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Lyon's Roar, Then a Whimper: The Demise of Broad Arranger Liability in the Ninth Circuit After the Supreme Court's Decision in Burlington Northern

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COMMENT

LYON'S ROAR, THEN A WHIMPER: THE DEMISE OF BROAD ARRANGER LIABILITY IN THE NINTH CIRCUIT AFTER THE SUPREME COURT'S DECISION IN *BURLINGTON NORTHERN*

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[1] imposes liability on different classes of persons for costs incurred responding to the release, or threat of release, of hazardous substances.[2] Included within this spectrum of liable parties are persons that contract or "otherwise arrange" for disposal or treatment of hazardous substances.[3] Under this definition of liability, persons become liable as "arrangers" for making arrangements to dispose of hazardous waste; this is commonly referred to as "arranger liability."[4]

The United States Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. United States*[5] limits an expansive interpretation of CERCLA arranger liability found in the jurisprudence of the U.S. Court of Appeals for the Ninth Circuit.[6] The Supreme Court's

[1] 42 U.S.C.A. § 9601 et seq. (Westlaw 2010).

[2] 42 U.S.C.A. § 9607(a)(1)-(4); *see* 42 U.S.C.A. § 9601(21) ("The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.").

[3] 42 U.S.C.A. § 9607(a)(3).

[4] *See, e.g.,* Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 973 F.2d 688, 696 (9th Cir. 1992).

[5] Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009).

[6] *Burlington Northern* also considered the question of apportionment and the application of

decision rejected a foreseeability test proffered by Ninth Circuit to define a class of "broader" arranger liability[7] and instead required a finding of a party's "intent to dispose" to impose arranger liability.[8] The Supreme Court's decision also has the effect of strengthening the "useful product doctrine," a doctrine holding that a product manufacturer may not be held liable under CERCLA for the sale of a useful product later disposed of.[9] The useful-product doctrine has been narrowly applied by the Ninth Circuit.[10]

The consequence of the Supreme Court's holding in *Burlington Northern* is a collective sigh of relief from products manufacturers that would have otherwise been subjected to the broad theory of arranger liability as spelled out by the Ninth Circuit.[11] A string of decisions throughout the Ninth Circuit, climaxing with the Eastern District of California's decision in *United States v. Lyon*,[12] had made it increasingly more plausible for manufacturers to be named in CERCLA contribution actions for simply selling a product that was later found to have been released from a site.[13] The Supreme Court's decision in *Burlington Northern* all but eliminates the possibility of attaching CERCLA liability to product manufacturers that have done nothing more than sell a product that was eventually disposed of.[14]

This Comment will examine the development of arranger liability under Ninth Circuit jurisprudence, specifically looking at the impact of Ninth Circuit's decision in *Burlington Northern*[15] and the impact of the Supreme Court's reversal. Section II of this Comment will briefly examine the mechanisms for triggering CERCLA liability, specifically the definition of arranger liability under CERCLA. Next, Section III will

joint and several liability. *Id.* at 1877. This Comment does not consider the Court's analysis of apportionment of liability.

[7] United States v. Burlington No. & Santa Fe Ry. Co., 520 F.3d 918, 948-50 (9th Cir. 2008), *rev'd* by Burlington Northern & Santa Fe Railway Company v. United States, 129 S. Ct. 1870 (2009).

[8] *Burlington N.,* 129 S. Ct. at 1880.

[9] *See id.* at 1878 ("It is . . . clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination.").

[10] *See Burlington N*, 520 F.3d at 949-50.

[11] *See* United. States v. Lyon, No.N. CV F 07-0491 LJO GSA, 2007 U.S. Dist. LEXIS 94329 (E.D. Cal. 2007).

[12] *Id.*

[13] *See* City of Merced v. R.A. Fields, 997 F. Supp. 1326 (E.D. Cal. 1998); Cal. Dep't of Toxic Substances Control v. Payless Cleaners, 368 F. Supp. 2d 1069 (E.D. Cal. 2005); United States v. Burlington N. & Santa Fe Ry. Co, 520 F.3d 918 (9th Cir. 2008).

[14] *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1878-79 (2009).

[15] *Burlington N.*, 520 F.3d 918.

address arranger liability in the Ninth Circuit. Specifically, this discussion will consider "direct" arranger liability considered in *Cadillac Fairview/California, Inc. v. United States*,[16] which examined when transactions constitute "arrangements for disposal,"[17] as contrasted with *Burlington Northern*, which expanded and applied a category of broader arranger liability to a supplier of chemical products to a site.[18] That section will also consider *United States v. Lyon*,[19] which utilized the Ninth Circuit's decision in *Burlington Northern* to cast an even wider net of CERCLA liability over manufacturers and suppliers of products that had no role in, or a limited role in, the disposal process.[20]

Section IV of this Comment will review the Supreme Court's decision in *Burlington Northern v. United States.*[21] The Supreme Court rejected the foreseeability standard proffered by the Ninth Circuit in favor of an "intent to dispose" standard for arranger liability under CERCLA.[22] Section V examines the significance of the Supreme Court's decision for future Ninth Circuit cases in addition to providing a snapshot of liability avoided for products manufacturers in the context of dry-cleaning litigation. Finally, this Comment concludes by suggesting that the Ninth Circuit is basically back where it started with a standard similar to the one announced in *Cadillac Fairview*.

II. AN OVERVIEW AND INTRODUCTION TO CERCLA AND ARRANGER LIABILITY

CERCLA was enacted by Congress in 1980 in response to the serious environmental and health risks posed by industrial pollution.[23] As originally envisioned, CERCLA provided both a funding mechanism for the U.S. government to undertake response activities at the nation's most polluted sites and a strict liability scheme to pursue potentially

[16] Cadillac Fairview/Cal., Inc., v. United States, 41 F.3d 562 (9th Cir. 1994).

[17] *Cadillac Fairview*, 41 F.3d at 565.

[18] *Burlington N.,* 520 F.3d at 807-11.

[19] United States v. Lyon, N. CV F 07-0491 LJO GSA, 2007 U.S. Dist. LEXIS 94329 (E.D. Cal.2007).

[20] *Id.* at *7-17.

[21] Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009).

[22] *Id.* at 1880.

[23] *See id.* at 1874 (citing United States v. Bestfoods, 524 U.S. 51, 53 (1998)). The statute gives broad powers to the President to command government agencies and private parties to clean up hazardous waste sites. United States v. Bestfoods, 524 U.S. 51, 53 (1998)*; see also* Exxon Corp v. Hunt, 475 U.S. 355, 358-59 (1986) (CERCLA was enacted, in part, in response to concerns that leaks of hazardous chemicals from disposal sites presented a great risk to the public).

responsible parties (PRPs) that polluted sites.[24] CERCLA also established the framework for private parties to pursue recovery actions for costs incurred responding to pollution.[25] The liability scheme under CERCLA has often been described as a "polluter pays" system, with the ultimate responsibility for the cleanup of hazardous waste on "those responsible for problems caused by the disposal of chemical poison."[26] The Ninth Circuit has described CERCLA as imposing strict liability for the release of hazardous substances at a given site.[27] Liability under CERCLA is joint and several,[28] is retroactive,[29] and includes past and future costs incurred and to be incurred in responding to the effects of pollution.[30]

Liability under CERCLA is triggered, in large part, by a "release" of "hazardous substances."[31] Both terms are defined broadly under the Act.[32] A "release" includes, but is not limited to, leaking, spilling,

[24] *See* Martina E. Cartwright, *Superfund: It's No Longer Super and It Isn't Much of a Fund*, 18 TUL. ENVTL. L.J. 299, 305-14 (2005). CERCLA, originally provided two funding mechanisms that allowed the government to respond to the threats posed by environmental waste sites. *Id*. at 305-06. The first funding mechanism was a strict-liability scheme that made polluters responsible for costs incurred by the government to respond to a release or threat of release of a hazardous substance. *Id.* The second CERCLA funding mechanism was the "Superfund," a trust that was created by taxing the petrochemical industry; the trust provided monies for the USEPA to take emergency measures without first establishing a polluter's liability. *Id*. at 308. CERCLA's original taxing authority, meant to feed the Superfund trust, expired on September 30, 1985. *Id.* at 312. The Superfund Amendment and Reauthorization Act of 1986 extended the Superfund taxing authority through December 31, 1995. *Id*. at 3143.

[25] *See* 42 U.S.C.A. § 9613(f)(1) (Westlaw 2010) (establishing a right of contribution against a liable party, as defined in 42 U.S.C. § 9607(a), during or following an action by the United States under 42 U.S.C. § 9606 or another party under 42 U.S.C. § 9607(a)); 42 U.S.C.A. § 9607(a)(4)(B) allowing recovery of response costs incurred from liable parties). For a discussion of how these two different sections work, see *United States v. Atl. Research Corp.*, 551 U.S. 128, 131-33 (2002). Both sections require that the recovery being sought is from one of the liable parties defined at 42 U.S.C. § 9607(a). *See id.* at 131-2.

[26] Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2s2d 1074, 1081 (1st Cir. 1986). This familiar quote has shown up in multiple opinions, in multiple circuits, aptly describing the purpose of CERCLA's liability scheme. *See, e.g.,* Fla. Power & Light Co.Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989).

[27] U.S. v. Burlington No.N. & Santa Fe Ry. Co., 520 F.3d 918, 933 (9th Cir. 2008).

[28] *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct.1870, 1881 (2009)) ("[A]lthough [CERCLA] imposed a 'strict liability standard,' it did not mandate 'joint and several' liability in every case." (citation omitted) (quoting the "seminal opinion" in United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805, 807 (S.D. Ohio 1983) (Rubin, C.J.)).

[29] 42 U.S.C.A. § 9607(a)(2) (Westlaw 2010). Liability may attach to a past owner of property, if releases occurred in the past. *Id.*

[30] *See Burlington N.*, 129 S. Ct. at 1878.

[31] 61C AM. JUR. 2D *Pollution Control* § 1271 (2009).

[32] *Id.*

dumping, discharging and pumping.[33] The term "hazardous substances" encompasses a wide potpourri of chemicals, including those substances defined under similar statutes such as the Solid Waste Disposal Act, the Clean Air Act, and the Clean Water Act. [34] "Hazardous substances" do not include, generally, petroleum products that are not otherwise listed or designated as hazardous substances.[35] Last, liability under CERLA requires that the hazardous substance be released from a "facility."[36] A "facility" is another broadly defined term describing areas for storage, handing or disposal of hazardous substances.[37] Consequently, CERLCA liability is triggered when a hazardous substance is released from a facility. Based on the comprehensive language of the statutes, most cases of pollution easily meet these three requirements, with liability ultimately hinging on whether a party is one of a group of liable parties.[38]

CERCLA liability may attach to persons generally described as any of the following: (1) the present owner and operator of a facility;[39] (2) the past owner and operator of a facility, during the time when hazardous

[33] 42 U.S.C.A. § 9601(22) (Westlaw 2010) ("release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)).

[34] 42 U.S.C.A. § 9601(14) ("The term 'hazardous substance' means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.").

[35] *Id.* ("The term ['hazardous substance'] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).").

[36] 42 U.S.C.A. at §§ 9601(a), 9607(a)(1)-(4); *see also* Tommy Tucker Henson, *What a Long, Strange Trip It's Been: Broader Arranger Liability in the Ninth Circuit and Rethinking the Useful Product Doctrine*, 38 ENVTL. L. 941, 944-45 (Summer 2008).

[37] 42 U.S.C.A. § 9601(9) ("The term 'facility' means (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."); *see also* Henson, *supra* note 36, at 945.

[38] Henson, *supra* note 36, at 945.

[39] 42 U.S.C.A. § 9607(a)(1) (Westlaw 2010).

substances were disposed of at the facility;[40]

> [(3)] 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[;][41]

and (4) any transporter of hazardous substances to a facility.[42] Accordingly, the United States may bring a CERCLA action to recover costs incurred cleaning up a hazardous waste site against an *owner* of a *facility* from which there had been a *release* of *hazardous substances*.[43] A prima facie case for contribution between liable persons requires a showing that a chemical was a hazardous substance, there was a release of the substance from a facility, the release caused the claimant to incur response costs, and the defendant is one of the four classes of liable persons under CERCLA.[44]

Interpreting the third class of liable parties, "arrangers" under CERCLA, is difficult due to the fact that the operative language is not defined in the Act.[45] 42 U.S.C. § 9607(a)(3) defines an arranger as "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . ."[46] The section defines both "disposal" and "hazardous substances,"[47] but it fails to give meaning to

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[40] 42 U.S.C.A. § 9607(a)(2).(Westlaw 2010).

[41] 42 U.S.C.A. § 9607(a)(3).

[42] 42 U.S.C.A. § 9607(a)(4).

[43] *See* United States v. Bestfoods, 524 U.S. 51, 55-57 (1998) (describing, generally, the mechanism for recovering response costs under CERCLA).

[44] *See* Cal. Dep't of Toxic Substances Control v. Payless Cleaners, 368 F. Supp. 2d 1069, 1076 (E.D. Cal. 2005).

[45] Jeffrey Gaba, *Interpreting Section 107(A)(3) of CERCLA: When Has a Person "Arranged for Disposal?"*, 44 Sw. L.J. 1313, 1317-18 (1991) ("At a minimum, section 107(a)(3) imposes liability on generators who send waste off-site for disposal. . . . More difficult questions about the scope of section 107(a)(3) arise when the transaction has characteristics of a sale of a product.").

[46] 42 U.S.C.A. § 9607(a)(3) (Westlaw 2010).

[47] "Disposal" is defined at 42 U.S.C.A. § 9601(29) (Westlaw 2010). The terms "disposal," "hazardous waste," and "treatment" have the meaning provided in section 1004 of the Solid Waste Disposal Act. *Id.* Under the Solid Waste Disposal Act "disposal" means "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.A. § 6903(3) (Westlaw 2010). "Hazardous substances" is defined in 42 U.S.C.A. § 9601(14).

the phrase "otherwise arranged for."[48] A plain reading of the statute requires that liability be attached to a party that enters into a transaction whose purpose is the disposal of a hazardous substance.[49] Legislative analysis, in an attempt to bring meaning to CERCLA, does not generally bear fruit.[50]

Parties covered under such an interpretation of § 9607(a)(3) may include generators of waste that contract for waste hauling services in addition to parties that serve a broker function, i.e., not owning the waste but controlling its ultimate disposition.[51] What unifies this liability scheme is that the central purpose of the transaction involves an arrangement for the disposal of waste.[52] These cases are commonly known as "direct" arranger liability cases.[53] The application of § 9607(a)(3) becomes more complex when the transaction or arrangement for disposal more closely resembles the sale of a product.[54] In the Ninth Circuit, these latter arranger liability cases have come to be known as broader arranger liability cases.[55]

A common defense to the allegation of arranger liability is the useful-product doctrine.[56] The useful-product doctrine recognizes that the sale of a hazardous substance, when marketed as a useful product[57] that

[48] *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1879 (2009) ("Because CERCLA does not specifically define what it means to 'arrang[e] for' disposal of a hazardous substance, we give the phrase its ordinary meaning. In common parlance, the word 'arrange' implies action directed to a specific purpose. See Merriam-Webster's Collegiate Dictionary 64 (10th ed.1993) (defining 'arrange' as 'to make preparations for: plan[;] ... . . to bring about an agreement or understanding concerning'); *see also* Amcast Indus. Corp., 2 F.3d 746, 751 (7th Cir. 1993) (words "'arranged for' . . . impl[ies] intentional action"). Consequently, under the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance." (some internal citations omitted)).

[49] Gaba, *supra* note 45, at 1318.

[50] TOD I. ZUCKERMAN, THOMAS J. BOIS II & THOMAS M. JOHNSON, ENVTL. LIABILITY ALLOCATION L. & PRAC. § 3:3 (2009) (discussing in part, the hurried legislative history of CERCLA limiting debate on statutory language and limited committee reports that confound attempts at understanding legislative intent). The Supreme Court has had occasion to observe that certain sections of CERCLA "[are] not a model of legislative draftsmanship." Exxon Corp. v. Hunt, 475 U.S. 355, 363 (1986). *But see* Gaba, *supra* note 45, at 1327. Professor Gaba argues that the sparse legislative history supports a conclusion that CERCLA's purpose was to impose liability on generators of waste. *Id.* at 1327. Arranger liability was intended to serve as a check on waste disposal practices of generators. *Id.*

[51] *See* Gaba, *supra* note 45, at 1318.

[52] *Id.*

[53] Henson, *supra* note 36, at 945.

[54] *See* Gaba, *supra* note 45, at 1318-19.

[55] *See* U.S. v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 948 (9th Cir. 2008).

[56] *See, e.g., id.* at 949-50.

[57] The definition of a "useful-product" in and of itself is often disputed, as plaintiffs and defendants attempt to distinguish between primary products and secondary products or byproducts

is later disposed of, is not an arrangement for disposal as envisioned by CERCLA.[58] While there is no per-se rule that any sale of a "useful product" escapes CERCLA liability, the Ninth Circuit has repeatedly stated that when a manufacturer does nothing more than sell a product to an end user, the manufacturer has not incurred liability for the generation, transportation, or arrangement for the disposal of waste.[59]

III. THE EVOLUTION OF ARRANGER LIABILITY IN THE NINTH CIRCUIT

The Ninth Circuit has given significant treatment to the question of what constitutes arranger liability and has likely expanded the reach of arranger liability further than any other circuit.[60] "Direct" or "traditional" arranger liability under 42 U.S.C. § 9607(a)(3) contemplates CERCLA liability attaching to a party involved in a transaction wherein the "sole purpose of the transaction is to arrange for the treatment or disposal of hazardous wastes."[61] However, this is not to say that the question of the purpose of a transaction cannot be disputed.[62] Thus the central inquiry in the application of arranger liability goes beyond the parties' own characterization of the transaction to determine if there was an arrangement for disposal.[63]

The Ninth Circuit also recognizes a broader arranger liability where the disposal may be contemplated by the transaction but is not the primary focus of the transaction, i.e., the arranger "is either the source of the pollution or manages its disposal."[64] The Ninth Circuit's interpretation of arranger liability hit its apex in *Burlington Northern.*[65]

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that may have market value. *See* Henson, *supra* note 35, at 36, at 944-45. This distinction and which type of product rightfully triggers the useful-product doctrine are beyond the scope of this Comment and were not at issue in the *Burlington Northern* matter.

[58] *See* Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 566 (9th Cir. 1994)*; see also* Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318-19 (11th Cir. 1990) (rejecting a theory of arranger liability based on a transaction where the defendant sold transformers containing PCBs to the plaintiff; the plaintiff was liable for response costs arising out of PCB contamination).

[59] *See, e.g.,* Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 508 F.3d 930, 934 (9th Cir. 2007).

[60] *See* Henson, *supra* note 36, at 946-48 (summarizing recent 9th Circuit case law regarding broader arranger liability).

[61] United States v. Shell Oil Co*.,* 294 F.3d 1045, 1054 (9th Cir. 2002).

[62] *See, e.g.,* Catellus Dev. Corp. v. United States, 34 F.3d 748, 752 (9th Cir. 1994) (disputing the characterization of the sale of used battery casings as an arrangement for transporting or disposing of wastes); Cadillac Fairview/Cal./California, Inc. v. United. States, 41 F.3d 562, 566 (9th Cir. 1994) (described *infra* notes 73-and 83 and accompanying text).

[63] *See* Cadillac Fairview/Cal., Inc., v. United States, 41 F.3d 562, 566 (9th Cir. 1994).

[64] United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 948 (9th Cir. 2008).

[65] Henson, *supra* note 36, at 943 (*Burlington Northern* constituted the "most expansive scope

Examining factors such as ownership, control, and the role of the useful-product doctrine, the court suggested that liability should be imposed when disposal is a foreseeable byproduct of any transaction.[66] The impact of the Ninth Circuit's holding was immediately seen in *United States v. Lyon*.[67] In *Lyon,* The District Court for the Northern District of California relied on the analysis provided by the Ninth Circuit in *Burlington Northern* to suggest that defendants that only supplied new products or equipment to a facility from which there had been a release were now covered by CERCLA under the guise of arranger liability.[68]

A. DIRECT ARRANGER LIABILITY: *CADILLAC FAIRVIEW/CALIFORNIA V. UNITED STATES*[69]

Direct arranger liability will be found when the removal and release of hazardous substances is not only the consequence but the very purpose of a transaction.[70] Factors such as control of the waste disposal process or ownership of the hazardous substance may be informative of arranger liability, but ultimately they are not requirements.[71] Thus a court will look to the substance of the transaction to determine if a finder of fact could infer that what the parties contemplated was an arrangement for the disposal of waste.[72]

Prior to *Burlington Northern*, the Ninth Circuit decided *Cadillac Fairview/California, Inc. v. United States*.[73] In that case, the court examined a series of transactions between Dow Chemical (Dow) and several rubber companies, finding that a party may be liable under § 9607(a)(3) without owning the hazardous substance or controlling the disposal process.[74] In *Cadillac Fairview*, the plaintiff brought suit under CERCLA against Dow, several rubber companies, and the government

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[of liability] accepted by any federal court of appeals.").

[66] *Burlington N.*, 520 F.3d at 948-49.

[67] United States v. Lyon, N. CV F 07-0491 LJO GSA, 2007 U.S. Dist. LEXIS 94329.

[68] *Id.* at *7-19.

[69] Cadillac Fairview/Cal./California, Inc., v. United .States, 41 F.3d 562 (9th Cir. 1994).

[70] *See Cadillac Fairview*, 41 F.3d at 565 ("the question is whether the fact-finder could infer from all the circumstances that a transaction in fact involves an arrangement for the disposal [or treatment] of a hazardous substance. The record before the district court was sufficient to support a finding that the rubber companies arranged to transfer contaminated styrene to Dow for completion of the re-distillation process that led to the release of the hazardous substances.") (internal citations and quotation marks omitted).

[71] *See id.*

[72] *See id.*

[73] *Id.*

[74] *Id.* at 565-66.

for costs incurred removing styrene and other hazardous chemicals from the plaintiff's property.[75] Dow and the rubber companies had produced synthetic rubber at the site in question under contract with the U.S. government during World War II.[76] Dow "sold" styrene to the rubber companies to process into synthetic rubber.[77] Dow then bought back, at a reduced price, approximately 30-40% of the styrene that had become contaminated during the manufacturing process and could not be converted to rubber.[78] Dow then distilled the contaminated styrene to remove the contaminants.[79] The distilled, "recycled," styrene was then sold back to the rubber companies, and the residual contaminants from the distillation process were disposed of in pits near Dow's plant.[80] After the war effort was over, the government sold the property, which ultimately ended up with the plaintiff, Cadillac Fairview.[81]

Dow filed cross-claims for contribution, alleging that the rubber companies were liable as arrangers under 42 U.S.C. § 9607(a)(3) for sending the contaminated styrene back to Dow for treatment.[82] In response, the rubber companies argued that they could not be arrangers because they did not own or control the disposal process that resulted in the release of hazardous substances.[83] In prior Ninth Circuit cases addressing arranger liability, ownership and control had been factors indicative of arranger liability.[84]

The court disposed of the rubber companies' arguments, holding that neither the language of the statute or cases interpreting it had limited the application of 42 U.S.C. § 9607(a)(3) to require that a responsible party own the hazardous substance or control the process that resulted in the release of contaminants.[85] The determinative inquiry, the court stated, was the one first proffered in *Jones-Hamilton Co. v. Beazer Materials &*

[75] *Id.* at 564.

[76] *Id*. The contract required that the companies would construct, lease, and operate a government-owned facility on land owned by the government. *Id.* at 563.

[77] *Id.* The styrene and raw materials used by Dow and the rubber companies were actually owned by the United States government, reimbursing the companies for the costs incurred and paying the companies a fee to operate the various facilities. *Id.* at 563.

[78] *Id.* at 564.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 564-65.

[83] *Id.* at 565.

[84] *See* Catellus Dev. Corp. v. United States, 34 F.3d 748, 752 (9th Cir. 1994) (citing Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 973 F.2d 688 (9th Cir. 1992) for the proposition that ownership or control of hazardous substances serves as evidence of arranging for disposal).

[85] Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 565 (9th Cir. 1994).

Services, Inc.:[86] "whether the fact-finder could infer from all the circumstances that a transaction in fact involves an arrangement for the disposal or treatment of hazardous substance."[87] The Ninth Circuit stated that the "[r]emoval and release of the hazardous substances was not only the inevitable consequence, but the very purpose of the return of the contaminated styrene to Dow."[88] On this basis the court found the rubber companies could be liable as arrangers under 42 U.S.C. § 9607(a)(3).[89]

The court also addressed the useful-product doctrine. The rubber companies argued that the transaction was one that involved the sale of a useful product, not an arrangement for disposal, thus invoking the useful-product doctrine.[90] The court stated that it does not necessarily matter how the transaction is cast; characterization of a transaction as a "sale" does not immunize the transaction from the reach of statute.[91]

The importance of *Cadillac Fairview* is the court's acknowledgment of factors considered to be determinative of arranger liability and rejection of these touchstones as per-se requirements under CERCLA.[92] Significantly, the Ninth Circuit considered control of the process that led to a release of hazardous substances, and ownership of the substances released.[93] Removing per-se requirements of "ownership" or "control" would become central themes in expanding arranger liability.[94] The finding of arranger liability will be based on an inquiry of all facts and

[86] Jones-Hamilton Co. v. Beazer Materials & Services., Inc., 973 F.2d 688, 694-95 (9th Cir. 1992). *Jones-Hamilton* was the first case by the Court of Appeals in the Ninth Circuit to consider the issue of arranger liability, adopting the test proffered by the Eighth Circuit in *United. States. v. Aceto Agrrgic. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989). *Id.* at 695. Ironically, the application of arranger liability in *Jones-Hamilton*, may be considered a "broader arranger" liability case under the term coined by the Ninth Circuit in later cases.

[87] *Cadillac Fairview*, 41 F.3d at 565 (quoting Jones-Hamilton v. Beazer Materials and & Services., Inc., 973 F.2d 688, 694-95 (9th Cir. 1992)) (citations omitted).

[88] *Cadillac Fairview,* 41 F.3d at 566.

[89] *Id.*

[90] *Id.* at 566.

[91] *Id.*

[92] *See id.* at 565.

[93] *Id.*

[94] *See id.* In later cases, the Ninth Circuit would reiterate the point that ownership or control were not prerequisites to finding arranger liability, but factors to be considered. *See* United States v. Shell Oil Co., 294 F.3d 1045, 1056 (9th Cir. 2002) ("We believe requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for [arranger] liability . . . would be inconsistent with the broad remedial purposes of CERCLA." (quoting United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986))); United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 951 (9th Cir. 2008) (stating, "[n]one of these cases, however, indicates that ownership or control at the time of transfer are the sine qua non of nontraditional arranger liability").

circumstances to determine the intent of the parties.[95]

B. BROAD ARRANGER LIABILITY: *UNITED STATES V. BURLINGTON NORTHERN & SANTA FE RAILWAY CO.*[96]

Cadillac Fairview addressed the concept of "direct" or "traditional" arranger liability.[97] The concept and application of a broader arranger liability, however, was fully realized in the Ninth Circuit's decision in *United States v. Burlington Northern & Santa Fe Ry. Co.*[98] In *Burlington Northern*, the Ninth Circuit expanded arranger liability to cover situations where disposal of waste is not the sole purpose of the arrangement but a foreseeable byproduct of the transaction.[99] Defining this class of broader arranger liability, the Ninth Circuit stated that factors such as control and ownership will largely influence the determination of broader arranger liability but are not dispositive of the liability outcome.[100] Further, the Ninth Circuit's opinion in *Burlington Northern* adopted a very narrow application of the useful-product doctrine, significantly limiting its immunizing effect.[101]

Brown and Bryant (B&B) was an agricultural chemical and storage and distribution company, operating in Arvin, California.[102] Included in B&B's operations were the purchase, receipt, and storage of two agricultural chemicals, including a chemical called D-D, produced by Shell Oil Company (Shell).[103] During the 1960s and 1970s, Shell encouraged its customers, including B&B, to purchase D-D in bulk.[104] Shell delivered the D-D, FOB destination via a common carrier, meaning that Shell delivered the chemical at its own risk and expense until

[95] *See* Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 565-66 (9th Cir. 1994).

[96] United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918 (9th Cir. 2008), *rev'd*, 129 S. Ct. 1870 (2009).

[97] *Cadillac Fairview,* 41 F.3d at 565; *see also Burlington N.*, 520 F.3d at 948.

[98] *Id*. *Burlington Northern* is the first Ninth Circuit case to provide a robust discussion and find broad arranger liability. Broad arranger liability had been previously considered in United States v. Shell Oil Co., 294 F.3d 1045 (9th Cir. 2002), but not applied. In fact the first broader arranger liability case was likely Jones-Hamilton Co. v. Beazer Materials & Services., Inc., 973 F.2d 688 (9th Cir. 1992), which discussed a transaction that fits the description of broader arranger liability found in *Burlington Northern.*

[99] *Burlington N.*, 520 F.3d at 948-49, 952.

[100] *Id.* at 951.

[101] *See id.* at 949-50.

[102] *Id.* at 930.

[103] *Id.* at 930-31. D-D is an agricultural chemical, specifically a soil fumigant that is designed to kill nematodes and microscopic worms that attack the roots of crops. *Id.* at 931.

[104] *Id.*

accepted by B&B.[105] Trucks delivered the D-D to B&B's large storage tanks by hoses: "[t]he process was quite messy, with frequent spills" of D-D.[106] B&B's own storage practices also resulted in releases from storage tanks, in part a result of the corrosive nature of D-D.[107]

In 1983, the California Department of Toxic Substance Control (DTSC) investigated the site and discovered that B&B was in violation of numerous hazardous waste laws; a separate United States Environmental Protection Agency (EPA) investigation confirmed substantial soil and groundwater contamination at the Arvin facility.[108] Both EPA and DTSC undertook remedial actions at the Arvin site.[109] In 1996 EPA and DTSC filed actions against PRPs, including B&B and Shell, for reimbursement of response costs incurred investigating and remediating contamination at the site.[110] The district court found Shell liable as a person that arranged for disposal of hazardous substances under § 9607(a)(3).[111]

On appeal, the Ninth Circuit distinguished direct arranger liability, as discussed in *Cadillac Fairview*, from the category of broader arranger liability first recognized in *United States v. Shell Oil*.[112] The court stated that in broader arranger liability, the transaction between the parties contemplates "disposal as a *part* of, but not the focus of, the transaction; the 'arranger' is either the source of the pollution or manages its disposal."[113] The court further described broader arranger liability as resulting from transactions where the arranger did not contract directly for the disposal of hazardous substances but in which disposal was a foreseeable byproduct of the transaction.[114]

The court also instructed that disposal need not have been purposeful to warrant the imposition of liability in a broader arranger

[105] *Id.*

[106] *Id.*

[107] *Id*.

[108] *Id.* at 931.

[109] *Id.*

[110] *Id.* at 932.

[111] *Id.*

[112] *See* United. States. v. Shell Oil Co*.,* 294 F.3d 1045 (9th Cir. 2002). *Shell* appears to be the first Ninth Circuit case to apply the nomenclature of "broader" arranger liability, while *Burlington Northern*, appears to be the first Ninth Circuit case to use the terminology and give considerable discussion to the distinction between the two before finding liability under a broad arranger theory of liability. Ironically, the concept of a broader arranger liability was introduced in *Shell*, by a group of oil companies including Shell. *Id.* at 1055.

[113] United States v. Burlington N. & Santa Fe Ry. Co*.,* 520 F.3d 918, 948 (9th Cir. 2008) (citing United States v. Shell Oil Co., 294 F. 3d 1045, 1058 (9th Cir. 2002)), *rev'd*, 129 S. Ct. 1870 (2009) (emphasis in original).

[114] *Id.* at 948-49.

liability context.[115] The court stated that because the definition of "disposal" under CERCLA includes unintentional actions such as leaking, the disposal by the arranger did not need to be intentional.[116] The court concluded that arranger liability could be found even when the transaction resulted in a "disposal" that was a result of leakage or other unintentional or non-purposeful conduct.[117]

The court in *Cadillac Fairview* held that the central query was whether the transaction in fact constituted an arrangement for disposal.[118] In finding liability, the court described a transaction where the *purpose* and *inevitable consequence* of the transaction was disposal.[119] *Burlington Northern* held that this inquiry could be expanded.[120] The Ninth Circuit was no longer solely considering the intent of the transaction, as instructed by *Cadillac Fairview*, but was assessing liability where the transaction had the secondary effect of disposal or even an unintentional element of disposal.[121]The court justified the expansion as being in line with the larger remedial goals of CERCLA.[122]

The Ninth Circuit also addressed issues of ownership and control as the guideposts for analyzing arranger liability.[123] While noting that there is no statutory requirement of control as a requisite to the imposition of liability, the court stated, "we have tended to view control as a 'crucial element' in determining whether the party arranged for disposal."[124] The court added that it viewed "ownership of hazardous substances at the time of disposal as an important factor in nontraditional, indirect arranger

[115] *Id.* at 948-49.

[116] *Id.* at 949.

[117] *Id.* The issue of intentional versus "non-purposeful" disposal in the context of arranger liability is also an important point of departure between the various circuits. *See* David W. Lannetti, Note, *"Arranger Liability" Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Judicial Retreat from Legislative Intent,* 40 WM. & MARY L. REV. 279, 291-312 (1998).

[118] Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 565 (9th Cir. 1994).

[119] *Id.* at 566.

[120] *See* United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 949 (9th Cir. 2008), *rev'd*, 129 S. Ct. 1870 (2009) ("an entity can be an arranger even if it did not intend to dispose of the product. Arranging for a transaction in which there necessarily would be leakage or some other form of disposal of hazardous substances is sufficient.").

[121] *Id.* at 949.

[122] *See id.* at 948 ("We have avoided giving the term 'arranger' too narrow an interpretation to avoid frustrating CERCLA's goal of requiring that companies responsible for the introduction of hazardous waste into the environment pay for remediation. Accordingly, we have recognized, in addition to 'direct' arranger liability, a 'broader' category of arranger liability in which disposal of hazardous wastes is a foreseeable byproduct of, but not the purpose of, the transaction giving rise to PRP status.") (citations omitted).

[123] *See id.* at 950-51.

[124] *Id.* at 951 (citing United States v. Shell Oil Co., 294 F.3d 1045, 1055 (9th Cir. 2002)).

liability cases."[125] Neither factor creates a per-se rule for finding or dismissing broader arranger liability, but instead constitutes "useful indices or clues toward the end of 'looking beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance.'"[126] The Ninth Circuit held that the district court's findings demonstrated that Shell had sufficient control over, and knowledge of, the transfer process to be considered an arranger within the meaning of CERCLA.[127]

The court also considered the useful-product doctrine as a defense raised by Shell.[128] The court stated that the defense is not available where the sale of a useful product "necessarily and immediately results in the leakage of hazardous substances."[129] Specifically, the court highlighted the fact that D-D can never realize its usefulness to B&B, if it is spilled before B&B can use it in agricultural application.[130] Such an event prevents a product from its intended use, thus stripping the product of immunity.[131] The court explained that Shell's liability was a not function of the nature of the product, but from the disposal of the product during a process orchestrated by Shell; thus liability was derived not from the manufacturing of products, but from Shell's role in the leakage prior to use.[132] Accordingly, the Ninth Circuit did not disavow the useful product defense, but clarified that it is intended to apply after a product is used, creating a narrow window in which it will be applied.

In concluding that Shell was liable as an arranger under the broader categorization, the Ninth Circuit keyed in on three determinative factors.

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[125] *Id.* (citing Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 973 F.2d 688, 695 (9th Cir. 1992)).

[126] *Id.* at 951 (quoting United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373,1381 (8th Cir. 1989)).

[127] *Id.* The Ninth Circuit points to six factors that demonstrate that Shell had sufficient control to impose arranger liability: "(1) [s]pills occurred *every time* the deliveries were made; (2) Shell arranged for delivery and chose the common carrier that transported its product to the Arvin site; (3) Shell changed its delivery process so as to require the use of large storage tanks, thus necessitating the transfer of large quantities of chemicals and causing leakage from corrosion of the large steel tanks; (4) Shell provided a rebate for improvements in B & B's bulk handling and safety facilities and required an inspection by a qualified engineer; (5) Shell regularly would reduce the purchase price of the D-D, in an amount the district court concluded was linked to loss from leakage; and (6) Shell distributed a manual and created a checklist of the manual requirements, to ensure that D-D tanks were being operated in accordance with Shell's safety instructions." *Id.* at 962 (italics in original).

[128] *Id.* at 949.

[129] *Id.* at 950.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 950 n.34.

First, Shell was not required to have intent to dispose of waste to have arranged for disposal under CERCLA.[133] Disposal for CERCLA purposes could be a passive byproduct of a transaction, with liability to be imposed where disposal is a foreseeable byproduct of the transaction.[134] Second, as held in *Cadillac Fairview,* no per-se rule regarding ownership or control of the hazardous substance was necessary for a finding of arranger liability, but that in a broader arranger liability scheme, control becomes central to the query on liability.[135] Last, immunity was not available to Shell under the useful-product doctrine because Shell's practices prevented the product from being put to its intended use.[136] Shell's liability, therefore, resulted from its role in the disposal of the product, not the product itself.[137]

As a result of the Ninth Circuit's decision, broader arranger liability is more expansive and more amorphous.[138] The Ninth Circuit's approach expands the inquiry past the parties' intention, prescribed by *Cadillac Fairview*, to find liability where disposal is a foreseeable byproduct of the subject transaction.[139] The Ninth Circuit in *Burlington Northern* did not suggest a concrete set of criteria to establish arranger liability, but instead suggested that arranger liability will be a consequence of a fact-intensive inquiry at the trial level.[140]

C. THE NINTH CIRCUIT'S BURLINGTON NORTHERN DECISION APPLIED: *UNITED STATES V. LYON*[141]

Within six months after *Burlington Northern,* the Ninth Circuit's expanded view of arranger liability reared its head.[142] In *U.S. v. Lyon,* the United States District Court for the Eastern District of California denied

[133] *Id.* at 949, 961.

[134] *Id.* at 948-49.

[135] *Id.* at 951.

[136] *Id.* at 950.

[137] *See id.*

[138] *See* Henson, *supra* note 36, at 943.

[139] United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 948-49 (9th Cir. 2008).

[140] *Id.* at 809.

[141] United States v. Lyon, No. CV F 07-0491 LJO GSA, 2007 U.S. Dist. LEXIS 94329 (E.D. Cal. 2007).

[142] *Lyon* was decided after the Ninth Circuit's opinion in United States v. Burlington N. & Santa Fe Ry. Co, 502 F.3d 781 (9th Cir. 2007), but before this opinion was superseded by United States v. Burlington N. & Santa Fe Ry. Co, 520 F.3d 918 (9th Cir. 2008). The Ninth Circuit's superseding opinion still features the same conclusions and the majority of the analysis as the original opinion. Thus, although *Lyon* cites to the now defunct 2007 *Burlington Northern* opinion, its analysis should still be considered valid.

a chemical manufacturer's motion to dismiss a claim of arranger liability.[143] The manufacturer's only connection to the site in question had been the sale of new chemical product, through an intermediary, to an end user at the site.[144] Relying chiefly on the third-party plaintiff's arguments that *Burlington Northern* had cast a broad net of liability and undermined the useful-product doctrine, the Eastern District of California held that the issue of the chemical manufacturer's liability could not be resolved on a motion to dismiss.[145]

The EPA instituted an action against the first-party defendants, including Lyon/Tondas (Lyon), the owner of a site where a dry cleaner had been located, for past and future response costs arising out of groundwater contaminated with percholorethylene (PCE), a solvent used in dry-cleaning operations.[146] Lyon subsequently filed a third-party complaint against 22 third-party defendants, including five chlorinated solvent manufacturers.[147] Vulcan Materials Company (Vulcan) was one of the five third-party defendant solvent manufacturers.[148] Lyon's third-party complaint alleged, in part, that the third-party defendants had *arranged for* disposal of hazardous substances at the site.[149] Lyon did not allege that Vulcan sold PCE directly to the dry cleaner at the site, but rather that distributors purchased and resold chlorinated solvents to the dry cleaner operator.[150] Further, the Lyon made no allegations that Vulcan: "(1) had contact with [the dry cleaner]; (2) was aware of which dry cleaners purchased PCE from a solvent distributor; or (3) possessed authority or control over subsequent PCE disposal of by [the dry cleaner] of PCE in waste form."[151]

Largely based on the Lyon parties' interpretation of *Burlington Northern*, the District Court denied Vulcan's motion to dismiss on the claim of arranger liability.[152] The district court pointed to the Ninth Circuit's recognition of a broader category of arranger liability "in which disposal of hazardous waste is a foreseeable byproduct of, but not the purpose of, the transaction giving rise to PRP . . . status."[153] Citing the

[143] *Id.* at *25.
[144] *Id.* at *6.
[145] *Id.* at *16, 20.
[146] *Id.* at *4.
[147] *Id* at *5.
[148] *Id.* at *4-5.
[149] *Id.* at *5.
[150] *Id.* at *6.
[151] *Id.* at *6.
[152] *See id.* at *11-16.
[153] *Id.* at *11 (citing United. States. v. Burlington N. & Santa Fe Ry. Co., 502 F.3d 781, 807

Ninth Circuit's decision, the district court stated that a transaction that necessarily resulted in leakage or some other form of disposal of a hazardous substance was sufficient for liability under CERCLA's statutory scheme.[154] As the district court conceded, the problem for Vulcan was reconciling the standard on a motion to dismiss and the theory of broader arranger liability as spelled out in *Burlington Northern.*[155] In essence, arranger liability is found when parties contract to sell hazardous substances that are then disposed of.[156]

Addressing the useful-product doctrine, the district court concluded that the characterization of a transaction as a sale does not immunize the transaction from an inquiry as to whether the product is used for its intended purpose.[157] If the product could never be put to its intended use because of leakage inherent in the manufacturer's transfer and delivery process, the useful-product doctrine could not be applied under *Burlington Northern.*[158] While the Ninth Circuit had refused to hold a party liable for merely selling a useful product that was later disposed of, in the CERCLA context, "hazardous substances are generally dealt with at the point where they are about to, or have become, wastes."[159] In *Lyon*, the defendants argued:

> the useful product doctrine does not apply when chemical leakage is inherent and contemporaneous with the manufacturer's transfer process and the manufacturer has sufficient control over and knowledge of the transfer process to be considered a CERCLA arranger.[160]

The questions surrounding Vulcan's "disposal," or the necessary

(9th Cir. 2007), *superseded on denial of reh'g en banc*, 520 F.3d 918 (9th Cir. 2008), *rev'd*, 129 S. Ct. 1870 (2009)).

[154] *Id.* at *12 (citing United States v. & Santa Fe Ry. Co, 781. 808 (9th Cir. 2007), *superseded on denial of reh'g en banc*, 520 F.3d 918 (9th Cir. 2008), *rev'd*, 129 S. Ct. 1870 (2009)).

[155] *Id.* at *16 ("[Third party defendant's] alleged disposal or leakage of hazardous materials are factual questions not subject to [Fed. R. Civ. P.] 12(b)(6) resolution. At this point, this Court is not in a position to determine whether [third-party defendant], as a PCE manufacturer and seller, is a disposer or discharger of PCE waste. Although they do not provide a model pleading, the Lyon/Tondas allege enough for arranger liability and to avoid the useful product defense.").

[156] *See id.*

[157] *Id.* at *15-6.

[158] *Id.* at *15; *see also* U.S. v. Burlington Northern & Santa Fe Ry. Co,, 520 F.3d 918, 950 (9th Cir. 2008) ("The useful product cases have no applicability where, as here, the sale of a useful product necessarily and immediately results in the leakage of hazardous substances. In that circumstance, the leaked portions of the hazardous substances are *never* used for their intended purpose.") (emphasis in original).

[159] *Lyon*, 2007 U.S. Dist. LEXIS 94329, at *14 (citation omitted).

[160] *Id.* at *15.

inquiry to determine if disposal had taken place, were factual issues that could not be resolved on a motion for dismissal.[161]

Last, the court concluded that, while ownership is not a prerequisite to arranger liability, arranger liability based on a theory of ownership was satisfied for purposes of a motion to dismiss under *Burlington Northern* by the allegation that Vulcan had sold PCE to the dry cleaner; the sales were indicative of Vulcan's possession.[162]

Lyon's interpretation of *Burlington Northern* may have pushed the barriers as to what the Ninth Circuit had intended.[163] Specifically, the *Lyon* decision did not distinguish the role played by Shell in the delivery process versus Vulcan's rather remote role.[164] Vulcan sold to an intermediary and had no knowledge of the end user.[165] Shell maintained an ongoing role in refining the bulk transfer process of D-D to B&B.[166] Therefore, addressing one of the "useful indices" of broader arranger liability, *Lyon* dispensed with the need for control that figured prominently in the Ninth Circuit's decision in *Burlington Northern.*[167] This conclusion appears to ignore the fact that Vulcan sold to an intermediary.[168] This obscured fact also impacts the application of the useful-product doctrine. If Vulcan had sold to an intermediary that in turn sold to a dry cleaner that Vulcan had no knowledge of, contact with, or control over, the remoteness of Vulcan from the ultimate site of disposal should have triggered the useful-product doctrine as described in *Burlington Northern*. Finally, the district court found that the other touchstone of arranger liability—ownership—was satisfied because at one time Vulcan owned the product.[169] The district court failed to distinguish the facts in *Burlington Northern*, namely that Shell owned the chemicals at the time the transaction was entered into.

The sum total of the court's ruling on *Lyon* can be interpreted as

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[161] *Id.* at *16.

[162] *Id.* at .*19-20.

[163] Meline MacCurdy, *"Useful Product" Exception Rejected and CERCLA Claim Against Chemical Manufacturer Is Allowed To Proceed*, MARTEN L. GROUP ENVTL. NEWS, Jan. 23, 2008, www.martenlaw.com/newsletter/20080123-cercla-exception-rejected.

[164] *Id.*

[165] *Lyon*, 2007 U.S. Dist. LEXIS 94329, at *6.

[166] United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 809 (9th Cir. 2007) ("Shell arranged for delivery of the substances to the site by its subcontractors; was aware of, and to some degree dictated, the transfer arrangements; knew that some leakage was likely in the transfer process; and provided advice and supervision concerning safe transfer and storage. Disposal of a hazardous substance was thus a necessary part of the sale and delivery process.").

[167] *See id.* at 809-10.

[168] *See Lyon*, 2007 U.S. Dist., at LEXIS *6.

[169] *Id.* at *18-.19.

creating a quasi-products-CERCLA liability scheme, undermining the useful-product doctrine and ensnaring a chemical manufacturer that had no contact with the ultimate purchaser in costly CERCLA litigation.[170] Notably, the intersection of "foreseeability" intertwined with pure manufacturer liability sounds in traditional products liability. It could be argued that differences between *Burlington Northern* and *Lyon* suggest that the district court's result is an aberration or simply the result of *Burlington Northern* applied under a more generous motion-to-dismiss standard. But the *Lyon* decision may also reflect a Ninth Circuit trend to impose liability on parties relating to dry-cleaning facilities.[171] The decision does suggest a broader reach of arranger liability based on the underpinnings of *Burlington Northern.*[172]

The result in *Lyon* should be distinguished from *City of Merced v. R.A. Fields*[173] and *California Department of Toxic Substances Control v. Payless Cleaners.*[174] All three cases presented similar facts, similar claims of arranger liability, and similar outcomes for the defendants.[175] The difference lies in the measuring stick by which the district court assessed arranger liability and facts or lack of facts material to the useful-product doctrine.

In *City of Merced* the court appeared willing to exonerate a manufacturer who "does nothing more than sell a useful, albeit hazardous product" as measured by analysis seen in *Cadillac Fairview.*[176] In *City of Merced* a third-party action was initiated against a manufacturer of dry-cleaning chemicals.[177] The gravamen of the third-party claim was arranger liability attaching to the manufacturer.[178]

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[170] This is an observation that is shared by the Chamber of Commerce of the United States, The American Chemistry Council, and the American Petroleum Institute, as evidenced in their amicus brief submitted to the Supreme Court prior to the Court considering the Ninth Circuit's ruling in *Burlington Northern*. *See* Brief for Chamber of Commerce of the United States et al. as Amici Curiae, 129 S. Ct. 1870 (2009) (Nos. 07-1601, 07-1607), 2008 WL 6059064, 2008 WL 5026653 at 17-18.

[171] MacCurdy, *supra* note 162; *see also* Brad Marten, *Dry Cleaning Franchisor Tagged with Cleanup Costs*, MARTEN L. GROUP ENVTL. NEWS, Nov. 2, 2005, www.martenlaw.com/news/?20051102-dry-cleaning-cleanup.

[172] MacCurdy, *supra* note 162.

[173] City of Merced v. R.A. Fields, 997 F. Supp. 1326 (E.D. Cal. 1998).

[174] Cal. Dep't of Toxic Substances Control v. Payless Cleaners, 368 F. Supp. 2d 1069 (E.D. Cal. 2005).

[175] *See supra* text accompanying notes 143-52 and *infra* text accompanying notes 176-85.

[176] *City of Merced*, 997 F. Supp. at 1332.

[177] *Id.* at 1329-30 (including defendant Vulcan Materials Company, the same movant in *Lyon*).

[178] *Id*. at 1331-32; *see also* Cal. Dep't of Toxic Substances Control v. Payless Cleaners, 368 F. Supp. 2d 1069, 1076-81 (E.D. Cal. 2005).

However, the court indicated that it simply did not have sufficient facts to find for the defendant in light of the plaintiff's allegations that the transaction went beyond supplying the chemical in question.[179] *Lyon* can be distinguished from *City of Merced*. The district court in *Lyon* accepted that the defendant had no contact with the third-party plaintiff, that the defendant was not aware that the third-party plaintiff had purchased the defendant's product, and that there was no subsequent authority or control of third-party plaintiff's disposal.[180] Employing facts similar to *Lyon,* a logical conclusion could be drawn that the court in *City of Merced* could have found for third-party defendants. Such a result would be contrary to the result in *Lyon*.

In *Payless Cleaners*, the court denied the third-party defendant's motion for summary judgment on arranger liability not because the manufacturer, the third-party defendant, sold a product, but because of the manufacturer's alleged control over the installation process that led to disposal.[181] The third-party plaintiffs had alleged that the third-party defendant was a manufacturer of dry-cleaning equipment and the successor of a franchisor for a dry-cleaning operation.[182] Further, the third-party plaintiff alleged that the third-party defendant designed, manufactured, and installed dry-cleaning machines.[183] The district court stated that allegations of a product sale did not support a finding for an arrangement for disposal because the transaction could be described "only as the sale of a useful good which, through its normal use, created a waste byproduct."[184] The court denied the motion for summary judgment however, based on allegations that the product manufacturer, in its role as franchisor, chose the location of waste discharge points at the facility in question in addition to physically installing machines and connecting machines to the discharge points.[185] *Lyon* lacked the additional allegations found in *Payless Cleaners* that the product manufacturer physically installed and chose the waste discharge points.[186] A strong argument exists that absent the additional facts in *Payless Cleaners*, beyond the sale of the product, the district court would have granted the third-party defendant's motion for summary judgment,

[179] *City of Merced*, 997 F. Supp. at 1332.

[180] United States v. Lyon, N. CV F 07-0491 LJO GSA, 2007 U.S. Dist. LEXIS 94329, at *6.

[181] Cal. Dep't of Toxic Substances Control v. Payless Cleaners, 368 F. Supp. 2d 1069, 1078-80 (E.D. Cal. 2005).

[182] *Id.* at 1076.

[183] *Id.*

[184] *Id.* at 1078.

[185] *Id.* at 1080.

[186] *See id.*

an outcome different than *Lyon.*

IV. THE SUPREME COURT ADDRESSES ARRANGER LIABILITY: *BURLINGTON NORTHERN'S* APPEAL FROM THE NINTH CIRCUIT

The Supreme Court considered Shell's appeal from the Ninth Circuit's decision imposing arranger liability in *Burlington Northern.*[187] In its brief discussion of arranger liability, the Court quickly undid much of the Ninth Circuit's decision and significantly curtailed the future application of a broader arranger liability.[188] The Court eschewed the notion of control or foreseeability under a broader arranger liability theory and instead required a definitive finding of intent.[189] In so doing, the Court set the stage for highly intensive fact-finding inquiries in order to determine arranger liability status.[190] The Court also impliedly reaffirmed the useful-product doctrine.[191]

In defining transactions that might trigger arranger liability, the Court drew two bookends. At one end, the Court placed clear-cut cases of direct or traditional arranger liability, and at the other, transactions that would invoke the useful-product doctrine.[192] Shell's transaction with B&B was somewhere within this spectrum.[193]

> [I]f an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance[, liability would attach under § 9607(a)(3)]. It is similarly clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination. Less clear is the liability attaching to the many permutations of "arrangements" that fall between these two extremes—cases in which the seller has some knowledge of the buyers' planned disposal or whose motives for the "sale" of a

[187] Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1878 (2009).

[188] *See id.* at 1880.

[189] *Id.*

[190] *See id.* at 1879 ("There is no bright line between a sale and a disposal under CERCLA. A party's responsibility . . . must by necessity turn on a fact-specific inquiry into the nature of the transaction.") (quoting Pneumo Abex Corp. v. High Point, Thomasville & Denton R. Co., 142 F.3d 769, 775 (4th Cir. 1998)).

[191] *See id.* at 1878-79.

[192] *See id.*

[193] *See id.*

hazardous substance are less than clear.[194]

The Court observed that lower courts, to define liability within this continuum, have often conducted fact-intensive inquiries beyond the parties' characterization of the transaction as a disposal or a sale to discern if the arrangement was one Congress intended to fall under CERCLA.[195] The Court agreed with that analysis but stated that the inquiry ends within the limits of the statute.[196] Looking to the plain language of the statute, the Court stated that to "arrange" implies action directed to a specific purpose, and therefore to "arrange" under § 9607(a)(3), an entity must take intentional steps to dispose of a hazardous substance.[197]

Describing Shell's practices, the Supreme Court stated that knowledge of leakage or spilling is insufficient to hold a party responsible for having planned a disposal. [198] Accordingly, to be liable under the Act, Shell would have to have entered into the transaction with the intention that at least some of the D-D be disposed of by one or more of the methods described in § 6903(3); the Court observed that the evidence before the district court did not establish this.[199] This conclusion is notable for two reasons. First, the Court's conclusion forecloses the Ninth Circuit's holding that arranger liability may be founded upon any transaction that includes disposal as a foreseeable byproduct.[200] Second, the Court seemed at odds with the Ninth Circuit's view on the effect of the district court's findings. The Supreme Court concluded that Shell's knowledge of continuing spills and leaks and unsuccessful efforts to stem these problems were insufficient to support a finding that Shell had arranged for the disposal of D-D and therefore liable under § 9607(a)(3).[201]

What the Supreme Court's decision in *Burlington Northern* makes clear is that arranger liability will attach only when an entity deliberately plans for disposal of an unused and useful product.[202] A PRP's

[194] *Id.* at 1878-79 (citations omitted).

[195] *Id.* at 1879.

[196] *Id.*

[197] *Id.* at 1879-80.

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

[199] *Id.*

[200] *See id.*

[201] *Id.*

[202] Gregory Weimer, Burlington Northern & Santa Fe Railway Co. v. United States*: The Supreme Court Provides Guidance on Arranger Liability and Apportionment,* 35 VT. BAR J. 46, 47 (2009).

knowledge of leaking and spillage may be used in the determination of intent but is not entirely dispositive of the issue.[203] Thus, sales of new and useful products will likely not be held to be arrangements for disposal.[204]

What the decision does not clear up, however, is how much knowledge of spillage and leakage will amount to the requisite level of intent to impose arranger liability.[205] Further, it is not clear what remains of a broader arranger liability scheme in general. It would appear that the Supreme Court's holding would favor a results analogous to *Cadillac Fairview* and less likely to support a ruling similar to that in *U.S. v. Lyon.*[206] The Court's ruling makes it more difficult to prove that a party involved in a new product "sales" transaction was an arranger.[207]

V. THE IMPACT OF THE SUPREME COURT'S DECISION IN THE NINTH CIRCUIT

The impact of the Supreme Court's decision in *Burlington Northern* on the Ninth Circuit's broader arranger liability scheme can be assessed both in attempting to quantify what remains of broader liability and moreover, in its practical, immunizing effect on products manufacturers. With respect to understanding what remains of broader liability, the Supreme Court's requirement to find an "intent to arrange" for disposal undermines liability based on a foreseeability test. In addition, the intent requirement impliedly broadens the scope of the useful-product doctrine. On a practical level, the Supreme Court's decision likely immunizes "pure" products manufacturers from significant liability under a theory of arranger liability.

In a certain respect, the arranger liability inquiry in the Ninth Circuit will not change after the Supreme Court's decision. The "useful indices" of ownership and control will still be useful as applied to understanding when an entity "takes intentional steps to dispose of a hazardous substance."[208] Added to the arsenal of useful indices will be the

[203] *Id.*

[204] Marc Lawrence, *To Arrange or Not To Arrange: Intent Is the Question*, 88-OCT MICH. B. J. 48, 50 (2009).

[205] Brad Marten, *U.S. Supreme Court Holds that Superfund Liability is Not Joint and Several Where A Reasonable Basis for Apportionment Exists; Court Also Narrows Arranger Liability*, MARTEN L. GROUP ENVTL. NEWS, May 4, 2009, www.martenlaw.com/news/?20090504-superfund-liablity.

[206] *See* Lawrence, *supra* note 204, at 50.

[207] *Id.* at 50-52.

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

knowledge that an entity's product will be spilled or leaked.[209] As stated in the Ninth Circuit opinions, with respect to ownership and control, and as stated in the Supreme Court's decision with respect to knowledge, none of these factors will necessitate a finding of liability, but they will instead be useful in providing evidence of the intent to dispose.[210] Consequently, under the Supreme Court's holding, the sum of the useful indices must now total *intent to dispose* instead of foreseeability. All these factors will be examined under an inquiry into the intent of the parties, to determine if a transaction is really an arrangement for disposal, as originally suggested in *Cadillac Fairview*.[211]

The most significant aspect of the Supreme Court's decision however, may be the interplay between the requirement of intent and the useful-product doctrine, and the resultant gap in CERCLA liability that is created. To reiterate, the useful-product doctrine immunizes manufacturers, under a theory of arranger liability, "for selling a useful product containing or generating hazardous substances that *later* were disposed of."[212] The Supreme Court arguably upheld this principle without mentioning it by name.[213] The "intent to dispose" requirement arguably eliminated liability for a manufacturer once its product is transferred to a common carrier. Recall that the issue in *Burlington Northern* was a "disposal" that took place after the product left the hands of the manufacturer but *before* the product was put to its intended use.[214] The process of D-D transfer, however, was one largely orchestrated by Shell.[215] As stated by the Ninth Circuit, "Shell's liability derives not from its role as a manufacturer of a useful product but rather from its role in leakage prior to use."[216] Without broad arranger liability, CERCLA liability does not attach to Shell for its role in the transfer of the product.

The Supreme Court, in ruling as it did, created a liability shield for products shipped by common carrier, notwithstanding any subsequent

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[209] *Id.* at 1880. However, "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." *Id.*

[210] *Id.*

[211] *See* Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 565 (9th Cir. 1994).

[212] United States v. Burlington N. & Santa Fe. Ry. Co., 520 F.3d 918, 949 (9th Cir. 2008), *rev'd*, 129 S. Ct. 1870 (2009) (italics in original).

[213] *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1878-9 (2009).

[214] *See Burlington N.,* 520 F.3d at 950.

[215] That Shell "orchestrated" the transfer of D-D may be matter of dispute. *See id.* at 931 n.5 (citing to the district court's findings that Shell controlled the transfer process). *But see* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1880 (2009) (describing Shell's knowledge of the transfer process and even steps to mitigate loss of product).

[216] *Burlington N.*, 520 F.3d at 950 n.34.

"gray area"[217] involvement such as Shell's. As stated by Judge Richard Posner of the Seventh Circuit, describing unintentional disposal under CERCLA, "in the context of the shipper who is arranging for the transportation of a product, 'disposal' excludes accidental spillage because you do not arrange for an accident except in the Æsopian sense illustrated by the staged accident." [218] The distinction between the liability for the manufacturer and transporter, Judge Posner explained, is that

> when the [manufacturer] shipper is not trying to arrange for the disposal of hazardous wastes, but is arranging for the delivery of a useful product, he is not a responsible person within the meaning of the statute and if a mishap occurs en route his liability is governed by other legal doctrines.[219]

Thus, CERCLA liability does not attach to Shell's role in influencing the delivery of its product.[220] A different outcome may have been likely if Shell had transported using its own fleet[221] or if the Supreme Court had found that Shell's involvement went beyond mere knowledge of leaks, spills and unsuccessful efforts to curtail spillage from the transfer process it required.[222] Requiring intent to dispose and dispatching a test based on foreseeability, the Supreme Court has largely eliminated the CERCLA "gap coverage" provided by a theory of broader arranger liability.

The practical impact of the Supreme Court's holding in the Ninth Circuit is best seen in its juxtaposition with the Ninth Circuit's approach in *Lyon*, which represented the climax of the Ninth Circuit's embrace of a broader arranger liability.[223] At one end of the spectrum, after *Lyon*, smaller PRPs saw a potential avenue for relief against the oppressive costs of site cleanup by attaching liability to most any product manufacturer whose product may have ended up in a disposal stream. After the Supreme Court's decision, this option has largely withered away. Conversely, chemical and products manufacturers, and their insurance carriers, were relieved after the Supreme Court's opinion in

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[217] *See supra* note 127 and notes 200-01 and accompanying text.

[218] Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993).

[219] *Id.*

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

[221] *See Amcast*, 2 F.3d at 751.

[222] *See Burlington N.*, 129 S. Ct. at 1880.

[223] *See* United States v. Lyon, N. CV F 07-0491 LJO GSA, 2007 U.S. Dist. LEXIS 94329, at *16.

Burlington Northern, the prospect of a products-based CERCLA liability having been diminished. The basis of these emotions, small PRPs' gloom and manufacturers' relief, are easily illustrated.

Using facts analogous to *Lyon*, *City of Merced* and *Payless Cleaners*, San Francisco dry cleaners provide a quick snapshot of the impact of the Supreme Court's decision. In San Francisco, there are approximately 360 dry cleaners.[224] Of those, almost twenty percent use PERC.[225] PERC is the same chemical at issue in *Lyon,*[226] *Payless Cleaners,*[227] and *City of Merced.*[228] Historically, a majority of dry cleaners have discharged PCE through sewer laterals, one of two primary routes for disposal.[229] Down-drain disposal of PCE and resultant sewerage leakage was the cause of contamination in *Payless Cleaners* and has been observed in other dry-cleaning cases.[230] Arguably, based on the aforementioned numbers and a *Lyon*-type holding, product manufacturers face the specter of liability at over seventy sites in San Francisco alone for having done nothing more than having sold their product. This does not take into account historic sites that may not currently house dry-cleaning operations and sites that may have switched from PERC to alternative cleaning methods. Subsequent to the Supreme Court's holding in *Burlington Northern*, absent additional factors, these same manufacturers of PERC or other dry-cleaning products are likely to be exempt from liability.

Neither *Lyon* nor the Ninth Circuit's holding in *Burlington Northern* stated that every CERCLA contribution action against a product manufacturer would ultimately be successful under an arranger theory. They did indicate that the issue was not going to be resolved on a motion

[224] Marisa Lagos, *S.F. Takes Green Issue to Dry Cleaners,* S.F. CHRON., Sept. 19, 2009, at A-1, *available at* http://articles.sfgate.com/2009-09-19/news/17206825_1_dry-cleaners-chemical-businesses.

[225] *Id.*

[226] *Lyon*, 2007 U.S. Dist. LEXIS, at *4.

[227] Cal. Dep't of Toxic Substances Control v. Payless Cleaners, 368 F. Supp. 2d 1069, 1074 (E.D. Cal. 2005).

[228] City of Merced v. R.A. Fields, 997 F. Supp. 1326, 1329 (E.D. Cal. 1998).

[229] State Coalition for Remediation of Drycleaners, *A Chronology of Historical Developments in Dry Cleaning* (Nov. 2007), *available at* www.drycleancoalition.org/download/drycleaning-historical_developments.pdf. A 1998 survey by the International Fabricare Institute, revealed that 70% of the 900 respondents queried indicated that they discharged waste water from dry cleaning equipment into sewer laterals or septic tanks. *Id.*

[230] *Payless Cleaners,* 368 F. Supp. 2d at 1075. A common allegation in California dry-cleaning litigation is that PERC is discharged during dry-cleaning operations into municipal sewer systems, which in turn leak or otherwise discharge the PERC. *See, e.g.*, City of Modesto Redevelopment Agency v. Superior Court, 13 Cal. Rptr. 3d, 865, 867-78 (Cal. Ct. App. 2004).

for dismissal.[231] The consequence of a holding similar to *Lyon* was also to require a manufacturing defendant to be subjected to additional litigation costs. The prospect of prolonged discovery may have resulted in more cost-of-defense settlement providing additional monies to address response costs. Further, while it was unlikely that equipment or chemical manufacturers would roll over by virtue of a ruling such as *Lyon,* the specter of strict and joint and several liability could have become an important bargain chip at the settlement table.

VI. CONCLUSION

The fate of a broader arranger liability in the Ninth Circuit is uncertain after the Supreme Court's reversal in *Burlington Northern.* Expansion of arranger liability after is unlikely, however, especially in a situation where a defendant may invoke the useful-product doctrine[232] or the hazardous substance in question was shipped via common carrier.[233] The Ninth Circuit's holding in *Burlington Northern* and the premise in *Lyon* that CERCLA liability may attach to products manufacturers via foreseeability is no longer good law. A court within the Ninth Circuit will likely revert to the analysis suggested in *Cadillac Fairview*, inquiring into the nature of a transaction, including looking beyond the defendants' characterization of the transaction.[234] Such a court will look to find intent or deliberate steps toward disposal in order to impose arranger liability.[235] The necessity of intent all but eliminates CERCLA liability for products manufacturers as envisioned by the Ninth Circuit's holding in *Burlington Northern* and the district court in *Lyon.*

VII. AFTERWARD

In early 2010, the United States District Court for the Eastern District of California would become one of the first courts within the Ninth Circuit to tackle the scope of broader arranger liability subsequent to the Supreme Court's ruling in *Burlington Northern*.[236] In *Hinds*

[231] *Lyon*, 2007 U.S. Dist. LEXIS 94329, at *16.

[232] *See* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1878-79 (2009).

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

[234] Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 565-6th66 (9th Cir. 1994) (quoting Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 973 F.2d 688, 696 (9th Cir. 1992)) (citations omitted).

[235] *See Burlington N.*, 129 S. Ct. at 1879.

[236] *See* Adam Orford, *District Court Applies BNSF Arranger Liability Test, Dismisses*

Investment v. Team Enterprises[237] the district court would address facts and circumstances similar to those in *Lyon*,[238] *City of Merced*,[239] and *Payless Cleaners*.[240] The outcome, however, would be very different.[241] The court concluded that as a matter of law plaintiffs' allegations against dry cleaning equipment manufacturers were not sufficient support a finding of arranger liability and the claims were dismissed.[242]

The general allegations in *Hinds*[243] are familiar ones. The plaintiffs were owners of property where the defendant, Team Enterprises, had operated a dry cleaning business.[244] The plaintiffs' sought response costs incurred responding to PCE contamination at the site.[245] It was alleged that defendant Kirrberg/Multmatic (Kirrberg) was liable as an arranger under CERCLA for having manufactured, assembled, installed, maintained, repaired, and/or sold dry cleaning machinery used at the site.[246] Plaintiffs also alleged that Kirrberg provided instructions and information regarding the handling and disposal of waste waters

CERCLA Claim Against Dry Cleaning Machine Manufacturers, MARTEN L. GROUP ENVTL. NEWS, Apr. 1, 2010, www.martenlaw.com/newsletter/20100401-bnsf-arranger-liability-test.

[237] The district court would issue three separate orders between January 15, 2010 and March 12, 2010: Hinds Investments v. Team Enterprises, No. CV F 07-0703 LJO GSA, 2010 WL 289116 (E.D. Cal. 2010) (entitled Order on Cooper Industries, LLC's F.R.Civ.P. 12 Motion to Dismiss (Doc. 43)); Hinds Investments v. Team Enterprises, No. CV F 07-0703 LJO GSA, 2010 WL 796844 (E.D. Cal. 2010) (entitled Order on R.R. Street & Co. Inc.'s F.R.Civ.P 12 Motion to Dismiss Second Amended Complaint (Doc. 76.)); Hinds Investments v. Team Enterprises, No. CV F 07-0703 LJO GSA, 2010 WL 922416 (E.D. Cal. 2010) (entitled Order on Kirrberg/Multimatic's F.R.Civ.P. 12 Motion to Dismiss (Doc. 78.)).

[238] *See supra* text accompanying notes 142-51.

[239] *See supra* text accompanying notes 176-80.

[240] *See supra* text accompanying notes 181-84.

[241] *See Hinds,* 2010 WL 289116, at *5, *7-8, *10; *Hinds,* 2010 WL 796844, at *7-8, *16; *Hinds*, 2010 WL 922416, at *6, *8, *16.

[242] *Hinds,* 2010 WL 289116, at *10; *Hinds,* 2010 WL 796844, at *16; *Hinds*, 2010 WL 922416, at *16.

[243] *See* Hinds Investments v. Team Enterprises, No. CV F 07-0703 LJO GSA, 2010 WL 796844 (E.D. Cal. 2010); Hinds Investments v. Team Enterprises, No. CV F 07-0703 LJO GSA, 2010 WL 922416 (E.D. Cal. 2010). The district court's ruling on these to motions are substantially similar. The district court's ruling on the Cooper motion is distinguishable both on the grounds that Cooper was a third-party defendant, allegations against Cooper included franchisor liability and that plaintiff and that the district offered a more robust discussion of "intent to dispose" based on arguments raised by plaintiff Hinds in response to motions by R.R. Street and Kirrberg/Multimatic. Hinds Investments v. Team Enterprises, No. CV F 07-0703 LJO GSA, 2010 WL 289116 (E.D. Cal. 2010), at *1-2, *4-5; *see Hinds,* 2010 WL 796844, at *6-7; *Hinds*, 2010 WL 922416, at *5-6. On account of the relative similarity and for purposes of brevity and clarity, the remaining analysis will only focus on the Kirrberg/Multimatic order.

[244] *Hinds*, 2010 WL 922416, at *1.

[245] *Id.*

[246] *Id.*

contaminated with PCE generated by the machinery.[247] The central thrust of plaintiff's allegations was that Kirrberg's manufacture and design of the dry cleaning equipment constituted intentional steps to dispose of wastes.[248]

The district court conceded that plaintiffs' allegations constituted the basis for knowledge of disposal but that this in itself, did not rise to the level of "intentional disposal of a hazardous substance."[249] The court stated, "[Kirrberg] at best knew that Multimatic machine . . . 'performed a separate and distinct function of waste disposal of used PCE . . .'"[250] However, citing the Supreme Court's decision in *Burlington Northern*, the district court stated that knowledge of disposal is insufficient to prove intentional disposal.[251]

The juxtaposition of "knowledge" with ownership and control were also important considerations for the court.[252] Clarifying plaintiffs' authority, the court stated that "[w]e believe that ownership or possession, knowledge and control are the most critical factors in this [arranger liability analysis . . . ."[253] In citing the factors involved in the arranger liability analysis, the district court stressed the importance, and plaintiff's failure, to demonstrate the ownership factor necessary to find arranger liability; the PCE must have been owned by the *operators* of the machinery.[254]

Addressing the useful-product doctrine, the court stated that the plaintiff's allegations did not suggest that the machinery at issue was either a hazardous substances or a transaction for disposal of such.[255] The court's analysis, citing heavily from *Payless Cleaners*, affirmed that the useful-product doctrine, where the transaction involves the sale of a useful good, remains undisturbed.[256]

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[247] *Id.*

[248] *Id.* at *5; *see also* Orford, *supra*, note 236.

[249] Hinds Investments v. Team Enterprises, No. CV F 07-0703 LJO GSA, 2010 WL 922416 at *6 (E.D. Cal. 2010).

[250] *Id.*

[251] *See id.* ("[Kirrberger] raise a valid point that 'knowledge of likely disposal' does not impose arranger liability given that 'knowledge alone is insufficient to prove that an entity 'planned for' the disposal . . .") (quoting Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1880 (2009).

[252] *Hinds*, 2010 WL 922416, at *5.

[253] *Id.* (citing Morton International, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 678 (3rd Cir. 2003)). It is notable that the *Morton* court stressed the importance of ownership or possession as necessary requirement to arranger liability. *Id*.

[254] Hinds Investments v. Team Enterprises, No. CV F 07-0703 LJO GSA, 2010 WL 922416 at *6 (E.D. Cal. 2010).

[255] *Id.* at *8.

[256] *Id.* ("Plaintiffs offer nothing substantial to negate the useful product defense . . . The

If *Hinds* is a harbinger of arranger liability within the Ninth Circuit a few conclusions may be drawn. First, three factors will be weighed heavily to find an intent to dispose and a subsequent finding of arranger liability: knowledge, control, and ownership or possession.[257] Second, pleadings will require specificity sufficient to divine more than one of these factors.[258] Last, a manufacturer of equipment, who does nothing more than sell a product, is likely immune from arranger liability under a theory that design does not equate intent to dispose in addition to possessing immunity under the useful product doctrine.[259]

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[second amended complaint] does not allege that the Multimatic machine itself is a hazardous substance and, in turn, that its sale is an arrangement to dispose of hazardous substances.").

[257] *Id.* at *5-6; s*ee also supra* text accompanying notes 208-11.

[258] *See supra* text accompanying notes 245-49; *see also* Orford, *supra* note 236.

[259] *Hinds*, 2010 WL 922416, at *5-6, *7-8; *see also supra* text accompanying notes 231; Orford, *supra*, note 236.

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