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Contaminating the Superfund: Arranger Liability and the Evolution of CERCLA's Not-so-Strict Liability

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COMMENT

Contaminating the Superfund: Arranger Liability and the Evolution of CERCLA's Not-So-Strict Strict Liability

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I. INTRODUCTION

In response to public outcry over the mismanagement of hazardous waste and the serious environmental and health risks it poses, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as a strict liability statute in 1980.[1] The statute promotes the prompt

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[1] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006). See Randy Boyer, Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*: The Third Circuit Establishes a Standard for CERCLA Arranger Liability*, 17 TUL. ENVTL. L.J. 201, 203 (2003), for an overview of the enactment of CERCLA. CERCLA's enactment "was largely the result of public outcry to incidents . . . which garnered national media attention and illustrated the consequences of many years of hazardous waste mismanagement." Boyer, *supra.* See also Martin A. McCroy, *Who's on First: CERCLA Cost Recovery, Contribution, and Protection*, for an explanation of the dangers posed

remediation of hazardous waste sites and functions to ensure all potentially responsible parties (PRPs) are held liable for the full cost of cleanup.[2] The trust fund created by CERCLA, the "Superfund," finances both the government's immediate removal of the waste and the long-term remedial costs associated with cleanup.[3] When no solvent PRP may be found, the Superfund covers all costs associated with remediation.[4] Expended Superfund monies are recovered through government lawsuits brought against respective PRPs.[5]

Few statutes have ignited more litigation than CERCLA.[6] Much of this litigation centers on government identification and classification of the four

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by hazardous waste, as well for information on the large number of American citizens impacted, or potentially impacted, by hazardous waste contamination:

> The problem of soil and water contamination by hazardous substances is quite extensive. Government figures estimate that one-third of the United States' population lives within four miles of a CERCLA site. . . . [T]hat eleven million people live within one mile of a . . . site. . . . [And] eighty percent of . . . sites are located in residential areas.

37 AM. BUS. L.J. 3, 4 (1999).

[2] *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) ("Congress specifically rejected including a causation requirement in [CERCLA]. . . . [and] imposed liability on classes of persons without reference to whether they caused or contributed to the release or threat of release."); Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1138 (N.D. Fla. 1994) (stating CERCLA is a strict liability statute making the parties' intent irrelevant); *see also* Lucia Ann Silecchia, *Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm*, 20 HARV. ENVTL. L. REV. 339, 339–40 (1996) (explaining the goal of CERCLA was to ensure efficient and effective cleanup of contaminated sites as quickly as possible and to do so at the expense of the responsible parties, not the taxpayers); Mark Yeboah, Case Comment, United States v. Atlantic Research*: Of Settlement and Voluntary Incurred Costs*, 32 HARV. ENVTL. L. REV. 279, 279 (2008) (discussing the purpose of CERCLA); *infra* note 7 and accompanying text.

[3] Exxon Corp. v. Hunt, 475 U.S. 355, 359–60 (1986) ("The Act establishes a trust fund, commonly known as 'Superfund.'"), *superseded by statute*, Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)), *as recognized in* Allied Corp. v. Frola, No. 87-462, 1993 U.S. Dist. LEXIS 13343, at *47 n.17 (D.N.J. Sept. 21, 1993) ("After the Supreme Court ruled in *Exxon Corp. v. Hunt* that section 114(c) partially preempted the Spill Act, Congress amended CERCLA and repealed the preemptive language interpreted by the Supreme Court."). *But see Allied*, 1993 U.S. Dist. LEXIS 13343, at *43 ("As the Court noted earlier in this Opinion, Congress designed this CERCLA provision to facilitate settlements of government-initiated Superfund actions.").

[4] *See generally* 42 U.S.C. § 9611(a) (regulating the use of Superfund money).

[5] *See Exxon*, 475 U.S. at 360 (describing that government initiated lawsuits are really claims for reimbursement of expended Superfund monies); *see also* Alfred R. Light, *The Importance of "Being Taken": To Clarify and Confirm the Litigative Reconstruction of CERCLA's Text*, 18 B.C. ENVTL. AFF. L. REV. 1, 1 n.1 (1990) ("[The Superfund] is a trust fueled by taxes on the oil and petrochemical industries, corporations, and general revenues, to be used to clean up releases of hazardous substances into the environment.").

[6] *See* Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 83 (1997) ("Few statutes have generated more controversy and litigation than . . . CERCLA . . . ."); *see, e.g.*,

statutorily-identified PRPs.[7] PRPs range from the owners and operators of contaminated sites to those who transport hazardous substances or otherwise arrange for its disposal.[8] Simply stated, if a PRP falls within one of the four statutorily defined categories, the PRP may be held strictly liable for the resulting harm.[9] In 2009, the United States Supreme Court reversed a decision of the United States Court of Appeals for the Ninth Circuit in one such Superfund case.[10] In *Burlington Northern & Santa Fe Railway Co. v. United States*, the Court held Shell Oil Company (Shell) not liable for cleanup costs as an "arranger" after it knowingly contributed to contamination on a land parcel in Arvin, California.[11] Although Shell knew of the improper management of hazardous materials, the Court reasoned the evidence failed to show Shell sold the contaminating chemicals with the *intent* to dispose of those chemicals.[12]

United States v. Simon Wrecking, Inc., 481 F. Supp. 2d 363, 368–69 (E.D. Pa. 2007) ("[F]ederal agencies are also PRPs."); Differential Dev.-1994, Ltd. v. Harkrider Distrib. Co., 470 F. Supp. 2d 727, 743–45 (S.D. Tex. 2007) (deciding one PRP may sue another PRP if the PRP has been identified under CERCLA); AMCAL Multi-Hous., Inc. v. Pac. Clay Prods., 457 F. Supp. 2d 1016, 1020–22 (C.D. Cal. 2006) (discussing whether a previous land owner is a PRP under CERCLA); Oshtemo v. Am. Cyanamid Co., 898 F. Supp. 506, 508 (W.D. Mich. 1995) (distinguishing between solvent PRPs and insolvent PRPs and the allocation of liability accordingly). *See generally* Annotation, *Governmental Recovery of Costs of Hazardous Waste Removal Under Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.A. §§ 9601 et seq.)*, 70 A.L.R. FED. 329 (1984) (listing and analyzing federal cases in which the government sought to recover cleanup costs under CERCLA).

[7] CERCLA defines potentially liable parties as including

> (1) the owner or operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (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, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan . . . .

42 U.S.C. § 9607 (a)(1)–(4).

[8] *Id.*

[9] *See* Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1078 n.18 (9th Cir. 2006) ("CERCLA is a strict liability statute, and liability can attach even when the generator has no idea how its waste came to be located at the facility from which there was a release."); O'Neil v. Picillo, 883 F.2d 176, 182 n.9 (1st Cir. 1989) (describing that CERCLA is a strict liability statute).

[10] Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1873 (2009).

[11] *Id.*

[12] *Id.*

Burlington Northern effectively resolved a nearly three-decade circuit split by requiring an intent element for the imposition of CERCLA arranger liability.[13] While the case marks a significant change in Superfund jurisprudence, it underscores a larger judicial trend toward a less draconian interpretation of CERCLA.[14] This comment illustrates the evolution of CERCLA interpretation, documenting the transition from traditionally defined strict liability—the interpretation Congress intended—to the much less stringent judicial interpretation set forth in *Burlington Northern*.[15] First, this comment explores the legislative history and general background of the statute.[16] Second, this comment uses the statutorily defined category of "arranger" to trace three judicial interpretations of CERCLA.[17] Third, this comment examines how the current judicial take on CERCLA interpretation stands to impact future Superfund cases.[18] Finally, this comment recommends a legislative amendment to CERCLA in order to return CERCLA to its traditional strict liability roots.[19]

II. BACKGROUND

In order to provide a complete explanation of the evolution of CERCLA judicial interpretation, it is first helpful to provide a general overview of the statute.[20] This section discusses the four types of PRPs in detail, paying specific attention to the judicial interpretive history of the arranger category.[21] Next, the section documents the shift from the imposition of joint and several liability cases to the apportionment of liability in CERCLA cases and offers a rationale for this occurrence despite CERCLA's strict liability provisions.[22]

A. Overview of CERCLA

The April 28, 1953, deal between the Hooker Electro Chemical Company and the Niagara Falls Board of Education seemed too good to be true: one sixteen-acre

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[13] Boyer, *supra* note 1, at 204–05.

[14] *See* Jon-Erik W. Magnus, 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, 3 GOLDEN GATE U. ENVTL. L.J. 427, 427 (2010) ("The United States Supreme Court's decision in Burlington Northern & Santa Fe Railway Co. v. United States limits an expansive interpretation of CERCLA arranger liability found in the jurisprudence of the U.S. Court of Appeals for the Ninth Circuit.").

[15] *See infra* notes 23–115 and accompanying text.

[16] *See infra* notes 23–50 and accompanying text.

[17] *See infra* notes 51–89 and accompanying text.

[18] *See infra* notes 116–68 and accompanying text.

[19] *See infra* notes 169–76 and accompanying text.

[20] *See infra* notes 23–50 and accompanying text.

[21] *See infra* notes 51–89 and accompanying text.

[22] *See infra* notes 90–115 and accompanying text.

parcel of prime New York real estate in exchange for one dollar.[23] Almost twenty years later, the discovery of over 21,000 tons of buried chemical waste beneath the recently developed public school and surrounding residential community proved it was too good to be true.[24] Along with a rising ooze of toxic waste from the ground, a barrage of personal health problems surfaced.[25] Reported conditions included liver problems, birth defects, miscarriages, sores, and rectal bleeding.[26] Despite the monumental human and environmental catastrophe, the Love Canal tragedy, as it came to be known, sparked tremendous interest in and concern over the environment, hazardous waste, and the policy and regulation of both.[27]

Toxic waste seeping into soil and groundwater threatens the environment and the health and safety of the public at large.[28] In 1980, Congress enacted CERCLA to address this public health threat and outlined two goals for the statute.[29] First, CERCLA aimed to ensure prompt remediation of hazardous contamination.[30] Second, Congress sought a mechanism to hold all contributing parties financially

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[23] *See* K. Jason Northcutt, *Reviving CERCLA's Liability: Why Government Agencies Should Recover Their Attorneys' Fees in Response Cost Recovery Actions*, 27 B.C. ENVTL. AFF. L. REV. 779, 784 n.50 (2000) (detailing the deal between the two entities and explaining that while CERCLA was drafted prior to the Love Canal incident it was incidents such as the Love Canal that led to CERCLA's passage).

[24] *See* Norman H. Nosenchuck, *Key Events of the New York Solid Waste Management Program: 1970–1995*, 7 ALB. L.J. SCI. & TECH. 69, 72–74 (1996) (describing the Hooker Electro Chemical Company's practice of burying chemical waste in the Love Canal).

[25] *See* Major Kenneth Michael Theurer, *Sharing the Burden: Allocating the Risk of CERCLA Cleanup Costs*, 50 A.F. L. REV. 65, 77 n.102 (2001) (listing the severe health problems experienced by residents living in the area surrounding the Love Canal).

[26] *Id.*

[27] Katherine Hausrath, *Crossing Borders: The Extraterritorial Application of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")*, 13 U. BALT. J. ENVTL. L. 1, 16 n.149 (2005) (explaining how the notoriety of the Love Canal tragedy sparked increased interest in environmental concerns worldwide); *see* Nosenchuck, *supra* note 24, at 73 (explaining that the Love Canal was the name of the landfill in which the Hooker Electro Chemical Company buried chemical waste).

[28] *See* Solid State Circuits, Inc. v. U.S. Env't Prot. Agency, 812 F.2d 383, 387 (8th Cir. 1987) (recognizing the "grave consequences arising from delays in cleaning up hazardous waste sites"); Lone Pine Steering Comm. v. U.S. Env't Prot. Agency, 777 F.2d 882, 886 (3d Cir. 1985) (discussing the danger hazardous waste sites posed to public health); *see also* McCroy, *supra* note 1, at 4; B.R. MacKay & Sons, Inc. v. United States, 633 F. Supp. 1290, 1293 (D. Utah 1986) (describing that the improper disposal of hazardous waste can have severe environmental and public health effects).

[29] *See* Silecchia, *supra* note 2, at 339–40.

[30] H.R. REP. NO. 99-253, pt. 3, at 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038 ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups."); *see* Price v. U.S. Navy, 39 F.3d 1011, 1015 (9th Cir. 1994) ("CERCLA was enacted to facilitate the cleanup of environmental contamination caused by hazardous waste releases."); United States v. Colorado, 990 F.2d 1565, 1570 (9th Cir. 1993) ("Congress enacted CERCLA in 1980 'to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste

responsible for the cost of cleanup rather than burdening the taxpaying public.[31] In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA) to further accomplish these two goals.[32]

CERCLA is a strict liability statute.[33] Traditionally, the elements of negligence and intent are not relevant in assessing liability in strict liability statutes.[34]

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disposal sites.'"); Boarhead Corp. v. Erickson, 923 F.2d 1011, 1019 (3d Cir. 1991) ("Congress enacted CERCLA so that the EPA would have the authority and the funds necessary to respond expeditiously to serious hazards without being stopped in its tracks by legal entanglement before or during the hazard clean-up."); United States v. M. Genzale Plating, Inc., 723 F. Supp. 877, 883 (E.D.N.Y. 1989) ("The purpose of CERCLA is to enable the President to target and clean up hazardous waste sites in an efficient manner."); United States v. Rohm & Hass Co., 669 F. Supp. 672, 674 (D.N.J. 1987) ("In CERCLA, Congress established a statutory scheme to ensure prompt and efficient clean-up of hazardous waste disposal sites."); Pac. Resins & Chems., Inc. v. United States, 654 F. Supp. 249, 253 (W.D. Wash. 1986) ("The purpose of Congress in passing CERCLA was to establish the authority and funding for the prompt, unhindered clean-up of dangerous hazardous waste sites without the need to await a judicial determination of liability or even before any final agency determination of liability.").

[31] *See* United States v. Witco Corp., 865 F. Supp. 245, 247 (E.D. Pa. 1994). *Witco* outlines the two primary goals of CERCLA:

> (1) enabling the EPA to respond efficiently and promptly to toxic spills, and (2) holding parties responsible for releases liable for the costs of the cleanup. In that way, Congress envisioned the EPA's costs would be recouped, the Superfund preserved, and the taxpayers not required to shoulder the financial burden of nationwide cleanup.

Id.; *accord* B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89, 94 (D. Conn. 1988) (citing the "twin goals" of CERCLA as a means to the prompt and effective response to hazardous waste contamination and to ensure that "those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibilities for remedying the harmful conditions they created"); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D.C. Minn. 1982) (discussing the two goals Congress sought to achieve by passing CERCLA); James B. Brown & Michael V. Sucaet, *Environmental Cleanup Efficiency: Private Recovery Actions for Environmental Response Costs*, 7 COOLEY L. REV. 363, 363–71 (1990) (analyzing CERCLA's polluter pays philosophy).

[32] Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)).

[33] *See* Bell Petroleum Serv., Inc. v. Sequa Corp., 3 F.3d 889, 897 (5th Cir. 1993) (recognizing CERCLA as a strict liability statute); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989) (ruling that arranger liability under CERCLA requires intent); Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1138 (N.D. Fla. 1994) (finding that CERCLA is a strict liability statute thus making the parties' intent irrelevant). One court described Congress's intent to have CERCLA be a strict liability statute as follows,

> Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise. Section 9601(32) provides that "liability" under CERCLA "shall be construed to be the standard of liability" under section 311 of the Clean Water Act, 33 U.S.C. § 1321, which courts have held to be strict liability . . . .

New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).

[34] *See Shore Realty*, 759 F.2d at 1044 ("Congress specifically rejected including a causation requirement in . . . [CERCLA] . . . . [And] imposed liability on classes of persons without reference to whether they caused or contributed to the release or threat of release."); *see, e.g.*, Babbit v. Sweet

Liability under CERCLA follows a "polluter pays" scheme: mandating parties responsible for hazardous waste mismanagement should also be held responsible for its cleanup.[35] Liability attaches to a party when a plaintiff can prove four elements: "(1) that the site in question is a 'facility'. . . ; (2) that the defendant is a responsible person . . . ; (3) that a release or a threatened release of a hazardous substance has occurred; and (4) that the release or threatened release has caused the plaintiff to incur response costs."[36] The term "facility" is defined broadly under the statute and generally encompasses any place where hazardous substances are located.[37] PRPs are defined as follows: (1) the current owners or operators of a contaminated site;[38] (2) the past owners or operators of a contaminated site;[39]

Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 712 (1995); New Mexico v. Gen. Elec. Co., 467 F.3d 1223, 1246 (10th Cir. 2006); Deadham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989); Yankee Gas Servs. Co. v. UGI Utils., Inc., 616 F. Supp. 2d 228, 270 (D. Conn. 2009); United States v. JG-24, Inc., 331 F. Supp. 2d 14, 61 (D.P.R. 2004); United States v. Union Corp., 259 F. Supp. 2d 356, 396 (E.D. Pa. 2003); Colorado v. Idarado Mining Co., 707 F. Supp. 1227, 1230–41 (D. Colo. 1989); *see also* Tommy Tucker Henson II, *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, 941–76 (2008) (generally discussing how strict liability is applied in CERCLA cases); Thomas Kearns, *An Examination of, and Suggested Revisions to, CERCLA's Provisions Waiving the Federal Government's Sovereign Immunity From Actions Based on State Law*, 5 BUFF. ENVTL. L.J. 17, 30 (1997) ("Lack of intent, lack of negligence, or lack of the existence of a duty of care are not defenses to an action based upon strict liability." (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 75 (5th ed. 1984))).

[35] *See* Magnus, *supra* note 14, at 430 ("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.'").

[36] Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1990); *see* 42 U.S.C. § 9601(9) (2006). Facility is a defined term:

> 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.

42 U.S.C. § 9601(9).

[37] *See* Magnus, *supra* note 14, at 431 ("A 'facility' is another broadly defined term describing areas for storage, handing [sic] or disposal of hazardous substances.").

[38] Courts have defined owner or operator in a fairly consistent manner:

> Under the plain language of the statute, any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution. See 42 U.S.C. § 9607(a)(2). This is so regardless of whether that person is the facility's owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice.

United States v. Bestfoods, 524 U.S. 51, 56 (1998).

[39] *See* Alliedsignal, Inc. v. Amcast Int'l Corp., 177 F. Supp. 2d 713, 729–30 (S.D. Ohio 2001) ("In addition to the text of CERCLA, its legislative history is indicative of clear Congressional intent that the statute should be applied retroactively.").

(3) individuals or entities which "arranged for" the disposal or treatment of hazardous substances;[40] and, (4) individuals or entities which accept hazardous substances for transportation to a contaminated site.[41]

Because Congress designed CERCLA as a strict liability statute, it offers defendants a limited number of defenses.[42] Defendants in CERCLA actions can argue the contamination in question resulted from an act of God or war.[43] Alternatively, defendants may argue that a third party, with whom the defendant had no legal relationship, caused the contamination.[44]

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[40] *See* United States v. Shell Oil Co., 294 F.3d 1045, 1054 (9th Cir. 2002) ("[A]n arranger is a 'covered person' and is thus liable for cleanup costs."). There are two kinds of arranger liability: (1) direct arranger liability wherein there is no doubt that the arranger contracted for the delivery of the hazardous substance to the contaminated site, and (2) broader arranger liability wherein liability attaches if control over the process that created the waste may be shown. *Id.* at 1054–59.

[41] *See* Tippins, Inc. v. USX Corp., 37 F.3d 87, 95 (3d Cir. 1994).

[42] *See* Gen. Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990) (citing United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377–78 (8th Cir. 1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2nd Cir. 1985)) ("CERCLA is a strict liability statute, with only a limited number of statutorily-defined defenses available.").

[43] *See* 42 U.S.C. § 9607(b) (2006). The only defenses available under CERCLA are defined in the statute:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> (1) an act of God;
> (2) an act of war;
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
> (4) any combination of the foregoing paragraphs.

Id. But see Alfred R. Light, *Restatement for Arranger Liability Under CERCLA: Implications of* Burlington Northern *for Superfund Jurisprudence*, 11 VT. J. ENVTL. L. 371, 384 n.69 ("That only express defenses are recognized does not mean that certain other universally applicable legal principles, sometimes denominated as affirmative defenses but not explicitly endorsed in CERCLA's language . . . are unavailable.").

[44] *See Gen. Elec. Co.*, 920 F.2d at 1418 (defendants may argue "that the release was caused solely by a third party whose actions were not foreseeable by the defendant, who was exercising due care . . . . The third party must not be an employee or agent of the defendant, nor have entered into a contractual relationship with the defendant" (citations omitted)). Proving one of these defenses under CERCLA is extremely difficult. *See, e.g.*, *Shore Realty Corp.*, 759 F.2d at 1037 (holding the defendant could not rely on any of the defenses listed in CERCLA).

Although CERCLA is a strict liability statute, courts have not mandated joint and several liability in every case.[45] In *United States v. Chem-Dyne Corp.*, for example, the United States District Court for the Southern District of Ohio concluded the congressional intent of assessing liability in CERCLA cases is to "be determined from traditional and evolving principles of common law."[46] Today, section 433A of the Restatement (Second) of Torts serves as the universal base for apportionment analysis in CERCLA cases, and courts have concluded if the harm in question is divisible and there is a reasonable means to determine the contribution of each respective PRP, then apportionment is an acceptable alternative to joint and several liability.[47] As per CERCLA's purpose of holding contaminators responsible for their conduct, the burden of proof lies with the PRP to demonstrate the harm in question is in fact divisible.[48] The plaintiff bears no such burden.[49] When harm is not divisible, each PRP remains subject to liability for the entire harm.[50]

B. Arranger Liability: A Snapshot of the Judicial Variance with CERCLA Interpretation

Although CERCLA identifies four broad categories of PRPs, litigation over the meaning of "arranger" has proven most contentious.[51] CERCLA defines an arranger as "any person who by contract, agreement, or otherwise arranged for

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[45] *See* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983) (recognizing that joint and several liability is not mandated under CERCLA and that the burden of proof to support apportionment is borne by the party attempting to escape or limit liability).

[46] *Id.* at 808.

[47] RESTATEMENT (SECOND) OF TORTS § 433A (1965); *see* Chem-Nuclear Sys., Inc. v. Bush, 292 F.3d 254, 259 (D.C. Cir. 2002); United States v. Hercules, Inc., 247 F.3d 706, 717 (8th Cir. 2001); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989); *see also supra* note 33 and accompanying text.

[48] United States v. Bestfoods, 524 U.S. 51, 56 n.1 (1998) ("The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 21 (1989) (plurality opinion))); *see, e.g.*, Centerior Serv. Co. v. Acme Scrap & Metal Corp., 153 F.3d 344, 348 (6th Cir. 1998); United States v. Alcan Aluminum Corp., 990 F.2d 711, 721–22 (2d Cir. 1993); United States v. Alcan Aluminum Corp., 964 F.2d 252, 268–69 (3d Cir. 1992); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); *supra* note 33 and accompanying text.

[49] *See* Purolator Prods. Corp. v. Allied-Signal, Inc., 772 F. Supp. 124 (W.D.N.Y. 1991) (holding that liability in CERCLA cases is joint and several unless liable parties can prove that the harm is divisible); *see also* Kearns, *supra* note 34, at 32 n.70 (explaining the presumption of joint and several liability "negates the existence of any affirmative burden on the plaintiff to show indivisibility of harm").

[50] RESTATEMENT (SECOND) OF TORTS § 881 (1979).

[51] *See, e.g.*, United States v. Shell Oil Co., 294 F.3d 1045 (9th Cir. 2002); *Hercules*, 247 F.3d 706; Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160, 164 (2d Cir. 1999); Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562 (9th Cir. 1994); Catellus Dev. Corp. v. United States, 34 F.3d

disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances."[52] Courts have varied greatly in the interpretation of this definition.[53] Contentions arise mainly with regard to the meaning of "arranged for," which Congress left undefined in the statute.[54] Generally, the circuit courts have relied on one of three approaches: "(1) a strict liability approach; (2) a specific intent approach; and (3) a 'totality of the circumstances' or case-by-case approach."[55] These three approaches exemplify the slow but steady judicial trend of decreasing liability under CERCLA.[56] The varying approaches provide an appropriate lens through which to trace the changing judicial attitude towards CERCLA's strict liability approach.

1. The Strict Liability Approach: A Broad Interpretation of CERCLA Arranger Liability

Courts subscribing to the broadest interpretation of CERCLA's arranger provision assert that those who arrange for hazardous waste disposal are subject

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748 (9th Cir. 1994); Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990). *See generally* Anna Marple Buboise, *Expanding the Scope of Arranger Liability Under CERCLA*, 43 U. KAN. L. REV. 469, 473 (1995) (citing Jeffery M. Gaba, *Interpreting Section 107(A)(3) of CERCLA: When Has a Person "Arranged for Disposal?"*, 44 SW. L.J. 1313, 1314 (1991)) ("The most problematic component of section 9607(a)(3), and that which is most subject to judicial interpretation, is the phrase 'or otherwise arranged for disposal.'").

[52] 42 U.S.C. § 9607(a)(3) (2006); *see* United States v. CDMG Realty Co., 96 F.3d 706, 713 (3d Cir. 1996) (defining disposal as including "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 . . . waste . . . may enter the environment or . . . be discharged into any waters, including ground waters").

[53] *Compare* Geraghty & Miller, Inc. v. Conoco Inc., 234 F.3d 917, 929 (5th Cir. 2001) ("'Arranger' is [a] CERCLA term that is to be given a liberal interpretation."), *and Aceto*, 872 F.2d at 1380 (rejecting the argument that a pesticide company could only be liable if it "intended" to dispose of waste, and noting that such a narrow reading would frustrate the goals of CERCLA), *with* Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 775 (4th Cir. 1998) (holding CERCLA is not to be broadly interpreted), *and* United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1231–32 (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."). *See generally* S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 407 (11th Cir. 1996) (adopting an interpretation of CERCLA in which knowledge and intent are not determinative of arranger liability); Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993) (reading a requirement of intent in order for arranger liability to attach); Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 973 F.2d 688, 695 (9th Cir. 1992) ("The agreement between Beazer and J-H contemplated 2% spillage of materials. Thus, it is clear that under the agreement Beazer 'arranged for disposal' of toxic substances within the meaning of section 9607."); *infra* notes 57–89 and accompanying text.

[54] *See* Walewska Watkins, Note, Burlington Northern & Santa Fe Railway Co. v. United States*: The Supreme Court Arranges for Disposal of CERCLA's Strict liability*, 23 TUL. ENVTL. L.J. 203, 208 (2009) ("The statute . . . does not define the phrases 'arranged for' or 'arranged with.'").

[55] Boyer, *supra* note 1, at 204–05.

[56] *See infra* notes 57–115 and accompanying text.

to strict liability, and intent to dispose of hazardous materials need not be demonstrated for arranger liability to attach.[57] Judicial decisions in the years immediately following CERCLA's enactment heavily favored this interpretation.[58] For these courts, the question of liability hinged on whether the arranger contributed—either knowingly or unknowingly—to the hazardous waste contamination.[59] Arranger liability became triggered by mere participation in the contamination and did not include the more specific inquiry into whether the arranger acted with the intent to dispose of the hazardous substances at issue.[60]

In *United States v. Aceto Agricultural Corp.*, the United States Court of Appeals for the Eighth Circuit became the first federal appellate court to expressly adopt this principle and enforce strict liability on arrangers.[61] Historically, *Aceto* served as the seminal case for the broad application of arranger liability.[62] In *Aceto*, the State of Iowa and the Environmental Protection Agency (EPA) sought over ten million dollars in response costs following the remediation of a contaminated pesticide manufacturing facility owned by the Aidex Corporation.[63] After Aidex's bankruptcy, the EPA and Iowa argued six companies that had contracted with Aidex for various chemical treatment processes at the contaminated site should

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[57] *See* United States v. Gordon Stafford, Inc., 952 F. Supp. 337, 340 (N.D. W. Va. 1997) ("In finding the pesticide manufacturers had 'arranged for' the disposal of wastes, the Eighth Circuit did not require the United States to show that the pesticide manufacturers intended for the wastes to be disposed."); *see also Aceto*, 872 F.2d at 1377–78 (citing United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 732 n.3 (8th Cir. 1986)); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808–10 (S.D. Ohio 1983).

[58] *See supra* note 57 and accompanying text.

[59] *See Gordon Stafford*, 952 F. Supp. at 339–41.

[60] *See Aceto*, 872 F.2d at 1377; *infra* notes 61–72.

[61] *Aceto*, 872 F.2d at 1377 (explaining that proof a PRP intended to dispose of hazardous waste need not be shown for arranger liability to attach). While the Eighth Circuit was the first federal appellate court to adopt the expansive view of CERCLA arranger liability, it was not the first court. S*ee generally* Anita Letter, *Reasonable Inference of Authority to Control Hazardous Waste Disposal Results in Potential Liability:* United States v. Aceto Agricultural Chemicals Corporation, 31 NAT. RES. J. 673 (1991) (documenting the expansion of CERCLA arranger liability); Kim Ruckdaschel-Haley, Note, *"Arranging for Disposal of Hazardous Substances"*: *Expansive CERCLA Liability for Pesticide Manufacturers After* U.S. v. Aceto Agricultural Chemicals Corp, 35 S.D. L. REV. 251 (1990) (discussing that *Aceto*'s expansive view of arranger liability comported with lower court precedent as well as with the growing trend of expanding arranger liability under CERCLA).

[62] *See, e.g.*, United States v. Shell Oil Co., 294 F.3d 1045, 1059 (9th Cir. 2002); Cox v. City of Dallas, 256 F.3d 281, 294 (5th Cir. 2001); Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160, 163 (2d Cir. 1999); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 847 (4th Cir. 1992); Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990); United States v. Valentine, 856 F. Supp. 627, 631 (D. Wyo. 1994); United States v. Hardage, 761 F. Supp. 1501, 1508 (W.D. Okla. 1990).

[63] *Aceto*, 872 F.2d at 1375. EPA investigations revealed the existence of hazardous substances in deteriorating containers, in the soil, in fauna samples, and in the groundwater, which in turn threatened the source of irrigation and drinking water for nearby residents. *Id.*

be held liable under a broad theory of CERCLA arranger liability.[64] The EPA and Iowa argued the companies had "arranged for" the disposal of hazardous waste because of the inherent nature of the pesticide processing business and should, therefore, be held strictly liable under CERCLA's arranger provision.[65]

The Eighth Circuit began its analysis by looking at the language and goals of the statute.[66] The court surmised the broad language of CERCLA combined with its "'overwhelmingly remedial' statutory scheme" indicated the appropriateness of a broad, "liberal judicial interpretation" of arranger.[67] It specifically rejected the use of a dictionary derived narrow definition of the word "arranger," a definition which the defendant companies argued mandated a showing of specific intent to dispose of a hazardous substance by the arranger in order for liability to attach.[68] The *Aceto* court also noted CERCLA's legislative history expressly stated liability could not be easily circumvented through creative labeling practices and "knowledge or imputed knowledge" of improper disposal could be enough to impose strict liability.[69] Further, the *Aceto* court recognized strict liability may be imposed even when defendants had no actual knowledge of the illegal disposal of hazardous materials.[70]

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[64] *Id.* at 1379.

[65] *Id.* The EPA and Iowa argued Aidex's participation in and knowledge of pesticide production was enough to demonstrate its intent to dispose:

> Plaintiffs argue that because the generation of pesticide-containing wastes is *inherent* in the pesticide formulation process, Aidex could not formulate defendants' pesticides without wasting and disposing of some portion of them. Thus, plaintiffs argue, defendants could not have hired Aidex to formulate their pesticides without also "arranging for" the disposal of the waste.

Id.

[66] *Id.*

[67] *Id.* at 1380 (quoting Ne. Pharm. & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1989)).

[68] *Id.* ("We reject defendants' narrow reading of . . . the statute.").

[69] *Id.* at 1381. The *Aceto* court believed knowledge of any improper disposal was enough to trigger liability:

> [T]he court emphasized G.E. allegedly arranged for the dragstrip to take away its used transformer oil with "knowledge or imputed knowledge" that the oil would be deposited on the land surrounding the dragstrip. . . . Stating that CERCLA liability could not be "facilely circumvented" by characterizing arrangements as "sales," the *G.E.* court cited CERCLA's legislative history: "[P]ersons cannot escape liability by 'contracting away' their responsibility or alleging that the incident was caused by the act or omission of a third party."

Id. (citations omitted) (quoting New York v. Gen. Elec. Co., 592 F. Supp. 291, 297 (N.D.N.Y. 1984)).

[70] *Id.* (citing United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985); Missouri v. Indep. Petrochemical Corp., 610 F. Supp. 4, 5 (E.D. Mo. 1985); United States v. Wade, 577 F. Supp. 1326, 1333 n.3 (E.D. Pa. 1983)).

Thus, in *Aceto*, the Eighth Circuit held intent to dispose of hazardous waste is not required for the imposition of strict liability under CERCLA's arranger provision.[71] The court's decision to interpret CERCLA's language with an expansive view and to turn toward the legislative history and goals of the statute for guidance has subsequently been followed by other courts.[72]

2. *The Specific-Intent Approach: A Narrow Interpretation of Arranger Liability*

In contrast to the broad view adopted by the Eighth Circuit Court of Appeals in *Aceto*, the United States Court of Appeals for the Seventh Circuit utilized a much narrower specific-intent approach beginning in 1993.[73] Courts following this approach determine liability based upon the specific reason behind the transaction of hazardous substances.[74] Generally, these courts require proof a PRP acted with the specific intent to dispose of hazardous substances before imposing arranger liability under CERCLA.[75] Knowledge or potential knowledge of current or future contamination alone is insufficient to trigger arranger liability under this interpretation.[76]

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[71] *Id.* at 1380.

[72] *See* United States v. Alcan Aluminum Corp., 990 F.2d 711, 721 (2d Cir. 1993) (holding that for the imposition of strict liability under CERCLA the government need only prove: (1) there was a release or threatened release, which (2) caused incurrence of response costs, and (3) that the defendant generated hazardous waste at the clean-up site); Jones-Hamilton Co. v. Beazer Materials & Serv. Inc., 973 F.2d 688, 695 (9th Cir. 1992) (agreeing with the Eight Circuit that requiring "intent" would frustrate CERCLA's goal of making the companies that were responsible for producing hazardous waste pay for cleanup); Gen. Elec. Co. v. Aamco Transmissions, Inc., 962 F.2d 281, 286 (2d Cir. 1992) ("[This] court concludes that it is the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision."); Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990) ("In light of the broad remedial nature of CERCLA, we conclude, as other courts have, that even though a manufacturer does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed, the manufacturer may be liable."); *see also* Buboise, *supra* note 51, at 477 ("The *Aceto* line of cases confirms courts' willingness to extend CERCLA liability to parties engaging in transactions intended primarily to produce useful materials that also result in waste disposal.").

[73] Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993) ("Although the statute defines disposal to include spilling, the critical words for present purposes are 'arranged for.' The words imply intentional action."); *see* Aaron Gershonowitz, Comment, *Superfund "Arranger" Liability: Why Ownership of The Hazardous Substance Matters*, 59 S.C. L. REV. 147, 148 (2007).

[74] Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651, 655 (N.D. Ill. 1988) (noting "the crucial inquiry" in determining arranger liability is the reason behind the transaction of hazardous substance).

[75] *See, e.g.*, Ekotek Site PRP Comm. v. Self, 932 F. Supp. 1328, 1336 (D. Utah 1996) (finding a specific-intent requirement for arranger liability to be compatible with CERCLA's strict liability scheme); G.J. Leasing Co., Inc. v. Union Elec. Co., 854 F. Supp. 539, 559 (S.D. Ill. 1994) ("[T]he phrase 'arranged for' implies intentional action."), *aff'd*, 54 F.3d 379 (7th Cir. 1995).

[76] *Vulcan*, 685 F. Supp. at 656.

The Seventh Circuit Court of Appeals broke from precedent and established the narrow, specific-intent approach to CERCLA arranger liability in *Amcast Industrial Corp. v. Detrex Corp*.[77] In that case, Elkhart, a manufacturing company, sought post-remediation contribution from Detrex Corporation, a chemical manufacturer, from whom it had purchased trichloroethylene, a hazardous substance.[78] Elkhart sought contribution based on evidence suggesting both Detrex and the carrier it hired to transport the trichloroethylene were responsible for the environmental harm caused by repeated spills.[79] Such spills occurred while filling Elkhart's storage tanks.[80]

The court reasoned Detrex could not be held liable under a theory of arranger liability because Detrex hired its carrier to transport the trichloroethylene and not to dispose of it.[81] The court found the words "arranged for" implied intentional action, and as such Detrex was not liable for the harm caused by its carrier because Detrex lacked the requisite intent to dispose.[82] In other words, Detrex was not liable because it did not intentionally arrange for the spilling of the trichloroethylene.[83]

3. The Totality of the Circumstances Approach: A Middle Ground Interpretation

The existing divide between a narrow interpretation of CERCLA's arranger provision and a broader interpretation led to the development of a middle ground, or case-by-case approach, to assessing arranger liability.[84] In 1996, in

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[77] *Amcast*, 2 F.3d 746; *see* Beth A. Caretti, Amcast Industrial Corp. v. Detrex Corp.*: The Shippers Exception to CERCLA and How it Compares in "Arranging For" Environmental Liability*, 41 WAYNE L. REV. 227, 228 (1994) (explaining how the *Amcast* decision differs from other circuits and goes against the statute's broad language and legislative history); David W. Lannetti, *"Arranger Liability" Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Judicial Retreat from Legislative Intent*, 40 WM. & MARY L. REV. 279, 296 n.82 (1998) ("Shortly after the *Amcast* decision, legal scholars recognized Posner's opinion as a deviation from over a decade of previous case law upholding strict CERCLA arranger liability.").

[78] *Amcast*, 2 F.3d at 747.

[79] *Id.*

[80] *Id.* Almost 800 gallons of trichloroethylene were discovered in the groundwater beneath a pharmaceutical plant adjacent to Elkhart's plant. *Id.* at 747–48.

[81] *Id.* at 751 ("Detrex hired a transporter, all right, but it did not hire it to spill TCE on Elkhart's premises.").

[82] *Id.* ("Although the statute defines disposal to include spilling, the critical words for present purposes are 'arranged for.' The words imply intentional action.").

[83] *Id.* ("It did not arrange for spilling the stuff on the ground. No one arranges for an accident, except in the sinister sense, not involved here, of 'staging' an accident—that is, causing deliberate harm but making it seem accidental.").

[84] *See* United States v. TIC Inv. Corp., 68 F.3d 1082, 1088–90 (8th Cir. 1995) (holding arranger liability requires some level of actual participation in activities connected to the arrangement for disposal). *See generally* Vincent S. Capone, *A Preemptive Limitation of CERCLA*

South Florida Water Management District v. Montalvo, the United States Court of Appeals for the Eleventh Circuit adopted a multifactor analysis for determining whether a party actually arranged for the disposal of hazardous substances.[85] The court identified knowledge of disposal, ownership of the hazardous substances, and intent as relevant factors in determining arranger liability.[86]

The judicial flexibility of the totality of the circumstances approach led to its swift appropriation by other courts.[87] In deciding *Mathews v. Dow Chemical Co.*, the United States District Court of Colorado, for example, exemplified the reasoning of courts adopting this approach.[88] In that case the court adopted the totality of the circumstances approach over the two polar views because the case-by-case basis was "most faithful to the statutory language and purposes of CERCLA."[89]

C. Burlington Northern *Marks an End to the Judicial Variance*

For nearly thirty years, the agricultural chemical distribution business of Brown and Bryant, Inc. (B&B) purchased large quantities of chemicals from suppliers such as Shell and then sold those chemicals to surrounding Arvin, California, farms.[90] Beginning operations on its own 3.8 acre parcel of land in 1960, B&B later expanded onto an adjacent 0.9 acre parcel owned jointly by the Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Transportation Company (Railroads).[91] Until 1975, both parcels drained into an unlined slump and pond at the southeast corner of B&B's main parcel.[92]

Arranger Liability—South Florida Water Management District v. Montalvo, 16 TEMP. ENVTL. L. & TECH. J. 139 (1997) (explaining how *Montalvo* represented a departure from prior precedent regarding arranger liability).

[85] 84 F.3d 402, 407 (11th Cir. 1996) ("When determining whether a party has 'arranged for' the disposal of a hazardous substance, courts must focus on all of the facts in a . . . case.").

[86] *Id.*

[87] *See, e.g.*, Briggs & Stratton Corp. v. Concrete Sales & Servs., Inc., 990 F. Supp. 1473, 1479 (M.D. Ga. 1998) (citing *Montalvo*, 84 F.3d at 407) ("Whether arranger status is found must depend upon the particular facts of each case, using the guidelines of the relevant caselaw along with other pertinent factors in each individual instance."); United States v. Gordon Stafford, Inc., 952 F. Supp. 337, 339–40 (N.D. W. Va. 1997); Mathews v. Dow Chem. Co., 947 F. Supp. 1517, 1523–25 (D. Colo. 1996); Lannetti, *supra* note 77, at 301 ("With its inherent judicial flexibility, other courts quickly adopted this case-by-case approach.").

[88] *Mathews*, 947 F. Supp. at 1525.

[89] *Id.*

[90] Burlington N. & Santa Fe Ry. v. United States, 129 S. Ct. 1870, 1873 (2009).

[91] *Id.* The Atchison, Topeka & Santa Fe Railway Company, and the Southern Pacific Transportation Company are now known respectively as the Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company. United States v. Burlington N. & Santa Fe Ry. Co., 502 F.3d 781 (9th Cir. 2007), *rev'd*, 129 S. Ct. 1870 (2009).

[92] *Burlington*, 129 S. Ct. at 1874–75.

In the early 1980s, the California Department of Toxic Substances Control and the EPA (Agencies) commenced investigations of the B&B Arvin facility.[93] The levels of soil and ground water contamination were so significant that, by 1989, the EPA decided to commence cleanup actions.[94] That same year B&B became insolvent and ceased all operations.[95] Acting under the powers provided by CERCLA, the Agencies proceeded to spend over eight million dollars in remediation costs on the contaminated site.[96]

Seeking reimbursement for the expended costs, the Agencies filed recovery actions against Shell and the Railroads in the United States District Court for the Eastern District of California.[97] The Agencies argued liability lay with both companies under CERCLA: Shell as an arranger for the disposal of hazardous materials through its sales to B&B, and the Railroads as landowners of a portion of the contaminated site.[98]

Following divergent decisions by the district court and the Ninth Circuit, the United States Supreme Court granted certiorari to resolve the issue.[99] On May 4, 2009, the Court reversed the decision of the Ninth Circuit and exonerated Shell from liability.[100] The Court reasoned that although Shell knew of B&B's improper management of hazardous materials, the evidence failed to show that Shell sold the chemicals to B&B with the *intent* to dispose of those chemicals.[101] Congress did not specifically define "arrange" in CERCLA, and as such the Court used the plain and ordinary meaning of the word to conclude an entity must take intentional steps to dispose of a hazardous substance in order to trigger arranger liability.[102] The Court decided it unlikely Shell intended to dispose of an unused, useful product and precluded Shell from all liability.[103] On the second

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[93] *Id.*

[94] *Id.* (describing that the Arvin site was added to the National Priorities List in 1989). The EPA annually publishes The National Priorities List for Uncontrolled Hazardous Waste Sites which includes a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. 42 U.S.C. § 9613(g)(1)(b) (2006).

[95] *Burlington*, 129 S. Ct. at 1876.

[96] *Id.*

[97] United States v. Atchison, Topeka & Santa Fe Ry., No. CV-F-92-5068 OWW, 2003 U.S. Dist. LEXIS 23130, at *5–6 (E.D. Cal. Jul. 14, 2003), *rev'd*, 520 F.3d 918 (2008). Since each agency conducted research and investigation into the extent of the contamination, both contributed to cleanup costs as defined by CERCLA in 42 U.S.C. §§ 9601–9675. *Id.*

[98] *Burlington*, 129 S. Ct. at 1876.

[99] *Id.* at 1876–77.

[100] *Id.* at 1878.

[101] *Id.* at 1880.

[102] *Id.* at 1879.

[103] *Id.* at 1880.

issue concerning apportionment, the Court found the Ninth Circuit erred in imposing joint and several liability on the Railroads.[104] In an affirmation of the district court's decision, the Court held apportionment in the matter comported with precedent and that the nine percent Railroad liability allocation was evidentially supported.[105]

1. Justice Ginsburg's Dissenting Opinion

The dissent took issue with the majority's view on both the arranger liability issue and the apportionment issue.[106] According to the dissent, Shell should have qualified as an arranger under CERCLA because Shell arranged for disposal of the hazardous materials.[107] The dissent pointed to the transfer process itself and that Shell specified the equipment to be used in the transfer and storage of chemicals from Shell's trucks to B&B's storage facility.[108] It was Shell's decision, the dissent noted, to move from the use of small drums to bulk tank truckloads in an effort to save money.[109] This method of larger volume shipping "led to numerous tank failures and spills as the chemical rusted tanks and eroded valves . . . . In the process, spills and leaks were inevitable, indeed spills occurred every time deliveries were made."[110] Because Shell knew of and continually contributed to the spills for twenty years, the dissent argued it should be held liable under the theory of arranger liability.[111] In accordance with this reasoning, the dissent agreed with the Ninth Circuit's observation that the fact Shell sold useful products to B&B was not enough to absolve Shell of liability.[112]

On the issue of apportionment, the dissent broke with the rationale utilized by both the district court and the Ninth Circuit, however, and found fault not in the issue of assessing joint and several liability, but rather in whether the district court should have apportioned liability in the manner utilized.[113] The dissent pointed out there was no precedent by which the court could support their apportionment calculations and that the court should not have pursued the

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[104] *Id.* at 1880–84.

[105] *Id.* at 1882–83.

[106] *Id.* at 1884–86.

[107] *Id.* at 1884–85.

[108] *Id.* at 1885.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* at 1885–86.

matter on its own.[114] The dissent stressed neither the Agencies nor the PRPs were given an equitable opportunity to address or rebut the court's apportionment scheme, let alone advocate for an alternative method.[115]

III. ANALYSIS

Through the adoption of a narrow interpretation of arranger liability, the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, stands in direct conflict with the primary purpose of CERCLA: to hold all polluting contributors strictly liable for remediation costs rather than passing those costs on to the tax-paying public.[116] The decision, however, is not entirely unfounded; it represents the culmination of slow but steady judicial favoritism towards a less draconian interpretation of CERCLA's strict-liability provisions.[117] From the time of CERCLA's enactment in 1980 up to the *Burlington Northern* decision in 2009, increasingly narrow judicial interpretation of the statute has resulted in less extensive punishment for polluting parties.[118] Because the *Burlington Northern* decision sets forth a finalized interpretation of this narrow judicial trend and marks an end to the circuit court splits, it will unfortunately serve as the governing case for all CERCLA cases involving the issue of arranger liability.[119]

In *Burlington Northern*, the United States Supreme Court made two major errors in reversing the United States Court of Appeals for the Ninth Circuit's decision on arranger liability.[120] First, the Court erroneously found "arrange for" unambiguous and undertook a superficial statutory interpretation of CERCLA arranger liability.[121] Second, the Court misconstrued the seminal case *Amcast* and

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[114] *Id.* (noting the majority should not have performed the calculations *sua sponte*); *see* Castro v. United States, 540 U.S. 375, 386 (2003) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.").

[115] *Burlington*, 129 S. Ct. at 1886.

[116] *See* Watkins, *supra* note 54, at 217–18; *see also supra* note 2 and accompanying text.

[117] *See supra* notes 23–116 and accompanying text (discussing the numerous cases leading to the Supreme Court's decision in *Burlington*).

[118] *See* Watkins, s*upra* note 54, at 217–18. *But see* Martha L. Judy, *Coming Full CERCLA: Why* Burlington Northern *is Not the Sword of Damocles for Joint and Several Liability*, 44 NEW ENG. L. REV. 249, 255 (2010) (explaining how *Burlington Northern* is not the end to strict liability in CERCLA cases involving apportionment).

[119] *See* John M. Barkett, Burlington Northern*: The Super Quake and Its Aftershocks*, CHEM. WASTE LITIG. REP. (INTERIM BULLETIN) 16 (May 15, 2009), *available at* http://www.shb.com/attorneys/Barkett/BurlingtonNorthern.pdf ("*Burlington Northern* is on its way to becoming the most-cited decision in future Superfund jurisprudence.").

[120] *See infra* notes 125–49 and accompanying text.

[121] *See infra* notes 125–33 and accompanying text.

adopted an overtly constricting interpretation of an already narrow approach to CERCLA arranger liability.[122] In ruling on the issue of apportionment, however, the Court recognized congressional intent in enacting CERCLA and correctly held that apportionment is an appropriate method for distributing liability in similar CERCLA cases.[123] The Court's decision on apportionment encourages the distribution of liability to all responsible parties, whereas the Court's adopted position on arranger liability conflicts with this core CERCLA ideal.[124]

A. The Court Erred in its Statutory Interpretation of CERCLA

The Court's failure to follow the basic canons of statutory interpretation resulted in the adoption of a superficial interpretation of "arranger" and a decision contrary to CERCLA's purpose.[125] When faced with questions of statutory interpretation, canons of statutory construction direct the Court to first look to the plain and ordinary meaning of the statute's language.[126] If the language is clear, it is conclusive and binding.[127] If the statute is ambiguous, however, the Court seeks guidance by turning to the legislative history of the statute and Congress's intent in enacting it.[128]

CERCLA does not specifically define what it means to "arrange for" disposal of a hazardous substance.[129] Because of this undefined phrase, a prominent circuit split developed amongst the United States Courts of Appeals regarding the scope

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[122] *See infra* notes 134–49 and accompanying text.

[123] *See infra* notes 150–55 and accompanying text.

[124] *See infra* notes 156–68 and accompanying text.

[125] *See infra* notes 126–33 and accompanying text.

[126] *See* Duncan v. Walker, 533 U.S. 167, 172 (2001) ("Our task is to construe what Congress has enacted. We begin, as always, with the language of the statute."); United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006) ("In interpreting a statute we look first to the plain meaning of its words." (quoting United States v. Maung, 267 F.3d 1113, 1121 (11th Cir. 2001)); *see, e.g.*, Williams v. Taylor, 529 U.S. 420, 431 (2000); Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 175 (1989); Watt v. Energy Action Educ. Found., 454 U.S. 151, 162 (1981); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

[127] *See* United States v. Buckland, 289 F.3d 558, 564–65 (9th Cir. 2002) ("If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." (quoting Reves v. Ernst & Young, 507 U.S. 170, 177 (1993))); *see, e.g.*, Salinas v. United States, 522 U.S. 52, 57–58 (1997); United States v. Charles George Trucking Co., 823 F.2d 685, 688 (1st Cir. 1987).

[128] United States v. Kay, 359 F.3d 738, 743 (5th Cir. 2004) ("If . . . we conclude that the statute is ambiguous, we may turn to legislative history."); *Buckland*, 289 F.3d at 565 ("Where the language is not dispositive, we look to the congressional intent 'revealed in the history and purposes of the statutory scheme.'" (quoting Adams Fruit Co. v. Barrett, 494 U.S. 638, 642 (1990))); *see also* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90 (2007) (criticizing the dissent for ignoring the history and purpose of a statute when ambiguity was at issue).

[129] United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1231 (6th Cir. 1996) ("CERCLA does not define the phrase 'arrange for.'"); Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751

of arranger liability.[130] The three approaches, which emerged from the circuit split, developed from decades of case law that wrestled with the issue through in-depth statutory analysis.[131] Perplexingly, in *Burlington Northern*, the United States Supreme Court disregarded this judicial history and relied on a simple dictionary definition of the term "arrange" to provide meaning to the historically contested phrase "arrange for."[132] Thus, in *Burlington Northern*, the Court applied plain meaning to a phrase that is clearly ambiguous as evidenced by the circuit split on the issue. The existence of three distinct, well-developed interpretations of arranger liability in the circuit courts exemplifies statutory ambiguity and justifies an examination of congressional intent in interpreting the statute.[133]

B. The Court Misconstrued Amcast *and Adopted an Overly Constrictive Definition of Arranger Liability*

The *Burlington Northern* Court's misguided adoption of a narrow definition of arranger liability stands in direct conflict with the primary purpose of CERCLA: to hold all polluting contributors strictly liable for remediation costs rather than the tax-paying public.[134] The specific-intent approach adopted by the Court will significantly decrease the number of PRPs held accountable for their

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(7th Cir. 1993) ("Statutes sometimes use words in nonstandard senses, and do so without benefit of a definitional section. (The Superfund statute does not define 'arrange for.')").

[130] Boyer, *supra* note 1, at 204–05 (explaining the three views adopted by the courts include strict liability, specific-intent, and case-by-case analyses).

[131] *See, e.g.*, Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co., 142 F.3d 769, 775–76 (4th Cir. 1998); S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 407–08 (11th Cir. 1996); *Cello-Foil*, 100 F.3d at 1230–32*; Amcast*, 2 F.3d at 751; Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 973 F.2d 688, 695 (9th Cir. 1992).

[132] Burlington N. & Santa Fe Ry. v. United States, 129 S. Ct. 1870, 1879 (2009) ("[W]e give the phrase ["arrange for"] its ordinary meaning.").

[133] *See* Rust v. Sullivan, 500 U.S. 173, 184 (1991). In *Sullivan*, the Court outlined the proper procedure for interpreting an ambiguous statute:

> We need not dwell on the plain language of the statute because we agree with every court to have addressed the issue that the language is ambiguous. . . . If a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

Id. (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

[134] *See* Fla. Power & Light Co., v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990) ("An essential purpose of CERCLA is to place the ultimate responsibility for the clean-up of hazardous waste on 'those responsible for problems caused by the disposal of chemical poison.'" (citing United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989)) (quoting Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986))); *see also* Watkins, *supra* note 54, at 217–18.

actions under CERCLA arranger liability.[135] As a byproduct of this approach, the number of PRPs available to contribute to remediation will be diminished, and the remaining PRPs will face higher per-share costs.[136] Moreover, the elimination of solvent PRPs will ultimately lead to a situation where the tax-paying public is forced to bear remediation costs.[137] Thus, the Court's approach in *Burlington Northern* clearly circumvents Congress's intent in enacting CERCLA.[138]

In *United States v. Atlantic Research Corp.*, the Supreme Court specifically acknowledged Congress's intent to include all parties potentially responsible for contamination as PRPs under CERCLA.[139] In that case, the Court acknowledged that Congress intended to broadly cast the accountability net and explicitly rejected a "textually dubious construction" of CERCLA that would limit the categories of identifiable PRPs.[140] Nevertheless, in *Burlington Northern*, the Court disregarded this and similar precedent in its adoption of the narrow and extremely limiting approach to arranger liability.[141] Furthermore, in adopting this narrow

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[135] *See* Marc P. Lawrence, *To Arrange or Not to Arrange: Intent is the Question*, 88 MICH. B.J. 48, 51–52 (2009); Watkins, *supra* note 54, at 216 ("In leaving these issues unaddressed, not only does the opinion generate an amended standard of liability for arrangers, but it is also likely to generate a systemic overhaul of liability for all CERCLA PRPs.").

[136] *See* Lawrence, *supra* note 135, at 52.

[137] *See* Dana C. Nifosi, *Environmental Law*, 44 U. RICH. L. REV. 423, 430 (2009) (noting the broad implications for the cleanup of hazardous waste sites throughout the country as a result of *Burlington Northern*).

[138] S*ee* Boarhead Corp. v. Erickson, 923 F.2d 1011, 1019 (3d Cir. 1991) ("Congress enacted CERCLA so that the EPA would have the authority and the funds necessary to respond expeditiously to serious hazards without being stopped in its tracks by legal entanglement[s] before or during the hazard clean-up."); United States v. M. Genzale Plating, Inc., 723 F. Supp. 877, 883 (E.D.N.Y. 1989) ("The purpose of CERCLA is to enable the President to target and clean up hazardous waste sites in an efficient manner."); United States v. Rohm & Haas Co., Inc., 669 F. Supp. 672, 674 (D.N.J. 1987) ("In CERCLA, Congress established a statutory scheme to ensure prompt and efficient clean-up of hazardous waste disposal sites."); Pacific Resins & Chems., Inc. v. United States, 654 F. Supp. 249, 253 (W.D. Wash. 1986) ("The purpose of Congress in passing CERCLA was to establish the authority and funding for the prompt, unhindered clean-up of dangerous hazardous waste sites without the need to await a judicial determination of liability or even before any final agency determination of liability.").

[139] 551 U.S. 128, 137 (2007) ("We must have regard to all the words used by Congress, and as far as possible give effect to them." (quoting Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467 (1911))).

[140] *Id.* at 136–37 (explaining that the Court specifically chose to follow Congress's intent with CERCLA and not restrict the categories of PRPs); *see also* United States v. Bestfoods, 524 U.S. 51, 71 (1998) (explaining how the court inquired "into the meaning Congress presumably had in mind" when faced with a similar interpretive issue not defined in CERCLA); Nat'l Steel Serv. Ctr. v. Gibbons, 693 F.2d 817, 818–19 (8th Cir. 1982) ("We note . . . that we are committed to a broader application of the strict liability doctrine of [CERCLA].").

[141] *See* Watkins, *supra* note 54, at 218.

approach, the Court misinterpreted *Amcast*.[142] This oversight further constricts the scope of arranger liability as it excludes more PRPs.[143]

In *Amcast*, the court expressly acknowledged how the broad language of CERCLA allows for the imposition of arranger liability upon transporters who are directly responsible for accidental spills.[144] In *Burlington Northern*, the Court failed to address any such scenario and erroneously allowed Shell to escape liability.[145] Had the Court correctly applied the broader view of arranger as expressed in *Amcast*, Shell would have been held liable because of its own admissions regarding pollution contribution.[146] It may well be, as the court stated in *Amcast*, "an extraordinary thing to make shippers strictly liable under the Superfund statute for the consequences of accidents" arising from the physical exchange of hazardous substances.[147] Yet, the Court's faulty reliance on *Amcast* suggests that it is not an equally extraordinary phenomenon to hold only one party (the purchasers) strictly liable for the consequences of known contamination arising out of the same two-party transaction.[148] This situation is especially evident when, as in *Burlington Northern*, the transporter fully dictates both the method for exchange of the hazardous substances as well as the storage of those substances.[149]

C. The Appropriateness of Apportionment

The Court's decision to reinforce the appropriateness of apportionment in future CERCLA cases comports with Congress's original intent to hold all those that contribute to contamination liable for the resulting harm.[150] As the district

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[142] *Id.* at 215–16.

[143] *See* Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993); Watkins, *supra* note 54, at 217.

[144] *Amcast*, 2 F.3d at 751 (finding that shippers may, under certain circumstances, be held liable as an arranger and that the language of CERCLA "permits but does not compel such a result").

[145] Watkins, *supra* note 54, at 217 ("The adoption of this unexplained extrapolation of principles incongruous with the Act is rendered additionally noteworthy by the majority's silence regarding the *Amcast* panel's recognition that, notwithstanding its preferred and adopted approach, CERCLA's language does permit the imposition of strict liability upon shippers for accidental spillage.").

[146] *See id.*

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

[148] *See* Ind. Harbour Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1181 (7th Cir. 1990) (determining that the appropriate assessment of liability can depend on the classification of active versus passive transporter).

[149] *See* United States v. Atchison, Topeka & Santa Fe Ry., No. CV-F-92-5068 OWW, 2003 U.S. Dist. LEXIS 23130 (E.D. Cal. Jul. 14, 2003), *rev'd*, 520 F.3d 918 (2008) (providing case specific facts in which the transporter dictated both the method for exchange and the storage of hazardous substances ultimately holding the transporter liable).

[150] B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89, 94 (D. Conn. 1988) (citing the "twin goals of CERCLA" as a means to the prompt and effective response to hazardous waste contamination and to ensure that "those responsible for problems caused by the disposal of chemical poisons bear the costs

court explained, the looming threat of joint and several liability leads to PRPs taking a "'scorched earth,' all-or-nothing approach to liability."[151] Apportionment aids in the alleviation of such an occurrence as it permits defendants to avoid the harsh realities of joint and several liability through the admission of a specific portion of liability.[152] One purpose of CERCLA was to place the cost of cleanup on all responsible parties instead of on the tax-paying public.[153] By ruling in favor of apportionment, the Court in *Burlington Northern* correctly followed this fundamental purpose of CERCLA.[154] Apportionment functions to ensure that at least some of the remediation costs are collected from each PRP, as opposed to the possibility of collecting nothing from a few.[155]

D. The Impact of Burlington Northern *on Future Superfund Cases*

The impact of *Burlington Northern* should not be understated.[156] It marks a major shift in CERCLA jurisprudence.[157] The Court's decision increases the difficulty in proving arranger liability.[158] No longer is evidence of a party's knowledge or participation in environmental contamination enough to trigger arranger liability.[159] With the Court's adopted interpretation, the only parties that may be held liable under CERCLA's once-broad arranger provision are the parties that enter into commercial transactions with the proven specific intent to dispose of hazardous substances.[160] In that respect, the ruling does far more than

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and responsibilities for remedying the harmful conditions they created"); *see also* Brown & Sucaet, *supra* note 31, at 363–71 (discussing CERCLA's "professed 'polluters should pay' philosophy").

[151] Atchison, Topeka & Santa Fe Ry., 2003 U.S. Dist. LEXIS 23130, at *236.

[152] Gregory A. Weimer, Burlington Northern & Santa Fe Railway Co. v. United States*: The Supreme Court Provides Guidance on Arranger Liability and Apportionment*, 35 VT. B.J. 46, 47 (2009) ("Creative litigants will be able to fashion arguments in favor of apportionment based on complex facts and a combination of . . . factors.").

[153] United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

[154] *See id.*

[155] *See* Benjamin J. Rodkin, Casenote, *Deciphering CERCLA's Vocabulary:* United States v. Burlington*—"Reasonable" Division and "Arranger" Liability*, 20 VILL. ENVTL. L.J. 275, 300 (2009) ("[Joint and several liability] was not Congress's intent. If Congress wanted a stricter standard, it would have articulated one instead of merely expecting courts to glean a reasonableness standard from the Restatement.").

[156] *See* Henson, *supra* note 34, at 952.

[157] *See* Jill Yung, David J. Freeman & Chuck Patrizia, *The Supreme Court's Decision in* Burlington*: Arranger Liability Under CERCLA Has Limits; Apportionment Claims Do Not Require Precise Evidence*, STAY CURRENT (Paul, Hastings, Janofsky & Walker LLP, New York, NY), May, 2009, at 4, *available at* http://www.paulhastings.com/assets/publications/1303.pdf.

[158] *See* Lawrence, *supra* note 135, at 50.

[159] *See id.* at 49–50.

[160] *See* Watkins, *supra* note 54, at 214.

just change the way evidence is presented in CERCLA cases; it functions as a complete "reconstruction of CERCLA's strict arranger liability into an intentional environmental torts scheme."[161]

Legal practitioners should take note of the major changes *Burlington Northern* poses for current and future CERCLA litigants.[162] With the narrowed definition of arranger, the burden of proof shifts from defendant to plaintiff.[163] In *Burlington Northern*, the Court stressed that in "order to qualify as an arranger, Shell must have entered into the sale . . . with the intention that at least a portion of the product be disposed of during the transfer process."[164] Plaintiffs in Superfund cases therefore now bear the burden of proving the seller's specific intent to dispose of used, unuseful, hazardous substances at each transaction.[165] The Court's holding indicates a dramatic change from previous decisions where plaintiffs were once able to impose strict liability against defendants under CERCLA who had no actual knowledge of the illegal disposal.[166] With the Court's correct reversal on the issue of apportionment, the burden is appropriately placed back on the PRPs since it is up to those parties first to prove that the harm in question is in fact divisible and second to account for their portion of liability.[167] Thus, the ruling in *Burlington Northern* leaves open the possibility that a PRP may still take a scorched earth approach, but the likelihood of it doing so is decreased because of the control it is able to exert in demonstrating liability.[168]

E. Revision to Traditional Strict Liability via Legislative Amendment

Congress passed SARA in 1986.[169] Congress intended SARA to strengthen the original goals of the statute: (1) to ensure prompt remediation of hazardous contamination;[170] and (2) to hold all contributing parties financially responsible

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[161] *Id.*

[162] Weimer, *supra* note 152, at 47 ("The Supreme Court's ruling may provide important tools to litigants facing Superfund liability issues. Defendants may now have a more clearly defined defense under arranger liability.").

[163] *Id.*; *see also* Barkett, *supra* note 119, at 7 ("[T]he burden of proof may well be outcome determinative since a plaintiff will have to prove the alleged arranger's intent.").

[164] Burlington N. & Santa Fe Ry. v. United States, 129 S. Ct. 1870, 1880 (2009); *see* Barkett, *supra* note 119, at 7.

[165] *Burlington*, 129 S. Ct. at 1880.

[166] United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1381 (8th Cir. 1989) (citing United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985)).

[167] United States v. Chem-Dyne Corp., 572 F. Supp 802, 810–11 (S.D. Ohio 1983).

[168] Weimer, *supra* note 152, at 46–47.

[169] Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601–9675 (2006)).

[170] *See, e.g.*, H.R. REP. NO. 99-253, pt. 1, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038 ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into

for the cost of cleanup rather than the taxpaying public.[171] Since the passage of SARA, various amendments to CERCLA have been proposed, but none have addressed the issues resolved, albeit incorrectly, by the Court in *Burlington Northern*—whether an intent element is required for arranger liability to attach under the strict liability statute and whether apportionment is appropriate in such cases.[172]

Congress has, however, previously amended CERCLA to counteract varying judicial interpretation of the statute.[173] In 1999, for example, Congress passed the Superfund Recycling Equity Act (SREA) to encourage recycling and counteract broadly varying judicial interpretations under CERCLA §§ 107(a)(3) and (a)(4).[174]

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the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups."). Following CERCLA's enactment, numerous case decisions have reinforced the first goal. *See, e.g.*, Price v. U.S. Navy, 39 F.3d 1011, 1015 (9th Cir. 1994) ("CERCLA was enacted to facilitate the cleanup of environmental contamination caused by hazardous waste releases."); United States v. Colorado, 990 F.2d 1565, 1570 (10th Cir. 1993) ("Congress enacted CERCLA in 1980 'to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.'" (quoting H.R. REP. NO. 96-1016, pt. 1, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125), *cert. denied*, 114 S. Ct. 922 (1994)); Boarhead Corp. v. Erickson, 923 F.2d 1011, 1019 (3d Cir. 1991) ("Congress enacted CERCLA so that the EPA would have the authority and the funds necessary to respond expeditiously to serious hazards without being stopped in its tracks by legal entanglement before or during the hazard clean-up."); United States v. M. Genzale Plating, Inc., 723 F. Supp. 877, 883 (E.D.N.Y. 1989) ("The purpose of CERCLA is to enable the President to target and clean up hazardous waste sites in an efficient manner."); United States v. Rohm & Haas Co., Inc., 669 F. Supp. 672, 674 (D.N.J. 1987) ("In CERCLA, Congress established a statutory scheme to ensure prompt and efficient clean-up of hazardous waste disposal sites."); Pac. Resins & Chems., Inc. v. United States, 654 F. Supp. 249, 253 (W.D. Wash. 1986) ("The purpose of Congress in passing CERCLA was to establish the authority and funding for the prompt, unhindered clean-up of dangerous hazardous waste sites without the need to await a judicial determination of liability or even before any final agency determination of liability.").

[171] *See supra* note 31 and accompanying text.

[172] *See, e.g.*, 156 CONG. REC. 5153-05 (2010), 2010 WL 2464942 ("A bill to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to establish a grant program to revitalize brownfield sites for the purpose of locating renewable electricity generation facilities on those sites."); 156 CONG. REC. 3482-01 (2010), 2010 WL 1924557 ("A bill to amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to reauthorize and improve the Brownfields revitalization program . . . .").

[173] *See, e.g.*, Superfund Recycling Equity Act (SREA) of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (codified as amended at 42 U.S.C. § 9627 (2006)) (eliminating liability for commercial transactions involving scrap paper, scrap plastic, scrap glass, scrap textiles, or scrap rubber, scrap metal, or spent lead-acid, spent nickel-cadmium, and other spent batteries, all in an effort to promote recycling); *see also* 145 CONG. REC. 14,986-03 (1999), 1999 WL 1050353 ("The Superfund Recycling Equity Act of 1999 . . . seeks to correct the unintended consequence of CERCLA that actually discourages legitimate recycling. The Act recognizes that recycling is an activity distinct from disposal or treatment . . . . Removing the threat of CERCLA liability for recyclers will encourage more recycling at all levels.").

[174] *See supra* note 173 and accompanying text; *see also* Barkett, *supra* note 119, at 6 (discussing why Congress passed SREA).

Before society suffers from the potentially detrimental environmental impacts of the *Burlington Northern* ruling, Congress should again amend CERCLA to provide increased strength for its strict-liability provision. Congress must ensure that intent is not a requisite element for CERCLA's strict-liability provisions to attach.

Specifically, Congress needs to clarify the root cause of the judicial discrepancy surrounding the interpretation of arranger liability—namely, Congress's failure to provide definitions for terms "arrange" and "arrange for." Through amendments, Congress must develop and explicitly state definitions for these core terms.[175] While drafting legislative amendments is unquestionably difficult, Congress must, at minimum, put forth a bill clearly stating that intent need not be demonstrated in order for strict liability to attach in CERCLA cases involving the issue of arranger liability. Such amendments are further in line with Congress's original intent in passing CERCLA and would provide for a restructuring and strengthening of CERCLA's strict-liability provisions.[176]

IV. CONCLUSION

In the thirty years following the enactment of CERCLA, undefined statutory terminology coupled with improper judicial statutory interpretation has led to the development of a requisite intent element in the strict liability statute.[177] Such characteristics are clearly contradictory to the congressional intent of CERCLA.[178] While *Burlington Northern* sent shockwaves through the environmental law community, it fundamentally represents the result of years of varied judicial interpretation.[179] A reversion to traditionally-defined strict liability is necessary for the statute to function as Congress intended.[180] Congress thus should amend CERCLA to ensure all polluting parties are held responsible for their actions.

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[175] *See* Barkett, *supra* note 119, at 7 (discussing how the U.S. Supreme Court effectively elevated an arranger's state of mind to "factual prominence" in arranger liability trials and as a result of *Burlington Northern* there may be a larger scope given to the word "intent").

[176] *See* Magnus, *supra* note 14, at 451 ("The most significant aspect of the Supreme Court's decision [in *Burlington Northern*] 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.").

[177] *See* Barkett, *supra* note 119, at 16 ("CERCLA remains a strict liability statute."); *supra* notes 23–115 and accompanying text.

[178] *See supra* notes 116–55 and accompanying text.

[179] *See supra* notes 116–76 and accompanying text.

[180] *See supra* notes 169–76 and accompanying text.