burlington Northern was liable as an owner because a portion of the B&B facility was on property B&B leased from Burlington Northern.¹⁸⁹

The case could be seen as the intersection between the sale of a useful product cases and the *Aceto* line of cases. Shell argued that it was merely selling a useful product and no court has ever held that sale of a useful product is an arrangement for disposal of hazardous substances.¹⁹⁰ The Government, on the other hand, argued that when Shell sold its products, it knew that the system of delivery it had set up always included some spillage upon delivery.¹⁹¹ That knowledge, the Government argued, plus Shell's control of the delivery process meant that what Shell called merely a sale was, in fact, an arrangement for the disposal of hazardous substances.¹⁹²

The district court held Shell liable as an arranger and the Ninth Circuit Court of Appeals affirmed.¹⁹³ The Court of Appeals noted

183. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1874–75 (2009). B&B had begun operations in 1960 on an approximately 3.8 acre parcel. *Id.* at 1874. B&B stored chemicals on-site and applied them to customers' farms. *Id.* at 1875.

184. *Id.* at 1875 (noting that because D-D was corrosive, it resulted in numerous tank failures and spills).

185. *Id.*

186. *Id.* at 1875–76. The California Department of Toxic Substances Control began investigating the site in 1983. *Id.* at 1875. The site was added to the National Priorities List in 1989. *Id.* at 1876.

187. *Id.* at 1876.

188. *Id.*

189. *Id.* The Ninth Circuit Court of Appeals held that Burlington Northern was jointly and severally liable for all of the cleanup costs even though it did not contribute to the contamination and it only owned a portion of the site for a portion of the time the site operated. *Id.* at 1877. The court reversed, holding that CERCLA liability is not joint and several where, as here, there is some reasonable basis for allocating the costs. *Id.* at 1882–83.

190. Reply Brief of Petitioner at 14, *Burlington N.*, 129 S. Ct. 1870 (No. 07-1607).

191. Brief for the United States at 12, *Burlington N.*, 129 S. Ct. 1870 (No. 07-1607).

192. *Id.* at 13.

193. *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 952 (9th Cir. 2008) (amended opinion), *rev'd*, 129 S. Ct. 1870.

that although Shell was not a “traditional” arranger, in the sense that it did not transact with B&B to dispose of hazardous waste, it could be held liable under the “broader” arranger theory, where disposal is not the goal of the transaction but is a foreseeable byproduct.¹⁹⁴ The court discussed whether arranger liability needed to be purposeful and concluded that it did not because “disposal” is defined in CERCLA to include activities such as leaking that could occur accidentally.¹⁹⁵ The court also noted that Shell had sent directions for the delivery process in an attempt to limit the amount of spillage.¹⁹⁶ These directions were seen by the court as an element of Shell’s control of the delivery process.¹⁹⁷

The Supreme Court reversed, holding that Shell was not liable as an arranger.¹⁹⁸ The Court began its analysis of the arranger issue by looking to the statute, noting that the language of CERCLA makes clear that one who enters a transaction “for the sole purpose of discarding” a hazardous substance, “arrange[s] for disposal.”¹⁹⁹ At the same time, if one merely sells a useful product and the purchaser, “unbeknownst to the seller, disposed of the product,” the seller has not arranged for disposal.²⁰⁰ The intermediate cases, the Court stated, are more difficult.²⁰¹ Two intermediate cases mentioned by the Court are (1) where the seller has some knowledge of the buyer’s planned disposal and (2) where the seller’s motive for sale of the substance is less than clear.²⁰² In such cases, courts require “a fact-intensive inquiry that looks beyond the parties’ characterization of the transaction . . . to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA’s strict-liability

194. *Id.* at 948–49 (defining “broader” arranger liability as cases in which a person does not contract directly for disposal but engages in a transaction that indirectly results in the disposal of hazardous substances).

195. *Id.* at 949 (discussing the definition of disposal, which includes “leaking,” which can occur accidentally).

196. *Id.* at 950–51 (stating that Shell’s change of its delivery practices to reduce spillage showed that it knew of the spillage and that it had some control).

197. *Id.*

198. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1880 (2009).

199. *Id.* at 1878.

200. *Id.* (citing *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999)).

201. *Id.* at 1879.

202. *Id.*

provisions.”²⁰³ The cases cited by the Court indicate that the issue is whether the transaction is, in essence, a sale or a disposal.²⁰⁴

The Court cautioned against taking that “fact-intensive inquiry” beyond the limits of the statute.²⁰⁵ Because Congress did not define *arrange for disposal*, the Court looked to the common understanding of the phrase.²⁰⁶ For the common understanding of the word *arrange*, the Court looked to the Merriam–Webster College Dictionary, which defined arrange as “to make preparations for: plan; . . . to bring about an agreement or understanding concerning.”²⁰⁷ Based on this, the Court concluded that an entity “may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance.”²⁰⁸

The Government argued that because *disposal* is defined broadly to include unintentional acts such as spilling and leaking, one can arrange for disposal unintentionally.²⁰⁹ The Government further argued that Shell could be liable as an arranger because it sold its product with the knowledge that some product will spill and result in disposal.²¹⁰ The Court rejected both of these arguments.²¹¹

The Court recognized that there may be circumstances where knowledge that the product will be spilled or disposed of will show intent to dispose of hazardous substances.²¹² However, knowledge alone does not create such an inference.²¹³ To be liable, the Court

203. *Id.*

204. *Id.* (citing *Freeman*, 189 F.3d at 164; *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 775 (4th Cir. 1998). All of the cases cited could be seen as raising the defense of sale of a useful product. *See, e.g., id.*

205. *Id.* This is probably a reference to the cases that focus on whether the defendant has some element of responsibility for the waste even though one cannot say that they made an arrangement for disposal.

206. *Id.*

207. *Id.* The Court stated that when a statute does not define a concept, courts are to give the concept its ordinary meaning. *Id.* (citing *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty.*, 129 S. Ct. 846, 850 (2009); *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

208. *Id.* (noting that state of mind plays an indispensable role in determining whether a party has arranged for disposal of hazardous substances).

209. *Id.* (discussing the definition of “disposal”).

210. *Id.* (quoting the portion of the Government’s brief that argued that Shell’s knowledge of the spills made Shell liable as an arranger).

211. *Id.* at 1880.

212. *Id.* (noting that knowledge alone, however, is never sufficient to prove that defendant planned for disposal).

213. *Id.* (noting that although there may be circumstances in which knowledge of spills may lead to an inference that the transaction is an arrangement for disposal, knowledge alone is insufficient).

stated, “Shell must have entered into the sale of D-D with the intention that at least a portion of the product be disposed of during the transfer process.”²¹⁴ Here, however, Shell took steps to prevent such spills.²¹⁵ The spills could not, therefore, have been intended by Shell.²¹⁶

B. Three Questions About Burlington Northern

To understand the Supreme Court’s decision, we need to closely examine three places where the Court appears to have used imprecise or uncertain language. First, the Court stated that “an entity *may* qualify as an arranger under § 9607(3) when it takes intentional steps to dispose of a hazardous substance.”²¹⁷ The use of the word *may* is puzzling because based on other portions of the decision, it would seem that anyone who takes intentional steps to dispose of a hazardous substance has necessarily arranged for disposal.²¹⁸ Thus, we need to examine the decision to determine whether the Court’s position is that there are cases in which a person takes intentional steps to dispose of a hazardous substance and does not qualify as an arranger or whether the Court is telling us that intentional steps to dispose are not the only way to arrange for disposal.

Second, the Court noted “that in some instances an entity’s knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity’s intent to dispose.”²¹⁹ What cases are those—could this be a reference to the *Aceto* scenario?

Third, the Court sometimes used the phrase “intent to dispose” and sometimes it used the phrase “intentional steps to dispose.”²²⁰ Are those two different things? This distinction could be crucial because while intent is clearly required, the defendants in *Aceto* intentionally participated in a transaction that included disposal, but they did not have intent to dispose.²²¹

214. *Id.* (noting that the facts of this case did not support such a conclusion).

215. *Id.* (noting that Shell had provided safety manuals and required adequate storage in an attempt to reduce or prevent spillage).

216. *Id.*

217. *Id.* at 1879 (emphasis added) (noting that inquiry into state of mind is indispensable).

218. *Id.* at 1878 (stating that “[i]t is plain from the language of the statute” that if one enters into a transaction for the “sole purpose of discarding a used . . . hazardous substance,” liability would attach).

219. *Id.* at 1880.

220. *See, e.g., id.* at 1879–80.

221. *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1379 (8th Cir. 1989).

1. What Did the Court Mean by “May Qualify”?

Did the Court use the phrase “may qualify” to indicate that there are cases where the defendant took “intentional steps to dispose of a hazardous substance” but did not incur arranger liability?²²² One could view *Pneumo* and *Cello-Foil* as such cases.²²³ In both cases, the transaction included sale of a useful product and some waste material that was expected to be discarded.²²⁴ Thus, one could view each transaction as one that included intentional steps to dispose of a hazardous substance. In each case, however, the courts looked to the essence of the transaction and asked what did the seller really intend—was this transaction primarily about getting rid of waste, or was it primarily about selling something the buyer intended to use?²²⁵ If the latter, there is no arranger liability.²²⁶

The *Burlington Northern* Court cited both cases favorably in its discussion of how to determine whether a defendant is liable as an arranger.²²⁷ Thus, it could be that when the Court said that an entity “may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance,” it meant to inform us that intentional steps to dispose are not sufficient to create liability.²²⁸ A court must look to all the circumstances and determine whether the essence of the transaction was disposal.²²⁹ If so, the intentional steps will incur liability, and if not, the intentional steps will not incur liability.²³⁰

A second possible understanding of the Court’s use of the phrase “may qualify” instead of “does qualify,” addresses whether liability arises where the hazardous substance disposed of is not a waste.²³¹ It is important to note that while most of CERCLA addresses the release of *hazardous substances* to the environment, § 9607(3) may be limited to hazardous waste.²³² Section 9607(3) incorporates the definition of *disposal*, which means the “discharge, deposit, [or]

222. *Burlington N.*, 129 S. Ct. at 1879.

223. *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769 (4th Cir. 1998); *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227 (6th Cir. 1996).

224. *Pneumo*, 142 F.3d at 772–73; *Cello-Foil*, 100 F.3d at 1229–30.

225. *Pneumo*, 142 F.3d at 775–76; *Cello-Foil*, 100 F.3d at 1231–34.

226. *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993).

227. *Burlington N.*, 129 S. Ct. at 1878–79.

228. *Id.* at 1879.

229. *See id.* at 1878–79.

230. *See id.*

231. *See id.* at 1879.

232. *See* 42 U.S.C. §§ 6903(3), 9601(29), 9607(a)(3) (2006).

injection” of any “hazardous waste.”²³³ Indeed, in *Burlington Northern*, Shell argued that it could not have liability because the product that was spilled or released was not a hazardous waste.²³⁴

The Court does not seem to have accepted this distinction between hazardous substance and hazardous waste. Indeed, the Court used the broader term *hazardous substances* throughout its decision.²³⁵ Thus, by implication, the Court rejected Shell’s argument that there could be no liability unless the subject matter of the transaction was a hazardous waste.²³⁶ The decisive factor, the Court explained, is not what the transaction is about (i.e., did the transaction involve waste), but what the parties intended when they engaged in the transaction.²³⁷

The Court made clear that the subject matter of the transaction will play a role in understanding the intent of the parties.²³⁸ That is, waste can indicate intent to dispose.²³⁹ However, the subject matter is a factor in determining what the parties intended; intent is not the means of determining the subject matter of the transaction.²⁴⁰

A third possible understanding of the Court’s use of “may” is that the Court was informing us that intentional steps to dispose are not necessary to produce arranger liability. Think back to the early generator cases.²⁴¹ In *United States v. Ward*,²⁴² for example, there was no evidence that the defendant made any arrangement for disposal.²⁴³ The court nevertheless found liability because the defendant was the generator of the waste and a party should not be able to escape liability by closing its eyes to what happens to its

233. *See id.*

234. Brief for Petitioner at 22, *Burlington N.*, 129 S. Ct. 1870 (No. 07-1607) (arguing that the correct understanding of “arranged for disposal” must incorporate the statutory definition of disposal, and that 42 U.S.C. § 9601(29) ties disposal to hazardous waste).

235. *Burlington N.*, 129 S. Ct. at 1878–79 (where the phrase “hazardous substances” appears at least seven times and hazardous waste is discussed only in responding to the Government’s argument that disposal required hazardous waste).

236. The Court did not respond directly to Shell’s argument, but the Court’s consistent use of “substances” where it could have used “waste” implies that waste is not a requirement for liability. *See id.* at 1878–80.

237. *Id.* at 1880 (stating that for there to be liability, Shell must have entered into the transaction with the intention that some of the product be disposed of during the transfer process).

238. *See id.*

239. *See id.* (discussing what facts may indicate an intent to dispose).

240. *See id.* (explaining that knowledge that a product will be leaked may provide evidence of intent to dispose).

241. *See* discussion *supra* Part I.B.

242. 618 F. Supp. 884 (E.D.N.C. 1985); *see also* discussion *supra* Part I.B.

243. *Ward*, 618 F. Supp. at 895.

waste.²⁴⁴ The *Burlington Northern* Court's use of the word *may* could mean, then, that intentional steps are not the only way to incur arranger liability.

Does the Court's reasoning that arranger liability includes an intent element mean that one who negligently handles hazardous waste and thus causes a release to the environment *cannot* be liable as an arranger? The policies underlying the *Ward* decision suggest the answer is no.²⁴⁵ There are numerous generator cases in which the generator mishandled the waste and that mishandling was seen as an arrangement for disposal.²⁴⁶ If the Court intended such a change in the law, the Court should have been explicit about it.

That explains why the Court talked about "intentional steps to dispose" as opposed to intent to dispose²⁴⁷—the Court was in fact being precise. Any person who disposes of hazardous waste has arranged for disposal. That issue was not before the Court; the issue before the Court was a transaction where the defendant was removed from the generation and disposal of waste.²⁴⁸ In such a case, the defendant's intent to take steps toward disposal is necessary—the key being the *purpose* of the steps the defendant took.²⁴⁹

2. Why Did the Court Say "In Some Instances"?

The Court stated that "in some instances," knowledge that the product being sold will be discarded may provide evidence of the entity's intent to dispose of its hazardous wastes.²⁵⁰ The Court cited nothing for that proposition, thus leaving the reader with little evidence of what those instances are.²⁵¹ This would have been an appropriate place for citing *Aceto* or other cases in that line, but the Court chose not to do so. In each of those cases, the defendant knew

244. *Id.*

245. *See id.*

246. *See, e.g.,* *United States v. Monsanto Co.*, 858 F.2d 160, 169 (4th Cir. 1988) (reasoning that the United States has made out a prima facie case if it shows that the generator's waste was shipped to the site); *United States v. Consol. Rail Corp.*, 729 F. Supp. 1461, 1469 (D. Del. 1990) (reasoning that authority to make waste-related decisions is sufficient to impose generator liability); *Violet v. Picillo*, 648 F. Supp. 1283, 1291–92 (D.R.I. 1986) (reasoning that generators are liable regardless of whether they carefully determined what would happen to the waste).

247. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1879 (2009).

248. *Id.*

249. *See id.* at 1879–80.

250. *Id.* at 1880.

251. *See id.*

that the transaction would generate hazardous waste.²⁵² The Court, however, continued with a discussion of Shell’s activities.²⁵³ Shell took steps to reduce the likelihood that there would be spills. This showed Shell’s knowledge of the disposal.²⁵⁴ Unlike the court of appeals, who saw this as rather damning evidence (Shell clearly knew that there would be spills and everyone intends the known or expected consequences of their actions), the Court saw this as evidence that Shell did not intend spills to occur.²⁵⁵ Thus, the phrase “in some instances” is meant as a limitation, a rejection of those decisions that saw knowledge that disposal would occur as always implying an arrangement for disposal.

There is a potentially significant difference between Shell’s knowledge that some spills would occur and Aceto’s knowledge that hazardous waste would be generated by the transaction.²⁵⁶ Shell’s knowledge of accidental spills of virgin product does not necessarily indicate intent to dispose of that product. Knowledge that a transaction will generate hazardous waste, however, is a greater indicator of an intent to dispose of waste, because hazardous waste must be disposed of. By only discussing spills of virgin product, as opposed to generation of waste, the Court has left open the possibility that *Aceto*-type cases are the “some instances” referred to by the Court.²⁵⁷

The Court’s message, then, is that knowledge that there will be spills or that material will be discarded is not sufficient to create liability.²⁵⁸ Knowledge is some evidence, but the goal of the inquiry is to determine the defendant’s intent when it entered the transaction. If the intent was disposal, then the transaction is an arrangement for disposal.²⁵⁹

252. See, e.g., *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1381 (8th Cir. 1989).

253. *Burlington N.*, 129 S. Ct. at 1880.

254. *Id.*

255. *Id.* at 1877, 1880.

256. Compare *id.* at 1880 (holding that Shell’s awareness of some potential spillage was insufficient evidence to infer that Shell intended such spills to occur), with *Aceto*, 872 F.2d at 1382 (affirming the imposition of liability on defendants who owned the hazardous substances at issue and retained ultimate authority over the work in progress).

257. See *Burlington N.*, 129 S. Ct. at 1880.

258. See *id.* (“[K]nowledge alone is insufficient to prove than an entity ‘planned for’ the disposal . . .”).

259. See *id.* (noting that an entity can be considered an arranger “when it takes intentional steps to dispose of a hazardous substance”).

3. Why Did the Court Say “Steps to Dispose” as Opposed to “Intent to Dispose”?

While it is clear that *arrange* includes an element of intent, the Court could have been more precise in defining what intent is required. The Court moves back and forth between intent to dispose and intent to take steps to dispose.²⁶⁰ That distinction is crucial because while it is difficult to say that Shell intended to dispose of hazardous substances at B&B, it is not so implausible to say that Shell intentionally took steps that resulted in a disposal at B&B.

As a first step in understanding what intent the Court referred to, the Court made it clear that not all arrangements that result in disposal are arrangements for disposal that bring § 9607(3) liability.²⁶¹ The Court cited two cases for the proposition that courts must look beyond how the parties characterize their transaction to determine “whether the arrangement was one Congress intended to fall within the scope of CERCLA’s strict liability provisions”: *Freeman* and *Pneumo*.²⁶² In both cases, the courts looked to the intent of the parties to determine whether the arrangement was one that should be subject to liability.²⁶³ In both cases, the courts examined *what* was being transferred as a key to understanding the intent of the parties.²⁶⁴ If the item was waste, the arrangement would be an arrangement for disposal.²⁶⁵ If the subject of the transaction was a useful product, no liability could attach.²⁶⁶

These cases suggest that the Court was being precise in requiring intent to take steps toward disposal. Intent to dispose would be sufficient, but is not necessary. If the intent was not disposal, but instead the intent was to engage in a transaction that the court finds (by examining all of the circumstances) to be essentially a disposal, that would also bring liability.²⁶⁷

260. See, e.g., *id.* at 1879–80.

261. See *id.* at 1878.

262. *Id.* at 1879 (citing *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 775 (4th Cir. 1998)).

263. *Freeman*, 189 F.3d at 164; *Pneumo*, 142 F.3d at 775.

264. *Freeman*, 189 F.3d at 164; *Pneumo*, 142 F.3d at 775.

265. See *Freeman*, 189 F.3d at 164 (noting that the chemicals in question were not waste at the time of the transaction); *Pneumo*, 142 F.3d at 775–76 (noting that the used wheel bearings were a “valuable product”).

266. See *Freeman*, 189 F.3d at 164; *Pneumo*, 142 F.3d at 775–76.

267. *Freeman*, 189 F.3d at 164 (discussing the circumstances that courts will consider in determining whether a transaction constitutes a disposal); *Pneumo*, 142 F.3d at 775 (providing the factors courts apply to determine whether a transaction is for disposal).

The Court’s response to the Government’s argument about disposal supports the conclusion that intent to take steps toward disposal is the key. The Government argued that *disposal* can occur accidentally, and therefore, one can arrange for disposal accidentally.²⁶⁸ The Court responded by focusing on the “ultimate purpose of the arrangement.”²⁶⁹ The question is not what happened, but what was “planned for.”²⁷⁰ Thus, the Court was being precise in addressing the nature of the arrangement (i.e. was it an intentional step toward disposal) rather than focusing on what actually occurred (i.e. was there a disposal). If the nature of the arrangement is one the court deems to be a disposal, the defendant will have liability.²⁷¹

C. Burlington Northern: *Generator or Cause?*

Does the *Burlington Northern* Court adopt the view of arranger liability that is built on generator liability, the view based on causation, or something else? At first glance, one would have to say something else. The Court examined the word *arrange* and concluded that it contains a required element of intent.²⁷² Neither generator liability, nor causation liability, contain a required element of intent.²⁷³

A good case can be made that the generator theory, or significant portions of that theory, survived because the Court indicated that the subject matter of the transaction is a major factor in determining the real intent of the transaction.²⁷⁴ CERCLA adopts the RCRA definition of hazardous waste.²⁷⁵ A major component of that definition is that waste is something to be discarded.²⁷⁶ It may be that regardless of what one claims to be doing, any transaction the subject of which is an item to be discarded is an arrangement for disposal. This is the core of the generator theory—every generator is an

268. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1880 (2009).

269. *Id.*

270. *See id.* at 1880.

271. *See id.* at 1878–80.

272. *Id.* at 1879.

273. *Compare supra* note 20 and accompanying text (discussing the requirements of generator liability under RCRA), *with supra* notes 28–33 and accompanying text (discussing the imposition of strict liability on those who cause contamination).

274. *See Burlington N.*, 129 S. Ct. at 1880.

275. *Compare* 42 U.S.C. § 9601(14) (2006) (defining “hazardous substance” in CERCLA in part by reference to RCRA’s characterization of hazardous waste), *and* 42 U.S.C. § 6921(b)(1) (linking RCRA’s characterization of hazardous waste to the definition of “hazardous waste”), *with* 42 U.S.C. § 6903(5) (2006) (defining “hazardous waste”).

276. *See* § 6903(5).

arranger because the only thing one can do with hazardous waste is arrange for its disposal.²⁷⁷

Causation theory, on the other hand, has a hard time surviving this decision. Shell's method of delivery was the cause of the disposal.²⁷⁸ Of course, the Court recognized that Shell had provided guidance to purchasers to reduce spillage and thus had demonstrated that they did not intend the spillage.²⁷⁹ Shell did, however, choose a method of delivery that produced spillage (tankers instead of drums) because it was less expensive.²⁸⁰ Thus, their actions were the cause of the spillage,²⁸¹ and their actions were not an arrangement for disposal.²⁸²

D. Where Does that Leave Aceto?

At first glance, the intent issue appears to be fatal to the *Aceto* line.²⁸³ The Court required intent, at least to the extent that one must intend to engage in a transaction whose purpose is to dispose of or discard a hazardous substance.²⁸⁴ The *Aceto* defendants intended a transaction that may have had an element of generation and disposal of hazardous waste.²⁸⁵ That disposal of waste was at best an unintended byproduct of a transaction whose purpose had nothing to do with waste.²⁸⁶ However, because the *Burlington Northern* Court said that intent can be inferred from the totality of the circumstances, we will need to examine the totality of circumstances to see if this intent problem can be overcome.²⁸⁷

Justice Ginsburg, dissenting in *Burlington Northern*, can be seen as suggesting that *Aceto* lives.²⁸⁸ She noted that, at oral argument, counsel for Shell was asked whether different shipping terms could have meant that Shell would have been the owner at the time the product was spilled.²⁸⁹ Counsel responded yes.²⁹⁰ Based on that, the dissent argued that there should be liability because the shipping

277. See Gershonowitz, *supra* note 49, at 154.

278. *Burlington N.*, 129 S. Ct. at 1875.

279. *Id.* at 1880.

280. *Id.* at 1885 (Ginsburg, J., dissenting).

281. See *id.* at 1875 n.1 (majority opinion).

282. *Id.* at 1880.

283. See *supra* note 78 and accompanying text.

284. *Burlington N.*, 129 S. Ct. at 1879–80.

285. See *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989).

286. See *id.* at 1376.

287. See *Burlington N.*, 129 S. Ct. at 1879–80.

288. See *id.* at 1885 (Ginsburg, J., dissenting).

289. *Id.* at 1885 n.2.

290. *Id.*

terms should not be the determining factor in arranger liability.²⁹¹ Underlying the dissent’s reasoning is the assumption that if Shell owned the hazardous substances at the time the substances spilled, Shell would have been liable.²⁹² That premise is based on, or at least consistent with, *Aceto*, where ownership was a very important factor.²⁹³

The dissent’s assumption that ownership would make a difference is not supported by the Court’s opinion.²⁹⁴ The Court said that courts should examine the purpose of the transaction to determine whether the defendant had the requisite intent.²⁹⁵ The purpose of the transaction does not change based on ownership of the hazardous substances.²⁹⁶ The Court made clear that intent of the parties to the transaction is important to determining whether there is an arrangement for disposal. Intent of the parties does change with a change in ownership.²⁹⁷

Ownership goes to the issue of control, which goes to the issue of whether a defendant can be liable as someone who is ultimately responsible for the waste disposal.²⁹⁸ Ownership is important, therefore, only if the causation theory of arranger liability survived.²⁹⁹ However, there is nothing in the Court’s opinion that would suggest that arranger liability is based on the causation or responsibility concept.

Thus, the Second Circuit’s understanding of *Aceto* in the *AAMCO* decision³⁰⁰ could not have survived. The Second Circuit understood *Aceto* to be based on traditional concepts of duty.³⁰¹ In *Burlington Northern*, there is no discussion of duty.³⁰² Indeed, one could have argued that Shell had a duty to take additional steps to prevent the spillage. Instead, the Court focused on whether Shell made a plan for

291. *Id.* Shipping terms could only be relevant if the dissent believed that ownership of the material would change the result. *See id.*

292. *See id.*

293. *See United States v. Aceto Agric. Chems. Corp.*, 892 F.2d 1373, 1381 (8th Cir. 1989).

294. *See Burlington N.*, 129 S. Ct. at 1879–80.

295. *Id.*

296. *See id.*

297. *See id.*

298. *See id.*

299. *See United States v. Shell Oil Co.*, 281 F.3d 812, 822–23 (9th Cir. 2002).

300. *See supra* Part II.B.

301. *See Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286–87 (2d Cir. 1992).

302. *See Burlington N.*, 129 S. Ct. 1870.

or intended the spillage.³⁰³ The nature of the transaction is one of the factors to be examined to determine intent. If waste is the subject of the transaction, that could imply intent to dispose.³⁰⁴

We noted above, however, that portions of the *Aceto* decision make *Aceto* look like a generator case.³⁰⁵ The *Aceto* court reasoned that the *Aceto* defendants should be liable just as the *NEPACCO* defendants were liable.³⁰⁶ In *NEPACCO*, the court reasoned that as generator, the defendant had control of the waste, and that control, prior to disposal, implied an arrangement for disposal.³⁰⁷ The Eighth Circuit in *Aceto* reasoned that ownership and control of the process that generated the waste made the defendants de facto generators of that waste.³⁰⁸ As noted above, the Sixth Circuit in *GenCorp* and the Eleventh Circuit in *Montalvo* understood *Aceto* as essentially a generator case.³⁰⁹ That leaves open the possibility that those cases that rely on *Aceto* could have survived. A court could examine the *Aceto* fact pattern and conclude that by engaging in a transaction that they knew would generate hazardous waste and would have to be disposed of as part of the transaction, the defendants took intentional steps to dispose of hazardous substances.³¹⁰

Does the complexity of the transaction prevent that interpretation? The *Burlington Northern* Court was a little unclear on this point, perhaps because the transaction at issue could not be interpreted as other than a sale.³¹¹ The Court stated that, “knowledge alone is insufficient to prove that an entity ‘planned for’ the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.”³¹² One could argue that disposal in *Aceto* was also a peripheral result of a legitimate non-waste related transaction. On the other hand, the *Aceto* transaction included much more than a sale.³¹³ The defendants provided chemicals and instructions for formulation and received a finished product.³¹⁴ Generation and disposal of waste were necessary parts of

303. *Id.* at 1880.

304. *See id.* at 1878–79.

305. *See supra* Part II.A.

306. *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1381–82 (8th Cir. 1989).

307. *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 743–44 (8th Cir. 1986).

308. *Aceto*, 872 F.2d at 1383–84.

309. *See supra* note 145 and accompanying text.

310. *See Aceto*, 872 F.2d at 1381.

311. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1880 (2009).

312. *Id.*

313. *Aceto*, 872 F.2d 1373.

314. *Id.* at 1375.

the transaction.³¹⁵ If generation and disposal of waste were necessary, maybe they were not peripheral, and a court could conclude that the defendants in *Aceto* planned for the disposal.

How subsequent courts deal with the issue of what is “peripheral” will play an important role in determining the impact of the *Burlington Northern* decision. The *Burlington Northern* Court did not explain whether the spillage was peripheral because the entire transaction could be completed without any spillage or because the transaction was essentially a sale. The Court did say, however, that “to qualify as an arranger, Shell must have entered into the sale of D-D with the intention that at least a portion of the product be disposed of during the transfer.”³¹⁶ That suggests that peripheral does not rely on what the essence of the transaction is.

The *Burlington Northern* Court discussed the efforts made by Shell to reduce spillage. The Court inferred from those facts that Shell did not intend the spillage.³¹⁷ That could mean that a defendant in an *Aceto*-type case could reduce the likelihood of liability by giving the formulator instructions to avoid the accidental disposal of hazardous waste.³¹⁸ If so, the advice counsel has been providing may change. Many have counseled clients not to get involved in other people’s waste handling matters because anything one does can lead to an inference of control and control can result in liability.³¹⁹ Now, control is no longer a key to arranger liability, but intent is, and actions taken to avoid disposal will indicate that disposal was not intended and thereby reduce the likelihood of liability.³²⁰

V. CONCLUSION

The Supreme Court has provided clear guidance regarding arranger liability for sellers of useful non-waste products.³²¹ Its reasoning, by focusing on intent, is a clear rejection of some of the appellate arranger decisions that had addressed transactions other than the sale of a useful product.³²² Whether the *Aceto* line or any portion of it can survive, however, depends to a large extent on a number of issues left open by the Court, particularly what intent will satisfy the intent

315. *Id.* at 1376.

316. *Burlington N.*, 129 S. Ct. at 1880.

317. *Id.*

318. *See id.*

319. *See Aceto*, 872 F.2d at 1379.

320. *Burlington N.*, 129 S. Ct. at 1879.

321. *See id.* at 1878–79.

322. Compare, e.g., *id.* at 1880, with *Aceto*, 872 F.2d 1373.

requirement and how subsequent decisions determine what is “peripheral” to a transaction.