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A Uniform Approach for Determining Arranger Liability Under CERCLA

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980¹ (CERCLA) “is a broad, remedial statute enacted by Congress in order to enable the Environmental Protection Agency (EPA) to respond quickly and effectively to hazardous waste spills that threaten the environment.”² CERCLA places the ultimate responsibility for the cleanup of hazardous waste on those responsible for the problems caused by the disposal of that waste.³

Due to “the difficulty in prescribing in statutory terms liability standards which [would] be applicable in individual

1. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended in 42 U.S.C. §§ 9601-9675 (1994)). The Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) amended CERCLA.

2. *General Elec. Co. v. Aamco Transmissions, Inc.*, 962 F.2d 281, 285 (2d Cir. 1992). CERCLA has a number of aims, including:

- (1) to provide an incentive for maximum care in the prevention of releases;
- (2) to assure that responsible parties bear the full cost of their activities;
- (3) to encourage the internalization of health and environment costs;
- (4) to encourage compensation of innocent victims by removing difficult proof burdens;
- (5) to place incentives for greater care on the parties with the best knowledge or risks inherent in the wastes and in the best position to control and supervise their disposal;
- (6) to spread costs; and
- (7) to encourage efficient resource allocation.

United States v. Miami Drum Serv., No. 85-0038-Civ-Aronovitz, 1986 U.S. Dist. LEXIS 16501, at *10 n.4 (S.D. Fla. Dec. 12, 1986) (citing S. REP. NO. 96-848, at 12, 15, 31-34 (1980)).

3. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (“CERCLA both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination.” (citations omitted)). The federal government, states, and private parties may seek reimbursement from potentially responsible parties for expenses incurred in the cleanup of a release or threatened release of a hazardous substance. The EPA can order a potentially responsible party to commence cleanup operations or may conduct the cleanup measures itself and then sue the responsible parties for necessary cleanup costs. *See* 42 U.S.C. §§ 9604, 9606, 9607 (1994). Courts are not obligated to defer to the EPA’s conclusions on issues of liability because “[c]ourts, not the EPA, are the adjudicators of the scope of CERCLA liability.” *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1507 n.24 (11th Cir. 1996).

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cases,”⁴ Congress deliberately gave the courts the task of developing a “uniform approach”⁵ of determining liability issues through the “traditional and evolving principles of common law.”⁶ This has proven difficult since CERCLA “was prepared and passed in considerable haste”⁷ and as a result, the statute was “inadequately drafted.”⁸ Courts have been left with the difficult task of determining its scope and intent.⁹ Due to ambiguity in the language of CERCLA,¹⁰ instead of a uniform approach, there is a split of opinion in federal courts on many issues that impact liability determinations.¹¹

4. 126 CONG. REC. S30,932 (1980).

5. O’Neil v. Picillo, 883 F.2d 176, 179 n.4 (1st Cir. 1989); *see also* 126 CONG. REC. 31,965 (1980) (“To insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law in this area.”).

6. 126 CONG. REC. S30,932 (1980).

7. Exxon Corp. v. Hunt, 475 U.S. 355, 368 (1986). Three hazardous substance response bills were fully considered and rejected by the 96th Congress. *See id.* at 365-66 n.8. The bill that became CERCLA “was introduced as a floor amendment in the Senate in the waning days of the lame-duck session of the 96th Congress.” *Id.* at 379 n.5 (Stevens, J., dissenting). The bill “became the subject of an 11th-hour compromise.” *Id.* “The only legislative history on the compromise is found in the floor debates.” United States v. USX Corp., 68 F.3d 811, 821 n.20 (3d Cir. 1995) (quoting United States v. A & F Materials Co., 578 F. Supp. 1249, 1253 (S.D. Ill. 1984)).

8. *USX Corp.*, 68 F.3d at 821 n.20 (quoting *A & F Materials*, 578 F. Supp. at 1253); *see also* United States v. Cordova Chem. Co., 113 F.3d 572, 578 (6th Cir. 1997) (“[I]t is difficult to divine the specific, as opposed to the general, goals of Congress with respect to CERCLA liability since the statute represents an eleventh hour compromise.”), *vacated and remanded on other grounds sub nom.* United States v. Bestfoods, 118 S. Ct. 1876 (1998); Atlantic Richfield Co. v. American Airlines, Inc., 98 F.3d 564, 570 (10th Cir. 1996) (“[C]ourts have complained CERCLA is inartfully drafted, and is riddled with inconsistencies and redundancies.” (quoting United States v. Rohm & Haas Co., 2 F.3d 1265, 1270 n.6 (3d Cir. 1995))); CP Holdings, Inc. v. Goldberg-Zoino & Assocs., 769 F. Supp. 432, 435 (D.N.H. 1991) (“Depending on what definitions are accorded to various words and phrases within the statute, sections, subsections, and even sentences within CERCLA seem to contradict themselves with little or no internal consistency.”).

9. *See* South Fla. Water Mgt. Dist. v. Montalvo, 84 F.3d 402, 406 (11th Cir. 1996) (“Congress has left this task to the courts, and the courts have at times struggled with the contours of ‘arranger’ liability under § 107(a)(3).”).

10. *See* United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984) (referring to CERCLA as a “hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions”).

11. *See, e.g.*, United States v. Bestfoods, 118 S. Ct. 1876, 1885-86 n.9 (1998) (“[T]here is significant disagreement among courts and commentators over whether, in enforcing CERCLA’s indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing.”); Pennsylvania v. Union Gas Co., 491 U.S. 1, 46-47 (1989) (White, J., concurring in part, dissenting in part) (reasoning that

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One issue on which courts are split is what the term “arranged for,” as used in 42 U.S.C. § 9607(a)(3),¹² means.¹³ Although Congress expressly defines some of CERCLA’s statutory terms,¹⁴ Congress did not clarify what is meant by the term “arranged for.” “Interpretation of this term, however, is critical” to a determination of liability.¹⁵

taking a judicial headcount is not dispositive, but does suggest that the statute’s provisions about state liability are not unmistakably clear and that “experienced jurists could disagree about Congress’ intent under CERCLA”).

12. According to 42 U.S.C. § 9607(a)(3) (1994), liability will attach to:

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

Id. (emphasis added).

13. The Second, Third, and Eighth Circuits do not require that a party intended that the hazardous wastes be disposed of before imposing arranger liability. *See, e.g.,* United States v. CDMG Realty Co., 96 F.3d 706, 712 (3d Cir. 1996) (“[R]esponsible parties are liable for response costs regardless of their intent.”); United States v. TIC Inv. Corp., 68 F.3d 1082, 1088 (8th Cir. 1995) (rejecting defendants’ “specific intent argument”); General Elec. Co. v. Aamco Transmissions, Inc., 962 F.2d 281, 285 (2d Cir. 1992) (“In enacting CERCLA, Congress established four groups of responsible parties, all of whom are liable regardless of intent”). The Sixth and Seventh Circuits have determined that the term “arranged for” implies intentional action. *See, e.g.,* United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1231 (6th Cir. 1996) (“We conclude that the requisite inquiry is whether the party intended to enter into a transaction that included an ‘arrangement for’ the disposal of hazardous substances.”); Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993) (reasoning that “arranged for” implies intentional action). The Eleventh Circuit considers factors such as intent, ownership and knowledge, in determining whether a party has “arranged for” the disposal of hazardous substances. *See, e.g., Montalvo*, 84 F.3d at 406-09. The Fourth and Tenth Circuits have not directly addressed the issue. *See* United States v. North Landing Line Constr. Co., 3 F. Supp.2d 694, 699 (E.D. Va. 1998) (“[T]he Fourth Circuit Court of Appeals has not definitively interpreted the phrase [arranged for disposal].”); United States v. Gordon Stafford, Inc., 952 F. Supp. 337, 339 (N.D. W. Va. 1997) (“[I]t does not appear as if the Fourth Circuit has defined or interpreted the term [arranged for].”); Mathews v. Dow Chem. Co., 947 F. Supp. 1517, 1523 (D. Colo. 1996) (“As to the term ‘arranged for,’ no court within the Tenth Circuit has interpreted it”).

14. For example, “disposal” is defined in 42 U.S.C. § 6903(3) (1994). *See infra* note 38. “Facility” is defined in 42 U.S.C. § 9601(9) (1994). *See infra* note 34.

15. *Mathews*, 947 F. Supp. at 1523; *see* Gregory A. Robins, Note, Catellus Development Corporation v. United States: A “Solid” Approach to CERCLA “Arranger” Liability, or a “Waste” of Natural Resources?, 47 HASTINGS L.J. 189, 190 (1995) (“Congress’s failure to define the crucial term ‘arrange’ in the provision left courts with little or no guidance as to its intended scope.”).

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To add to the confusion, as courts nationwide struggle to interpret the term “arranged for,”¹⁶ the positions taken by individual courts may change over time. For example, in one action involving the Ekotek site in Utah, the federal district court in Utah stated that “[in] enacting CERCLA, Congress made the public policy decision to place the burden of the cost of remedying environmental damage upon ‘responsible parties,’ an aptly-named class defined by Congress in sweeping terms, *without regard to individual intent, expectation, guilty knowledge or degree of negligence.*”¹⁷ Approximately two years later, in another case involving the Ekotek site, the court reasoned that “*requiring intentional action* is consistent with the plain language of the statute” and that “in order to hold a person responsible for arranger liability, the person *must have intended* to ‘get rid of its hazardous wastes.’”¹⁸ Courts attempting to interpret CERCLA’s language are understandably confused by its language and may be persuaded more by a litigant’s arguments as to how the language should be construed than by prior decisions of the court.

Uncertainty in how courts interpret arranger liability under CERCLA can lead to unfair settlements¹⁹ or excessive litigation²⁰ because so much is at stake. Litigation costs for CERCLA actions are significant. More than one third of the money spent on Superfund sites by the private sector is spent

16. See *Montalvo*, 84 F.3d at 406 (“[C]ourts have at times struggled with the contours of ‘arranger’ liability under § 107(a)(3).”; *United States v. New Castle County*, 727 F. Supp. 854, 871 (D. Del. 1989) (“Congress did not . . . illuminate the trail to the intended meaning of arranger status and liability.”).

17. *Quaker State Minit-Lube, Inc. v. Fireman’s Fund Ins. Co.*, 868 F. Supp. 1278, 1332 (D. Utah 1994) (emphasis added).

18. *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1336 (D. Utah 1996) (emphasis added) (quoting *Amcast Indus. Corp. v. Detrex*, 2 F.3d 746, 751 (7th Cir. 1993)). Although both cases were heard in the United States District Court of Utah, the judges in the two cases were different. The *Quaker State* opinion was written by Chief Judge Patrick F. Kelly, while the *Ekotek* opinion it is being compared to was written by Judge John W. Lungstrum.

19. Because liability is so uncertain, some litigants may be unwilling to take a chance in court and thus agree to an out of court settlement, even though their liability under the Act is not clear.

20. See *W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS* § 78, at 556 (5th ed. 1984) (“[T]here should be some rather well-understood requirements to be satisfied so that there can be some degree of predictability about when strict liability will be applicable. This will prevent unnecessary litigation.”).

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on litigation.²¹ CERCLA cleanup operations take an average of seven to ten years²² and cost an average of thirty million dollars.²³ It is not uncommon for site cleanups to cost almost one billion dollars,²⁴ and at some sites, cleanups could reach fifty billion dollars.²⁵ Since CERCLA liability is strict²⁶ and applied jointly and severally,²⁷ even slight variations in the

21. See Robins, *supra* note 15, at 213 n.189 (“More than one third of the 11.3 billion dollars spent on Superfund sites by the private sector through 1991 funded litigation.”); see also 126 CONG. REC. 31,970 (1980) (concluding that CERCLA’s vagueness and inconsistencies would make the statute “a welfare and relief act for lawyers”).

22. See Keith Schneider, *EPA Announces New Steps to Prod Cleanup of Wastes*, N.Y. TIMES, Oct. 3, 1991, at A1.

23. See Christopher J. Nowicki, *A Step Back From Chevron? An Analysis of Kelley v. EPA*, 9 ADMIN. L.J. AM. U. 221, 226 n.25 (1995) (citing *Report on Defense Plant Wastes*, BUS. PUB. INC., Mar. 13, 1995).

24. See Payson R. Peabody, *Taming CERCLA: A Proposal to Resolve the Trustee “Owner” Liability Quandary*, 8 ADMIN. L.J. AM. U. 405, 422 n.62 (1994) (“Higher site cleanup costs, some approaching one billion dollars, are becoming more commonplace.” (citing ALFRED E. LIGHT, CERCLA LAW AND PROCEDURE 232 (1991))).

25. See Nowicki, *supra* note 23, at 226 n.25.

26. CERCLA provides that liability is that “standard of liability which obtains under [section 311 of the Federal Water Pollution Control Act].” 42 U.S.C. § 9601(32) (1994). “Section 311 of the Federal Water Pollution Control Act has been interpreted as imposing strict liability.” *United States v. Miami Drum Serv., Inc.*, No. 85-0038-Civ-Aronovitz, 1986 U.S. Dist. LEXIS 16501, at *9 (S.D. Fla. Dec. 12, 1986); see also, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 53 n.5 (1989) (Scalia, J., concurring in part, dissenting in part) (“Section 9607 is a strict-liability provision.”); *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988) (“[T]he overwhelming body of precedent . . . has interpreted section 107(a) as establishing a strict liability scheme.”). Strict liability “means liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence.” *KEETON ET AL.*, *supra* note 20, § 75, at 534.

27. See, e.g., *Aluminum Co. v. Beazer East, Inc.*, 124 F.3d 551, 562 (3d Cir. 1997) (“Under CERCLA, four types of ‘covered persons’ are held jointly and severally liable as ‘responsible parties.’”); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 191 (W.D. Mo. 1985) (“[L]iability under . . . CERCLA . . . is joint and several where the harm arising from a release or threatened release of a hazardous substance is indivisible.”). CERCLA’s joint and several liability standard has developed through case law since Congress “deliberately left the task of articulating such a standard to the courts.” Lynda J. Oswald, *New Directions in Joint and Several Liability Under CERCLA?*, 28 U.C. DAVIS L. REV. 299, 312 (1995). “[V]irtually every court that has examined the issue has held such defendants jointly and severally liable.” *Id.* at 304 n.12. Although joint and several liability will not be imposed if the defendant can prove the harm is divisible, once hazardous wastes have commingled it is almost impossible to determine the amount of environmental harm caused by each party. See *O’Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989).

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manner courts determine arranger liability have significant ramifications for plaintiffs and defendants.²⁸

Environmental problems are “often not susceptible of a local solution.”²⁹ Eliminating the dangers resulting from hazardous waste disposal requires “a national solution to a nationwide problem.”³⁰ Without uniform national standards, businesses that dispose of hazardous substances could skirt liability by locating “primarily in states with more lenient laws.”³¹ Liability under CERCLA should depend on the nature of the activity engaged in, rather than the federal court in which the action is brought. Yet CERCLA is a federal statute that, in the eighteen years it has been in effect, has not developed a uniform approach to arranger liability.³² Therefore, the time is ripe for Congress or the Supreme Court to expressly define the term “arranged for.” However, even absent Congressional or Supreme Court action clarifying the issue, lower courts should take a uniform approach in determining arranger liability under CERCLA.

28. See, e.g., *infra* text Part V.A.3 (explaining how differences in language used by courts could result in a finding of liability in one court, but not the other).

29. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 20 (1988).

30. *United States v. Cordova Chem. Co.*, 113 F.3d 572, 584 (6th Cir. 1997) (Merritt, J., dissenting), *vacated and remanded on other grounds sub nom.* *United States v. Bestfoods*, 118 S. Ct. 1876 (1998); see *Ekotek Site PRP Comm. v. Self*, 948 F. Supp. 964, 1000 n.8 (D. Utah 1996) (noting the need for federal interpretation of CERCLA due to the statute’s “national application, the need for fairness to similarly situated parties, and the possibility that CERCLA’s purposes would be frustrated by state law”); *In re Acushnet River*, 675 F. Supp. 22, 31 (D. Mass. 1987) (“One can hardly imagine a federal program more demanding of national uniformity than environmental protection.”); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809 (S.D. Ohio 1983) (“[T]he delineation of a uniform federal rule of decision is consistent with the legislative history and policies of CERCLA . . .”). In *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the Court noted that when there is a federal program that requires national uniformity, the Constitution allows uniform federal rules of decisions. Courts deciding whether federal common law applies must consider, among other things, the need for national uniformity on the issue. See *id.* at 728.

31. 126 CONG. REC. 31,965 (1980); see also *Ekotek*, 948 F. Supp. at 1000 n.8 (noting CERCLA’s “national application, the need for fairness to similarly situated parties, and the possibility that CERCLA’s purposes would be frustrated by state law”). But see *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1502 (11th Cir. 1996) (“I see no necessity to create federal common law in this area to guard against the risk that states will create safe havens for polluters.” (quoting *Ansbec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991))).

32. See, e.g., *supra* note 13 and accompanying text.

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This Comment provides such a uniform approach. Part II of this Comment examines the current standard of liability for arrangers under CERCLA. Part III argues that including an intent requirement for arrangers is consistent with the statutory language of CERCLA. It also reasons that strict liability should only apply after the party has been determined to be a responsible person. Part IV proposes a definition of the term “arranged for” that should be expressly enacted into CERCLA by Congress. Part IV also argues that a statutory definition would be the best method of removing the confusion that results when courts make determinations of arranger liability. Two hypotheticals are provided to illustrate how the definition would be used by courts making liability determinations. Part V advocates that until Congress enacts clear statutory language, courts should adopt a manageable multifactor analysis to determine arranger liability that considers (1) whether the transaction involved the sale of a useful product, (2) whether the party generated the hazardous substance, and (3) whether the party actually participated in the decision to dispose of or treat the hazardous substance. Part VI concludes by explaining that this multifactor test provides an answer to the ambiguities surrounding arranger liability.

II. CERCLA’S STANDARD OF LIABILITY

“In enacting CERCLA, Congress made the public policy decision to place the burden of the cost of remedying environmental damage upon ‘responsible parties’”³³ In order to establish a prima facie case of CERCLA liability, a plaintiff must prove that (1) the site is a facility,³⁴ (2) a release or threatened release of a hazardous substance has occurred,³⁵

33. *Quaker State Minit-Lube, Inc. v. Fireman’s Fund Ins. Co.*, 868 F. Supp. 1278, 1332 (D. Utah 1994).

34. “Facility” is defined as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9) (1994).

35. Hazardous substances “include a broad range of pollutants, chemicals, and

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(3) the release or threatened release has caused the plaintiff to incur certain response costs,³⁶ and (4) the defendant in question is a responsible person, as defined by the statute.³⁷ There are four classes of responsible persons under CERCLA: (1) the current owners and operators of a facility, (2) persons who formerly owned or operated the facility at the time of the disposal of hazardous substances, (3) *persons who arranged for the disposal³⁸ or treatment³⁹ of hazardous substances*, and (4)

other substances.” Ekotek Site PRP Comm. v. Self, 881 F. Supp. 1516, 1524 (D. Utah 1995); *see also* 42 U.S.C. § 9601(14) (1994).

36. Actions for cost recovery under CERCLA can be brought in two different ways, depending upon who is initiating the suit. “CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others.” Key Tronic Corp. v. United States, 511 U.S. 809, 819 n.13 (1994). “[A] section 107 action brought for recovery of costs may be brought only by *innocent* parties that have undertaken clean-ups.” New Castle County v. Halliburton Nus Corp., 111 F.3d 1116, 1120 (3d Cir. 1997). Section 107 actions “historically [have] been used by governments to recover costs incurred in the clean-up of hazardous sites.” *Id.* at 1123. “An action brought by a potentially responsible person is by necessity a section 113 action for contribution.” *Id.* at 1120. “A section 107 cost recovery action imposes strict liability on potentially responsible persons for costs associated with hazardous waste clean-up and site remediation.” *Id.* at 1120-21. In comparison, section 113 contribution claims allow the court to “allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” 42 U.S.C. § 9613(f)(1) (1994); *see, e.g.*, United States v. Miami Drum Serv., Inc., No. 85-0038-Civ-Aronovitz, 1986 U.S. Dist. LEXIS 16501, at *16 (S.D. Fla. Dec. 12, 1986).

37. *See* Ekotek Site PRP Comm. v. Self, 932 F. Supp. 1328, 1332 (D. Utah 1996).

38. “Disposal” is defined as:

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3) (1994). Disposal “includes not only the initial introduction of contaminants onto a property but also the spreading of contaminants due to subsequent activity.” United States v. CDMG Realty Co., 96 F.3d 706, 719 (3d Cir. 1996).

39. “Treatment” is defined as:

any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

42 U.S.C. § 6903(34) (1994).

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transporters of hazardous waste.⁴⁰ This Comment limits its discussion to those persons who arranged for the disposal or treatment of a hazardous substance.

A person deemed to be a responsible party may escape CERCLA liability by demonstrating “by a preponderance of the evidence the existence of one of the three [following statutory] affirmative defenses”:⁴¹ (1) an act of God, (2) an act of war, or (3) an act or omission of a third party.⁴² Over time, additional judicially created defenses have developed.⁴³ For example, the useful product defense is “a fixture of CERCLA jurisprudence”⁴⁴ and thus it is well recognized that “CERCLA liability will not attach if a transaction involves the sale of a new useful product.”⁴⁵

Early court decisions held that CERCLA imposes strict liability,⁴⁶ jointly and severally, upon responsible parties.⁴⁷ More recently, some commentators and courts have questioned whether liability determinations under CERCLA are fair.⁴⁸ De

40. See *Ekotek*, 932 F. Supp. at 1332 (emphasis added).

41. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993); see also *New Castle County*, 111 F.3d at 1120 n.2 (“A person who can successfully establish a defense under section 107(b) is not a potentially responsible person.” (citations omitted)).

42. See 42 U.S.C. § 9607(b) (1994); see also *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1507 (11th Cir. 1996) (discussing the application of the three possible affirmative defenses). The first two defenses are rarely invoked. See *id.* Defendants raising the third-party defense are required to prove: (1) “they did not contribute to the contamination”; (2) “they were not in a direct or indirect contractual relationship with any person who . . . caused the contamination”; (3) “they exercised due care throughout”; and (4) “[t]hat they protected against those acts and omissions of the polluting persons, and the consequences of those acts and omissions, that were foreseeable.” *United States v. Cordova Chem. Co.*, 113 F.3d 572, 593-94 (6th Cir. 1997) (Merritt, J., dissenting), *vacated and remanded on other grounds sub nom. United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

43. See, e.g., *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988) (“The defenses enumerated in section 9607(b) are not exclusive in suits for contribution.”).

44. *Ekotek*, 932 F. Supp. at 1336.

45. *Id.* at 1335 (quoting *Douglas County v. Gould, Inc.*, 871 F. Supp. 1242, 1247 (D. Neb. 1994)). For a discussion of the useful product doctrine, see *infra* Part V.A.

46. See *supra* note 26 and accompanying text.

47. See *supra* note 27 and accompanying text.

48. See, e.g., *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 716 (2d Cir. 1993) (“In passing CERCLA Congress faced the unenviable choice of enacting a legislative scheme that would be somewhat unfair to generators of hazardous substances or one that would unfairly burden the taxpaying public.”); *O’Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989) (recognizing that CERCLA “may often result in defendants paying for more than their share of the harm”); John M. Hyson, “Fairness”

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spite these criticisms, this Comment demonstrates that strict liability can be applied in a manner that is fair and is still consistent with the statutory language and purpose of the Act.

III. ARRANGER LIABILITY, STRICT LIABILITY AND INTENT

A. *A Split Among the Circuits*

In the past ten years several federal courts have considered whether assessing a potentially responsible party's intent is congruent with the strict liability structure of arranger liability.⁴⁹ The courts have been unable to reach a uniform conclusion.⁵⁰ For example, in *General Electric Co. v. Aamco Transmissions, Inc.*,⁵¹ three oil companies had entered into lease agreements with dealers for service station operations. The lease agreements failed to specify how the dealers were to dispose of waste motor oil.⁵² The dealers, without receiving advice from the oil companies, decided to allow a waste oil business to pick up their waste oil.⁵³ The dealers did not pay for their waste oil to be picked up, nor did they receive compensation for it.⁵⁴ The waste oil was taken to a storage site, where it eventually leaked into the soil, surface water, and groundwater of a freshwater wetland.⁵⁵ In an action for contribution, the primary issue was whether the oil companies could be held liable as arrangers.⁵⁶ The Second Circuit Court of Appeals reasoned that responsible parties are liable "regardless

and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA, 21 HARV. ENVTL. L. REV. 137, 143 (1997) ("CERCLA's basic liability scheme imposes liability on a basis that is inconsistent with the notions of culpability and causation that underlie common law principles of liability. For that reason, it is often said that the basic liability scheme of CERCLA is unfair."); Jay Sandvos, Comment, *CERCLA Arranger Liability in the Eighth Circuit: United States v. TIC Industries*, 24 B.C. ENVTL. AFF. L. REV. 863, 864 (1997) ("One fundamental problem of CERCLA interpretation is how to harmonize CERCLA's broad scheme of strict, joint, and several liability with the primary canons of torts and corporations law on which the statute overlays.").

49. See, e.g., *supra* note 13.

50. See *supra* note 13.

51. 962 F.2d 281 (2d Cir. 1992).

52. See *id.* at 283-84.

53. See *id.* at 283, 284 n.3.

54. See *id.* at 284 n.3.

55. See *id.* at 282.

56. See *id.* at 284.

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*of intent.*⁵⁷ Therefore, the court did not consider the intent of the oil companies when it held that the oil companies were not liable as arrangers.⁵⁸

In contrast, the Sixth Circuit Court of Appeals interpreted arranger liability in *United States v. Cello-Foil Products, Inc.*,⁵⁹ as requiring an intent to enter into an arrangement for the disposal of hazardous substances.⁶⁰ The defendant in this case bought virgin solvent in fifty-five gallon reusable drums from Thomas Solvent.⁶¹ When the defendant was finished with the drums, the drums were returned to Thomas and the defendant was credited for the amount of the drum deposit.⁶² For several years, Thomas emptied any contents remaining in the returned drums onto the ground.⁶³ Later, it was discovered that hazardous waste had contaminated the primary public water supply of Battle Creek, Michigan. Thomas' property, therefore, was designated as a Superfund site.⁶⁴ The court remanded the case for further findings since the trial court had not determined whether the defendant had the intent required to have arranged for disposal of the hazardous substances.⁶⁵ Had the *Cello-Foil Products* court subscribed to the same reasoning on intent that was described in *Aamco*,⁶⁶ the *Cello-Foil Products* court would not have found it necessary to remand the case.⁶⁷

B. CERCLA's Statutory Language is Consistent With an Intent Requirement

Incorporating an intent requirement into an examination of whether a party has arranged for disposal or treatment of

57. *Id.* at 285 (emphasis added).

58. *See id.* at 288. In finding that the oil companies were not liable, the court noted that the oil companies had not taken part in the disposal of the waste oil and that they were not obligated to exercise control over their dealers' waste oil disposal practices.

59. 100 F.3d 1227 (6th Cir. 1996).

60. *See id.* at 1231.

61. *See id.* at 1230.

62. *See id.*

63. *See id.*

64. *See id.* at 1230-31.

65. *See id.* at 1233-34.

66. *See United States v. Aamco Transmissions, Inc.*, 962 F.2d 281, 285 (2d Cir. 1992).

67. For further discussion of the approaches taken by the other circuits, see *supra* note 13.

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hazardous substances is congruent with the statutory language and does not frustrate the strict liability nature of CERCLA. "Strict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct."⁶⁸ Even though liability under CERCLA is strict liability,

it would be error for us not to recognize the indispensable role that state of mind must play in determining whether a party has "otherwise arranged for disposal . . . of hazardous substances."

We derive the intent element from the canons of statutory construction. "Otherwise arranged" is a general term following in a series two specific terms All of these terms indicate that the court must inquire into what transpired between the parties and what the parties had in mind with regard to disposition of the hazardous substance. Therefore, including an intent requirement into the "otherwise arrange" concept logically follows the structure of the arranger liability provision.⁶⁹

There is no need "to depart from the language of the statute"⁷⁰ when incorporating an intent requirement. Although the text of § 9607(a)(3) does not use "the words 'intent,' 'knowingly,' 'willfully' or any other motivational term . . . [g]iven its plain meaning, the verb 'to arrange' arguably implies a person has the intent to accomplish that which they are 'arranging' to do."⁷¹

C. Strict Liability Only Applies After it is Determined the Person is a Responsible Party

Strict liability under CERCLA only attaches to persons who are determined to be responsible parties as defined by the Act.⁷²

68. *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 711 (1995) (O'Connor, J., concurring).

69. *Cello-Foil Prods.*, 100 F.3d at 1231 (citations omitted). "[G]eneral terms following specific terms should be understood under the rubric of the specific term." *Id.* This canon of statutory interpretation is known as *ejusdem generis*. See Peabody, *supra* note 24, at 441 n.189.

70. *Exxon Corp. v. Hunt*, 475 U.S. 355, 371 (1986).

71. *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1138 (N.D. Fla. 1994).

72. See *id.* This is in keeping with other areas of law in which strict liability applies. For example, the RESTATEMENT (SECOND) OF TORTS § 519 imposes strict liability only after an activity is deemed to be "abnormally dangerous." To determine

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Therefore, “examining state of mind or ascertaining intent at the contract, agreement, or other type of arrangement stage does not undermine the strict liability nature of CERCLA. The intent inquiry is geared only towards determining whether the party in question is a potentially liable party.”⁷³ It is not until after

a party is determined to have the requisite intent to be an arranger, [that] strict liability takes effect. If an arrangement has been made, that party is liable for damages caused by the disposal regardless of the party’s intent that the damages not occur. Moreover, a party can be responsible for “arranging for” disposal, even when it has no control over the process leading to the release of substances. Therefore, once it has been demonstrated that a party possessed the requisite intent to be an arranger, the party cannot escape liability by claiming that it had no intent to have the waste disposed in a particular manner or at a particular site.⁷⁴

If the transaction includes an arrangement for the ultimate disposal of a hazardous substance, CERCLA’s strict liability is imposed.

IV. A DEFINITION OF THE TERM “ARRANGED FOR”

A. *Proposed Statutory Language*

The most effective way to improve the national uniformity of CERCLA’s liability determinations for arrangers would be for Congress to expressly define the term “arranged for.” The

whether an activity is “abnormally dangerous,” the Restatement lists several factors to consider, including:

- (a) existence of a high degree of risk of some harm to the person, land, or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

See id. § 520.

73. *Cello-Foil Prods.*, 100 F.3d at 1232.

74. *Id.*; *see also* *Ekotek Site PRP Comm. v. Self*, 881 F. Supp. 1516, 1527 (D. Utah 1995) (“And while the defendants repeatedly emphasize that . . . they had no knowledge of the conditions of the Ekotek facility, this is irrelevant to the scheme of strict liability created by CERCLA.”).

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definition would give courts direction as to the scope of liability Congress intended under § 9607(a)(3). This Comment advocates that 42 U.S.C. § 9607(a)(3) be modified to read as follows:⁷⁵

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.

(A) *“Arranged for” requires a specific intent to dispose of or treat a hazardous substance.*⁷⁶

(i) *This intent is presumed if the person has generated the hazardous substance as a by-product for which there is not a viable market.*⁷⁷

(ii) *Selling a useful product is not an arrangement for disposal or treatment; however, it is not enough that the product have an incidental or residual value to another person. The product must be of the type that if unavailable from the seller, the buyer would need to look for a replacement product.*⁷⁸

(iii) *Additionally, to have “arranged for” disposal or treatment of a hazardous substance, the person must have actually participated in the crucial decision to rid itself of the hazardous substance.*⁷⁹ *The person need not know the details of the transactions, (i.e., location of where the product is going,*

75. Proposed modifications to § 9607(a)(3) are italicized. The rationale behind each of the proposed modifications to the statute is described in subsequent footnotes.

76. *See supra* Part III.B (reasoning that the statutory language is consistent with an intent requirement).

77. *See infra* Part V.B (discussing policy reasons for holding generators liable under CERCLA).

78. *See infra* Part V.A.2 (discussing the useful product doctrine). It is understood that the wording of this portion of the statute requires a court to consider factors extrinsic to the seller to determine the seller's intent. However, this is in accord with the approach taken by courts. *See, e.g.,* Ekotek Site PRP Comm. v. Self, 948 F. Supp. 994, 997 (D. Utah 1996) (drawing an inference that the defendant intended to get rid of hazardous substances from the low price at which the product was sold). One Supreme Court justice reasoned that a person “is presumed to have intended the natural consequences of his deeds.” *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). Therefore, “the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.” *Id.*

79. *See infra* Part V.C (discussing the actual participation requirement).

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method of disposal),⁸⁰ rather only needs to have participated in the decision to get rid of the hazardous substance.

B. Application of the Proposed Statutory Language

1. First hypothetical

To illustrate how this statutory definition would give structure to a court's analysis, consider the following hypothetical scenario.⁸¹ ABC, a recycling business, obtains used motor oil from service stations and other businesses that have waste oil to dispose. ABC filters and processes the used oil and then sells the treated oil to businesses that have a use for it. ABC has a good market for its processed oil. XYZ buys some of ABC's processed oil to use in its business operations. Unbeknownst to ABC, XYZ changes its operations and no longer needs all the processed oil it bought and so disposes of the excess oil on its property. Several years later, XYZ has a series of hazardous waste accidents on the property. Eventually the property is designated as a Superfund site and ABC is sued for contribution.

Since the agreement in this hypothetical did not expressly provide for the treatment or disposal of hazardous substances, the court needs to determine whether ABC had "otherwise

80. Although some courts have considered whether the party knew the location of the disposal site, "[t]he plain language of the statute does not require knowledge of the facility's location." *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1334 (D. Utah 1996). "CERCLA does not require that the arrangement be location specific." *Id.* at 1335 n.5; *see also* *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1318 (11th Cir. 1990) (reasoning that even if a manufacturer did not decide how, when, and by whom a hazardous substance was to be disposed of, the manufacturer could still be liable); *O'Neil v. Picillo*, 883 F.2d 176, 182 n.9 (1st Cir. 1989) (reasoning that since CERCLA is a strict liability scheme, it is possible to hold defendants liable even if they did not know how their waste made its way to the site).

Also, courts should not consider whether the party knew how the substances would be disposed of because it would encourage parties "to escape liability by 'playing dumb' about how their hazardous wastes are disposed of." *Ekotek Site PRP Comm. v. Self*, 881 F. Supp. 1516, 1530 (D. Utah 1995) (quoting *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1142 (N.D. Fla. 1994)). "In short, Defendants cannot eschew their responsibilities under CERCLA merely because they allegedly did not know the location or methods of [the disposer]'s business." *Id.* (alteration in original) (quoting *Chatham Steel*, 858 F. Supp. at 1142).

81. Although this is a hypothetical scenario, it is similar in many respects to the litigation Fuel Processors faced in *Ekotek*, 932 F. Supp. at 1328. *See infra* Part V.B.

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arranged for” the disposal or treatment of the processed motor oil.⁸² Since the processed motor oil was not generated by ABC as a by-product and there was a viable market for the product, there is no presumption that ABC had the requisite intent.⁸³ The transaction appears to involve a useful product, but further analysis is required to ensure that it is not merely being characterized as a useful product.⁸⁴ The court would need to inquire into the price of the processed motor oil and whether, if it was unavailable, XYZ would have been required to find a replacement product. Since at the time the transaction occurred XYZ required oil for its operations, XYZ would have obtained oil from a different source if it had not bought the oil from ABC.⁸⁵ In this hypothetical, the inquiry could stop at this point since the sale of a useful product does not incur arranger liability.⁸⁶

2. *Second hypothetical*

To illustrate how this definition would be applied to a different fact pattern, consider a hypothetical involving a manufacturing plant that generates toxic wastes as an unintended by-product.⁸⁷ The plant has paid for the disposal of the toxic wastes in the past, but has recently entered into an agreement with a fertilizer company to take the plant’s toxic wastes. The fertilizer company pays a nominal sum for the toxic wastes, and then adds the toxic wastes in low concentrations as filler to the fertilizer. This practice continues for a number of years before the fertilizer plant is designated as a Superfund site. The manufacturing plant is eventually sued under CERCLA to recover costs incurred in cleanup operations.

Under the proposed statute, a court would begin its analysis by examining the agreement to determine whether its express purpose was to dispose of the hazardous wastes of the

82. *See supra* Part IV.A (providing current statutory language of 42 U.S.C. § 9607(a)(3) (1994)).

83. *See supra* Part IV.A (providing proposed statutory language at subsection (i)).

84. *See supra* Part IV.A (providing proposed statutory language at subsection (ii)).

85. *See supra* Part IV.A (providing proposed statutory language at subsection (ii)).

86. *See infra* Part V.A (discussing the useful product doctrine).

87. Although this is a hypothetical scenario, it is similar in many respects to the discussion of fertilizer companies found *infra* Part V.A.3.

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manufacturing plant.⁸⁸ According to the facts, this is unlikely. However, the court would presume that the manufacturing plant had the requisite intent to dispose of the hazardous wastes since it was an unintended by-product for which there was not a viable market.⁸⁹ Although the fertilizer company was willing to pay a nominal price for the waste, this alone is insufficient to make it a useful product.⁹⁰ The fertilizer company was willing to add the waste to its fertilizer to add weight to the product; however, the waste was not necessary for the fertilizer. There is no indication that the fertilizer company would have looked for another product if this waste was not readily and cheaply available.⁹¹ The manufacturing plant decided it needed to get rid of its hazardous wastes and entered into the transaction for that purpose.⁹² Therefore, the manufacturing plant would be held liable as an arranger.

3. Conclusion

The above hypotheticals illustrate the ease in which this proposed statutory definition could be applied by the courts. The courts would be required to apply findings of fact to the statutory language to determine whether or not the person has arranged for disposal or treatment of a hazardous substance. There may be slight variations in the way courts do that; however, the proposed statutory language would help bring uniformity in the analysis and would infuse fairness into liability determinations since a finding of liability would depend more upon the activity in which the person has engaged than which court the case was brought.

88. *See supra* Part IV.A (providing current statutory language of 42 U.S.C. § 9607(a)(3) (1994)).

89. *See supra* Part IV.A (providing proposed statutory language at subsection (i)).

90. *See supra* Part IV.A (providing proposed statutory language at subsection (ii)).

91. Although in this hypothetical the court looks at the buyer's business, the inquiry is limited to facts that help the court determine whether the transaction was a sham for disposal. The overall focus of the inquiry, therefore, remains on the intent of the manufacturer of the waste. Although courts would have to weigh a few facts, there would be more uniformity in the results because courts would all consider the same type of evidence. *See supra* notes 16-18 and accompanying text; *see also infra* Part V.

92. *See supra* Part IV.A (providing proposed statutory language at subsection (iii)).

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V. USING A MULTIFACTOR APPROACH TO ESTABLISH A PRIMA FACIE CASE

Until Congress gives guidance on what it intended by the term "arranged for," courts will need to continue to strive to establish a uniform approach. Whether a party intended to arrange for disposal or treatment of a hazardous substance is a factual issue⁹³ that "need not be proven by direct evidence"⁹⁴ as long as it can "be inferred from the indirect action of the parties."⁹⁵ "Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."⁹⁶ Due to the difficulty of proving intent, "in the absence of a contract or agreement [for the disposal or treatment of a hazardous substance], a court must look to the totality of the circumstances, including any 'affirmative acts to dispose,' to determine whether the [d]efendants intended to enter into an arrangement for disposal."⁹⁷ To do this, courts have reviewed "the totality of the circumstances, on a case-by-case basis."⁹⁸ Since there is no bright-line test, a detailed analysis of the transaction is necessary.⁹⁹ A multifactored analysis is an orderly method of considering the totality of the circumstances.

An example of a multifactored analysis is found in *United States v. American Cyanamid Co.*¹⁰⁰ The issue in *American*

93. See *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1233 (6th Cir. 1996) ("The state of man's mind is as much a fact as the state of his digestion. It is true that [it] is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." (quoting *Eddington v. Fitzmaurice*, 29 Ch. D. 459, 483 (1885))).

94. *Id.* at 1231.

95. *Id.* at 1233.

96. *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

97. *Cello-Foil Prods.*, 100 F.3d at 1232 (footnote omitted).

98. *United States v. Gordon Stafford, Inc.*, 952 F. Supp. 337, 340 (N.D. W. Va. 1997); see also *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1333 (D. Utah 1996) ("Arranger liability depends on the facts of each case and must be decided by reviewing the entire record.").

99. See *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1354 (N.D. Ill. 1992).

100. Civ. No. 2:93-0654, 1997 U.S. Dist. LEXIS 4413, at *16-17 (S.D. W. Va. Jan. 27, 1997).

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Cyanamid was whether transactions for the sale of TCP and sodium demonstrated an arrangement for the disposal of hazardous substances.¹⁰¹ The court recognized that “a transaction does not escape the scope of section 107(a)(3) and liability as an arranger merely because it is characterized as a sale.”¹⁰² When it is unclear whether a transaction is a sale of a useful, albeit hazardous, product or whether it is merely an arrangement for disposal, the court reasoned it was important to examine all of the circumstances.¹⁰³ The court listed several factors considered by other courts, including: (1) whether the party had knowledge of and control over the disposal, (2) who owned the hazardous substance at the time of disposal, (3) the party’s intent, (4) the purpose and inevitable consequences of the transaction, (5) whether the product had value on the market, (6) whether there was a productive use for the substance or whether it would be more proper to characterize the substance as waste to be disposed, (7) whether the substance was a principal business product or a by-product, (8) whether at any time the seller has disposed of the substance as waste, and (9) whether a used product is being sold for the same use for which it was manufactured.¹⁰⁴ The court applied these factors to the transactions involving TCP and then to the transactions involving sodium.

The multifactor approach adopted by the *American Cyanamid* court is useful in determining whether a party arranged for the disposal of a hazardous substance; however, it is cumbersome, especially when more than one transaction is involved. The nine factors considered can be consolidated into the following three critical factors: (1) whether the transaction involved the sale of a useful product,¹⁰⁵ (2) whether the party generated the hazardous substance,¹⁰⁶ and (3) whether the

101. *See id.*

102. *Id.* at *14.

103. *See id.*

104. *See id.* at *17.

105. This addresses the following factors considered by the *American Cyanamid* court: (3) the party’s intent, (4) the purpose and inevitable consequences of the transaction, (5) whether the product had value on the market, (6) whether there was a productive use for the substance, (8) whether at any time the seller has disposed of the substance as waste, and (9) whether a used product is being sold for the same use for which it was manufactured. *See supra* notes 100-04 and accompanying text.

106. This addresses the following factors considered by the *American Cyanamid*

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party actually participated in arranging for the disposal or treatment of the hazardous substance.¹⁰⁷ Adopting this test would not only make the court's analysis more manageable, it would also give guidance on what type of activities will subject a person to liability.

When a court has numerous factors to analyze, it is difficult to predict how much emphasis will be put on any particular factor. With only three factors to consider, it will be much easier for a court to make liability determinations, and the liability determinations will be more uniform. It will also be easier for parties to predict how liability determinations will be resolved. This would reduce the amount of arranger liability litigation.¹⁰⁸ An explanation of each factor follows.

A. *The Useful Product Doctrine*

1. *Reason for the useful product doctrine*

The useful product doctrine is well recognized by courts even though it is not expressed in the statute.¹⁰⁹ The useful product defense "implicitly recognizes that not all transactions impose arranger liability."¹¹⁰ Courts have reasoned that it is necessary to consider the useful product doctrine because

the sale of a product which contains a hazardous substance cannot be equated to the disposal of the substance itself or even the making of arrangements for its subsequent disposal

These distinctions are necessary because otherwise the sale of an automobile would be the disposal of a hazardous

court: (2) who owned the hazardous substance at the time of disposal, (7) whether the substance was a principal business product or a by-product, and (9) whether a used product is being sold for the same use for which it was manufactured. *See supra* notes 100-04 and accompanying text.

107. This addresses the following factors considered by the *American Cyanamid* court: (1) whether the party had knowledge of and control over the disposal, (2) who owned the hazardous substance at the time of disposal, and (3) the party's intent. *See supra* notes 100-04 and accompanying text.

108. *See supra* notes 19-21 and accompanying text.

109. *See, e.g.*, *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1336 (D. Utah 1996) (referring to the useful product doctrine as "a fixture of CERCLA jurisprudence").

110. *Id.*

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substance, since an automobile contains a battery, and a battery contains lead, which is a hazardous substance

Those would be preposterous results.¹¹¹

2. *Characterization of the event*

Consistent with the reasoning in *American Cyanamid*, courts must look beyond the characterization of the event. Merely characterizing a transaction as a sale of a useful product does not preclude a finding of liability. "If the transaction is really a sham for disposal [of a hazardous substance], CERCLA liability will attach."¹¹² However, there may be more than one way to characterize the event. For example, in a "mixed motives" case, a party may be as interested in getting rid of a substance no longer useful to him as he is in earning revenue from the sale of that substance to a party that has a use for it.¹¹³ "As the sale of wastes and byproducts becomes indistinguishable from ordinary commercial transactions, the intent of the vendor may become more significant."¹¹⁴ For example, in *Cooper Industries, Inc. v. Agway, Inc.*,¹¹⁵ the defendant's manufacturing process resulted in scrap steel, which the defendant sold.¹¹⁶ Some of the defendant's scrap steel ended up at the Rosen Superfund site.¹¹⁷ The court looked past the defendant's characterization as a sale and found that the defendant's "purpose for entering into this arrangement was to [permanently] remove the scrap steel from its property."¹¹⁸

111. *G. J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 384 (7th Cir. 1995).

112. *United States v. Vertac Chem. Corp.*, 966 F. Supp. 1491, 1508 (E.D. Ark. 1997); *see also* *Ekotek Site PRP Comm. v. Self*, 881 F. Supp. 1516, 1527 (D. Utah 1995) ("So long as the defendants are shown to have arranged for the disposal of waste, the characterization of the transfer as a 'sale' will not provide protection from liability under CERCLA.").

113. *See G. J. Leasing*, 54 F.3d at 384 ("In the middle would be a mixed-motives case, where the seller's goal was both to get rid of wastes and to make a bona fide sale of commercially valuable property."). Companies selling their toxic wastes to fertilizer companies may have mixed motives. It is possible that the companies are as interested in receiving money for their toxic by-products as they are motivated by a desire to dispose of their toxic wastes.

114. Eric Fjelstad, *1992 Ninth Circuit Environmental Review, Jones-Hamilton and CERCLA Arranged-For-Disposal Liability*, 23 ENVTL. L. 1107, 1117-18 (1993).

115. No. 92-CV-0748, 1997 U.S. Dist. LEXIS 19192 (N.D.N.Y. Nov. 14, 1997).

116. *See id.* at *38.

117. *See id.*

118. *Id.* at *40.

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3. *Standards applied*

Even though courts have generally recognized the useful product doctrine,¹¹⁹ courts are not united in the standard required to successfully assert the defense. For example, the court in *Ekotek Site PRP Committee v. Self* noted “that the useful products defense focuses only upon whether the product is still fit for *its original purpose*.”¹²⁰ In comparison, the court in *United States v. Vertac Chemical Corp.*,¹²¹ did not require that the product be fit for its original purpose as long as it involved “[t]he sale of a useful, although hazardous substance, to serve a *particular purpose*.”¹²² Differences such as these are significant since the same transaction could result in a finding of liability by one court and no liability by another court. This is unacceptable since “Congress intended for the federal courts to develop a uniform approach” to liability under CERCLA.¹²³

Many courts have reasoned that they “are required to engage in a liberal judicial interpretation of the terms within CERCLA in order to achieve CERCLA’s ‘overwhelmingly remedial’ statutory scheme.”¹²⁴ “Accordingly, courts generally will not interpret [CERCLA] in a way that apparently frustrates the statute’s goals in the absence of specific congressional intent to the contrary.”¹²⁵ Nonetheless, liberal construction “may not be employed ‘as a means for filling in the blanks so as to discern a congressional intent to impose liability

119. See, e.g., *United States v. American Cyanamid Co.*, Civ. No. 2:93-0654, 1997 U.S. Dist. LEXIS 4413, at *15 (S.D. W. Va. Jan. 27, 1997).

120. *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1334 (D. Utah 1996) (emphasis added) (citing *Ekotek Site PRP Comm. v. Self*, 881 F. Supp. 1516, 1527 (D. Utah 1995)).

121. 966 F. Supp. 1491 (E.D. Ark. 1997).

122. *Id.* at 1507 (emphasis added) (quoting *Douglas County v. Gould, Inc.*, 871 F. Supp. 1242, 1245 (D. Neb. 1994)).

123. *O’Neil v. Picillo*, 883 F.2d 176, 179 n.4 (1st Cir. 1989).

124. *United States v. Gordon Stafford, Inc.*, 952 F. Supp. 337, 339 (N.D. W. Va. 1997) (citing *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990)); see also *United States v. USX Corp.*, 68 F.3d 811, 822 (3d Cir. 1995) (“CERCLA . . . is to be construed liberally to effectuate its goals.”); *B. F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) (“CERCLA must be construed liberally . . .”).

125. *United States v. Cordova Chem. Co.*, 113 F.3d 572, 577 (6th Cir. 1997), *vacated and remanded on other grounds sub nom. United States v. Bestfoods*, 118 S. Ct. 1876 (1998). “[I]t is difficult to divine the specific, as opposed to the general, goals of Congress with respect to CERCLA liability.” *Id.* at 578.

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under nearly every conceivable scenario.”¹²⁶ Interpreting CERCLA in the same manner as the *Vertac Chemical* court would be the better approach for a court to follow. The approach taken in *Vertac Chemical* is consistent with the statutory language and does not discourage recycling products as long as the product has a particular useful purpose.

There are many facts a court may consider when determining whether the transaction at issue was for the sale of a useful product, rather than a sham for disposal. For example, one type of concrete evidence a court may consider is the price at which the product was sold. If the substance was sold at a price much lower than the market price for a useable product, an inference could be drawn that the party intended to dispose of a hazardous substance, not a useful product.¹²⁷ If a product does not have value for the purpose it was made (even though it may have a residual value to the buyer) and it contains a hazardous substance, it is likely the transaction will be deemed to be an arrangement for disposal.¹²⁸ For example, it has been reported in the news that “[s]ome industries dispose of tons of toxic waste by giving it free to fertilizer manufacturers, or even paying them to take it.”¹²⁹ The wastes, “laden with heavy metals” are then used as a raw material for fertilizer and road de-icer.¹³⁰ An inference can be drawn that the industries are arranging for the disposal of their wastes since they are not paid for their wastes. However, even if the industries were paid a nominal amount for their wastes, an inference could be drawn that the transaction did not involve a useful product if the fertilizer companies would not seek a replacement product if the industries’ wastes were unavailable.

126. *USX Corp.*, 68 F.3d at 822 (quoting *United States v. Cordova Chem. Co.*, 59 F.3d 584, 588 (6th Cir. 1995)).

127. *See* *Ekotek Site PRP Comm. v. Self*, 948 F. Supp. 994, 997 (D. Utah 1996) (drawing an inference that the defendant intended to dispose of hazardous substances from the low price at which the product was sold); *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1140 (N.D. Fla. 1994) (noting that the price paid for used batteries was determined by the scrap price of lead in the batteries).

128. *See Chatham Steel*, 858 F. Supp. at 1140 (reasoning that a transaction is less likely to be deemed an arrangement to dispose of a hazardous substance if the product retains some value for the purpose it was manufactured).

129. Duff Wilson, *Fear in the Fields—How Hazardous Wastes Become Fertilizer—Spreading Heavy Metals on Farmland is Perfectly Legal, But Little Research Has Been Done to Find Out Whether It’s Safe*, SEATTLE TIMES, July 3, 1997, at A1.

130. *Id.*

4. *Shifting how the useful product doctrine is used*

Although courts have recognized the useful product doctrine as an affirmative defense,¹³¹ incorporating it into a multifactor analysis shifts the way the doctrine is used. For example, instead of treating it merely as a defense, the *American Cyanamid*¹³² court used the useful product doctrine to determine whether a prima facie case of arranger liability had been met. This shifts the burden of proof from the defendant to the plaintiff. The plaintiff, as part of the prima facie case, would be required to show that, by the transaction, the defendant intended to dispose of a hazardous substance. This is a significant shift in the burden placed on the plaintiff, potentially making it more difficult for a plaintiff to bring an action under CERCLA. However, this shifting of the burden of proof “is not onerous,”¹³³ would assist innocent defendants, and may encourage recycling. Unless a plaintiff could establish a prima facie case, the defendant could make a motion for summary judgment or a motion to dismiss. This could significantly lower the costs involved in defending against a CERCLA suit and thus persons may be less concerned about incurring CERCLA liability by recycling.¹³⁴ Recycling helps the environment and should be encouraged.¹³⁵

B. *Generators of Hazardous Substances*

The second factor that warrants consideration by the courts is whether the defendant generated the hazardous substance or

131. See, e.g., *Ekotek*, 948 F. Supp. at 996 n.1 (reasoning that the defendant “carries the burden of proof as to [the useful product] defense”).

132. *United States v. American Cyanamid Co.*, Civ. No. 2:93-0654, 1997 U.S. Dist. LEXIS 4413 (S.D. W. Va. Jan. 27, 1997).

133. *Ekotek*, 948 F. Supp. at 967 (quoting *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1334-35 (D. Utah 1996)).

134. See *infra* notes 145-46 and accompanying text.

135. See Fjellstad, *supra* note 114, at 1118 (“In the spirit of environmentalism, parties should be encouraged to recycle and sell their byproducts when doing so is a safe alternative to land disposal or treatment.”). Although recycling should be encouraged, “the threat of liability for well-intentioned recycling efforts is a real one.” Lee A. Braem, *Beating the Recycling Conundrum*, 12 ENVTL. COMPLIANCE & LITIG. STRATEGY 4, 4 (1997).

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merely engaged in a transaction involving the hazardous substance. CERCLA's essential purpose is to make "those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."¹³⁶ The need to focus on generators who "create the hazardous wastes" is addressed in the legislative history.¹³⁷ Liability should attach only to "parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions."¹³⁸

There are significant differences between arrangers that generate the hazardous wastes they are trying to get rid of and those arrangers that do not. Recyclers, for example, usually do not create hazardous substances. Instead, they provide an environmental benefit by finding a use for what would otherwise be waste. An example of an arranger that did not generate hazardous waste can be found in *Ekotek Site PRP Committee v. Self*.¹³⁹ Fuel Processors, one of the defendants, was "in the business of treating, recycling, and rerefining used oils."¹⁴⁰ Fuel Processors did not generate used oil; instead, it obtained waste oil products from generators and turned the waste oil into a useful product for different companies.¹⁴¹ The facts presented by Fuel Processors indicated that Ekotek approached Fuel Processors in 1986 and requested a clean usable oil product to manufacture automatic transmission fluid.¹⁴² Fuel Processors filtered used mineral oil and made it a valuable substance prior to selling it to Ekotek.¹⁴³ The court

136. *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993) (quoting *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993)).

137. S. REP. NO. 96-848, at 15 (1980). The legislative history of CERCLA indicates that the statute's goals include ensuring that the burden of remedying hazardous waste problems is borne by those responsible for creating the hazardous substances and that the social cost of unsafe disposal practices is internalized by the industries that generate the waste. *See id.* at 12-15, 31-34.

138. *United States v. Cordova Chem. Co.*, 113 F.3d 572, 578 (6th Cir. 1997), *vacated and remanded on other grounds* sub nom. *United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

139. 932 F. Supp. 1328 (D. Utah 1996).

140. Reply Mem. of Fuel Processors at 9, *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1328 (D. Utah 1996) (No. 94-CV-00277L).

141. *See id.* at 11-12.

142. *See Ekotek*, 932 F. Supp. at 1334.

143. *See id.* at 1334-35.

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found that the record indicated the oil Fuel Processors sold to Ekotek could “be used as hydraulic fluid, transformer oil, and fuel, apparently without further processing.”¹⁴⁴ If, by recycling, a business puts itself in a position to be liable for multimillion dollar cleanups, fewer businesses will recycle.¹⁴⁵ This would be contrary to the goals of CERCLA.¹⁴⁶

Generators, on the other hand, “create the harmful conditions.”¹⁴⁷ A generator is a party that produces a useful product, but in the process of producing the useful product also generates hazardous waste as a by-product of its operations.¹⁴⁸ Generators should be required to pay their own way.¹⁴⁹ Even if the generator has “not even departed in any way from a reasonable standard of intent or care,”¹⁵⁰ the generator should be liable for damage done to the environment from its hazardous waste.¹⁵¹ “[A]s a matter of public policy, . . .

144. *Id.* at 1335.

145. *See* United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1234 n.6 (6th Cir. 1996) (noting that since agreements to reuse and recycle barrels are beneficial, the court’s decision should not be interpreted in a way that discourages reuse or recycling); 141 CONG. REC. S4492, S4506 (1995) (“[M]any materials which can be properly recycled are now not being captured for reuse because of Superfund liability exposure.”). *But see* United States v. Maryland Sand, Gravel & Stone Co., No. HAR 89-2869, 1994 WL 541069, at *8 n.26 (D. Md. Aug. 12, 1994) (reasoning that arranger liability is not a disincentive to recycling).

146. *See, e.g.,* United States v. Miami Drum Serv., No. 85-0038-Civ-Aronovitz, 1986 U.S. Dist. LEXIS 16501, at *10 n.4 (S.D. Fla. Dec. 12, 1986) (listing encouraging efficient resource allocation as a goal of CERCLA).

147. United States v. Cordova Chem. Co., 113 F.3d 572, 578 (6th Cir. 1997), *vacated and remanded on other grounds sub nom.* United States v. Bestfoods, 118 S. Ct. 1876 (1998); *see also* Robins, *supra* note 15, at 214 n.192 (“The legislative history discusses the need to focus on generators who ‘create hazardous wastes . . . and . . . determine whether and how to dispose of these wastes.’”) (quoting S. REP. NO. 96-848, at 15 (1980)).

148. For example, industries that give or pay fertilizer companies to take their hazardous wastes away are generators.

149. *See* Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1142 (N.D. Fla. 1994) (noting that one of CERCLA’s goals is to place “responsibility for the proper treatment and disposal of hazardous substances on those who generate these dangerous compounds and arrange for their disposal or treatment”).

150. KEETON ET AL., *supra* note 20, § 75, at 536.

151. *See* St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1197-98 (1st Cir. 1994) (“[A] person that generates hazardous substances and arranges for their disposal is *strictly liable*, regardless of whether the person was at fault or whether the substance actually caused or contributed to any damage”); Quaker State Minit-Lube, Inc. v. Fireman’s Fund Ins. Co., 868 F. Supp. 1278, 1332 (D. Utah 1995) (“*Strict* liability is imposed upon those whose business operations generate hazardous waste, even in cases where such ‘responsible parties’ entrusted such

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generators transfer their toxic byproducts to others at their own peril”¹⁵² and should be held liable if they create “an undue risk of harm to other members of the community.”¹⁵³ The generator is acting for his own purposes, and is seeking a benefit or a

profit from such activities, and . . . he is in a better position to administer the unusual risk by passing it on to the public The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is imposed upon the party best able to shoulder it. The [generator] is held liable merely because, as a matter of social adjustment, the conclusion is that the responsibility should be so placed.¹⁵⁴

The cost of the valuable product the generator sells should reflect the cost of properly disposing of its hazardous waste and of any accidental discharges. If the increased costs make the product no longer commercially viable, then that product would not be produced. However, even if recycling cannot pay its own way, recycling should still be encouraged since it benefits society by minimizing wastes and contributing to resource conservation.¹⁵⁵ Due to such policy considerations, the multifactor analysis reflects the difference between those who generate hazardous substances and those who do not.

C. Control or Authority to Control the Hazardous Substance

The third factor a court should consider when making a liability determination is whether the party sued had control of

materials to a contractor promising their safe handling, storage, recycling or ultimate disposal.”).

152. *Quaker State*, 868 F. Supp. at 1332.

153. KEETON ET AL., *supra* note 20, § 75, at 538.

154. *Id.* § 75, at 537. Although Keeton was not specifically referring to generators, his statement of the common law applies to generators. If CERCLA was intended “to abrogate a common-law principle, the statute [would have to] speak directly to the question addressed by the common law.” *United States v. Bestfoods*, 118 S. Ct. 1876, 1885 (1998) (quoting with approval *United States v. Texas*, 507 U.S. 529, 534 (1993)).

155. Just as in the useful product doctrine, a court should look beyond the characterization of the event. For example, a fertilizer company that mixes toxic substances into its fertilizer may try to characterize its activities as recycling. However, instead of recycling the toxic substances into something that can be used, a court may find that it is only a method of disposing of an unwanted hazardous substance. For a discussion of the benefits of recycling, see generally Robins, *supra* note 15.

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the hazardous substance and made the decision to dispose of it. Courts have not developed a uniform standard on whether arranger liability requires actual participation in the activity or whether the authority to control the hazardous substance is sufficient.¹⁵⁶ This factor is most often discussed when a court is trying to determine whether the corporate veil should be pierced to hold a corporate officer or parent corporation liable under CERCLA.¹⁵⁷ Courts that have addressed the issue of whether CERCLA liability should extend to corporate officers or parent corporations generally adopt either (1) an actual participation requirement,¹⁵⁸ or (2) an authority to control requirement.¹⁵⁹

1. Actual participation

“[C]ases concerning the liability of corporate officers and employees as hazardous waste ‘generators’ or ‘arrangers’ of hazardous waste disposal under [§ 9607(a)(3)] have generally required actual participation in the liability-creating

156. Care should be taken when analyzing this issue. Discussions of this issue in cases that do not deal with arranger liability are not controlling. *See* General Elec. Co. v. Aamco Transmissions, Inc., 962 F.2d 281, 287 (2d Cir. 1992) (“The factors which make an owner or operator a responsible party do not apply with equal force in determining arranger liability.” (footnote omitted)). Although not controlling, it is of interest to note that the Supreme Court recently held that operator liability only attaches if the person “manage[d], direct[ed], or conduct[ed] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” *Bestfoods*, 118 S. Ct. at 1887. The *Bestfoods* Court also held that a parent corporation may be held directly liable under CERCLA if it actually participated in the wrong complained of. *See id.* at 1886. However, the parent corporation is not liable for the subsidiary’s acts unless there is an independent basis for piercing the corporate veil. *See id.* at 1885-86.

157. *See, e.g., supra* note 156; *see also* Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1500 (11th Cir. 1996) (“[C]ourts in CERCLA actions have had to determine when to ‘pierce the corporate veil’ to hold a corporation’s shareholders liable, whether a corporation can be held accountable as a ‘successor’ corporation for its predecessor’s CERCLA liability, and whether a dissolved corporation is subject to suit under CERCLA.” (citations omitted)).

158. *See, e.g.,* United States v. USX Corp., 68 F.3d 811, 824 (3d Cir. 1995).

159. *See, e.g.,* Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1341 (9th Cir. 1992) (reasoning that liability “only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment”); *see generally* Kamie Frischknecht Brown, Note, *Parent Corporation Liability for Subsidiary Violations Under § 107 of CERCLA: Responding to* United States v. Cordova Chemical Co., 1998 BYU L. REV. 265.

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conduct.”¹⁶⁰ Courts that take this approach reason that “a finding of arranger liability requires some level of actual participation in or exercise of control over, activities that are causally connected to, or have some nexus with, the arrangement for disposal of hazardous substances or the off-site disposal itself.”¹⁶¹

2. Authority to control

There are some courts that do not require actual participation as long as the person had the authority to control.¹⁶² The rationale for using the authority to control standard is because otherwise

[a] corporate officer, who has virtually unlimited control over a company and in fact exercises that control but knows well enough to close his or her eyes to the specific details of the company's hazardous waste disposal practices, could avoid CERCLA liability; meanwhile, the employee charged with the job of actually carrying out the disposal activities or making the disposal arrangements—even if he or she has no meaningful decision making authority—could *not* avoid personal liability.¹⁶³

160. *USX Corp.*, 68 F.3d at 824 n.25. Courts may phrase this as the “crucial decision” test. *See, e.g.*, *United States v. North Landing Line Constr. Co.*, 3 F. Supp.2d 694, 701 (E.D. Va. 1998) (“[T]he Court finds that the . . . ‘crucial decision’ approach should be applied”); *United States v. A & F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984) (reasoning that liability should rest “with that party who both owned the hazardous waste and made the crucial decision how it would be disposed of or treated, and by whom”).

161. *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1087-88 (8th Cir. 1995). The court in *TIC Investment* held that the proper standard “imposes direct arranger liability on a corporate officer or director if he or she had the authority to control and did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal, or the off-site disposal, of hazardous substances.” *Id.* at 1089.

162. *See Fjelstad, supra* note 114, at 1111 n.21 (“Clearly, the Eighth Circuit believes that the authority to control hazardous substance disposal is critical and that this authority is assumed when a party owns the substances at issue.”). However, there are also courts that have expressly rejected the authority to control standard. *See, e.g.*, *General Elec. Co. v. Aamco Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (“[T]his court cannot conclude that by enacting § 9607(a)(3), Congress intended to hold any entity that merely had the opportunity or ability to control a third party’s wastes disposal practices liable as an entity that ‘otherwise arranged for’ disposal or transport of hazardous waste.”).

163. *TIC Inv. Corp.*, 68 F.3d at 1089.

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“From a policy standpoint, such a holding would violate the goals underlying CERCLA by creating a loophole for powerful individuals”¹⁶⁴

Since it is presumed that a person “intend[s] the natural consequences of his deeds,”¹⁶⁵ some courts have reasoned that intent can be inferred whether the person actually participated in arranging for disposal or chose not to take part in making the arrangements for disposal even though he could have.¹⁶⁶ Some courts have reasoned that authority to control may be assumed when a company owns the hazardous materials at the time of the arrangement.¹⁶⁷

Most courts have reasoned that authority to control is not enough; there must also be an obligation to exercise control before arranger liability attaches.¹⁶⁸ Although there may be some policy reasons for courts to adopt one approach over another,¹⁶⁹

[a]t the time CERCLA was enacted, it was firmly established that control of a corporation, in and of itself, was not a basis for imposing liability on a corporate officer for the actions of other corporate officers or employees. Instead, actual participation in the wrongful conduct was a prerequisite.¹⁷⁰

The actual participation standard is consistent with principles of corporate law. Generally,

[a]n officer of a corporation who takes part in the commission of a tort by the corporation is personally liable for resulting injuries; but an officer who takes no part in the commission of

164. *Id.*

165. *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1233 (6th Cir. 1996) (quoting *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring)).

166. *See Redwings Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1506 n.23 (11th Cir. 1996) (“It is possible that under different factual circumstances, a plaintiff could predicate a claim under subsection 107(a)(3) on a defendant’s failure to act.”).

167. *See, e.g., Jones-Hamilton Co. v. Beazer Materials & Servs.*, 973 F.2d 688, 695 (9th Cir. 1992); *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1389 (8th Cir. 1989).

168. *See, e.g., General Elec. Co. v. Aamco Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992).

169. The same arguments that were made for national uniformity in *supra* text accompanying notes 30-31 also apply to this issue.

170. *United States v. USX Corp.*, 68 F.3d 811, 824 (3d Cir. 1995).

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the tort is not personally liable to third persons for the torts of other agents, officers, or employees of the corporation.¹⁷¹

CERCLA's language does not indicate that traditional concepts of limited liability should be disregarded.¹⁷² "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."¹⁷³ Therefore, courts should only consider a party to be a responsible person under § 9607(a)(3) if the party actually participated in arranging for the disposal of the hazardous wastes.

VI. CONCLUSION

The statutory language of "arrange for" implies that more is required to impose liability than just prior ownership of the substance. "[W]hile the liability provisions . . . should be construed so that financial responsibility for clean-up operations falls upon those entities that contributed to the environmental problem, the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue."¹⁷⁴ To hold a person responsible for arranger liability, the person must have intended to get rid of its hazardous wastes.¹⁷⁵

The most effective method to facilitate a uniform approach to CERCLA arranger liability is for the courts to adopt the statutory language proposed in this Comment. However, until Congress clears up the ambiguity in the language used in 42 U.S.C. § 9607(a)(3), adopting the manageable multifaceted

171. 3A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1137 (James Solheim & Kenneth Elkins eds., perm. ed. 1994) (footnotes omitted).

172. See *United States v. Bestfoods*, 118 S. Ct. 1876, 1885 (1998) ("[N]othing in CERCLA purports to reject [the] bedrock principle [of limited liability], and against this venerable common-law backdrop, the congressional silence is audible."); *USX Corp.*, 68 F.3d at 824 ("CERCLA's language fails to indicate that traditional concepts of limited liability are to be disregarded . . .").

173. *Midlantic Nat'l Bank v. New Jersey Dept. of Env'tl. Protection*, 474 U.S. 494, 501 (1986); see also *Bestfoods*, 118 S. Ct. at 1885.

174. *United States v. Cordova Chem. Co.*, 113 F.3d 572, 578 (6th Cir. 1997), *vacated and remanded on other grounds sub nom. United States v. Bestfoods*, 118 S. Ct. 1876 (1998).

175. See, e.g., *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1336 (D. Utah 1996).

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analysis also proposed in this Comment would help courts determine whether a person arranged for disposal of its hazardous wastes. It would also help parties determine beforehand which type of activities may result in CERCLA liability. Most importantly, it would facilitate a uniform approach by the federal courts in determining arranger liability under CERCLA.

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