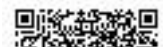

RE-"ARRANGING" CERCLA LIABILITY: WHAT IS THE STATE OF ARRANGER LIABILITY POST-*BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY V. UNITED STATES*?

BY HEIDI RASMUSSEN

INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 for two primary purposes: (1) providing prompt cleanup of sites contaminated by releases of hazardous substances; and (2) holding responsible parties liable for damages caused by improper hazardous waste disposal.[1] Due to its hasty drafting and remedial nature, early lower courts typically interpreted CERCLA as casting a wide net for liable parties.[2]

CERCLA holds responsible parties strictly liable for site contamination. Specifically, there are four types of CERCLA responsible parties: (1) current owners or operators, (2) owners or operators at the time of disposal, (3) arrangers, and (4) transporters.[3] While

1 Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting United States v. Reilly Tar & Chem. Corp., 546 F.Supp. 1100, 1112 (D. Minn. 1982)); *see* 42 U.S.C. §§ 9605, 9607 (2002).

2 *See Dedham Water Co.*, 805 F.2d at 1081; Gen. Elec. Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 285 (2d Cir. 1992); United States v. Mottolo, 605 F.Supp. 898, 902 (D.N.H. 1985); *Reilly Tar & Chem. Corp.*, 546 F.Supp. at 1112.

3 *See* 42 U.S.C. § 9607(a).

some of these categories are straightforward and leave scant room for litigation,[4] the arranger category has been a chronic source of confusion and inconsistency.[5]

Divining who Congress intended to include in the arranger category in CERCLA has been a notoriously difficult task. As one court framed the issue:

> We have previously said that "neither a logician nor a grammarian will find comfort in the world of CERCLA," . . . a statement that applies with force to § 9607(a)(3). Section 9607(a)(3) does not make literal or grammatical sense as written. It is by no means clear to what the phrase "by any other party or entity" refers. Pakootas argues that it refers to a party who owns the waste; and Teck argues that it refers to a party who arranges for disposal with the owner. To make sense of the sentence we might read the word "or" into the section, which supports Pakootas's position, or we might delete two commas, which supports Teck's position. Neither construction is entirely felicitous.[6]

This remark aptly illustrates the confusion surrounding CERCLA generally and arranger liability specifically.

Lower courts have consistently interpreted CERCLA broadly, often beginning their CERCLA analysis by explicitly stating this premise.[7] For example, when deciding a case of arranger liability, one district court noted that courts have broadly construed different elements within the traditional definition of arranger liability.[8] Another district court noted in its opinion that, because CERCLA has a "broad remedial reach," defenses to CERCLA liability should be interpreted narrowly.[9] The Supreme Court, on the other hand, has not adhered to this broad interpretation.[10]

In 2009, the Supreme Court rendered a decision on arranger liability in *Burlington Northern & Santa Fe Railway Co. v. United States*.[11] Scholars and potential arrangers hoped that *Burlington Northern* would provide much-needed clarification for the unique category of CERCLA arranger liability. Unfortunately, regarding arranger liability specifically, some scholars indicate that, even after *Burlington Northern*, there is still a need for clarification.[12] This note: (1) addresses the state of arranger liability under CERCLA prior to *Burlington Northern*; (2) examines the *Burlington Northern* decision itself; (3) analyzes three post-*Burlington Northern* decisions to determine whether those decisions

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4 *Id.* (identifying, for example, "the owner and operator of a vessel or a facility" as a responsible party leaves little room for interpretation).

5 *See* Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1079–80 (9th Cir. 2006).

6 *Id.* (quoting Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 883 (9th Cir. 2001)).

7 *See, e.g.*, United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989); United States v. New Castle Cnty., 727 F.Supp. 854, 871 (D. Del. 1989); United States v. Alliedsignal, Inc., 62 F.Supp.2d 713, 726 (N.D.N.Y. 1999).

8 Mainline Contracting Corp. v. Chopra-Lee, Inc., 109 F.Supp.2d 110, 118 (W.D.N.Y. 2000).

9 N.Y. State Elec. & Gas Corp. v. First Energy Corp., 808 F.Supp.2d 417, 487 (N.D.N.Y. 2011), *aff'd in part, vacated in part*, 766 F.3d 212 (2d Cir. 2014).

10 *See generally* Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009); United States v. Bestfoods, 524 U.S. 51 (1998).

11 556 U.S. 599 (2009).

12 Alexandra E. Shea, *CERCLA Arranger Liability and the Intent to Dispose of Hazardous Waste*, 59-JUL FED. LAW. 42, 42 (2012).

comply with the principles in *Burlington Northern*; and (4) provides suggestions for parties potentially facing arranger liability.

I. Arranger Liability

Under CERCLA, an arranger is:

> [A]ny 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 . . . .[13]

Although it is not clear from the statute's terms, the arranger category of liability is unique. Typically, the other categories of liability (transporters, owners, and operators) are found liable without consideration of intent.[14] Arranger liability, however, inherently examines intent, at least according to several courts' interpretations.[15] As one court indicated:

> [D]iscussing state of mind in a CERCLA case appears inappropriate . . . [However, n]otwithstanding the strict liability nature of CERCLA, it would be error for us not to recognize the indispensable role that state of mind must play in determining whether a party has "otherwise arranged for disposal . . . of hazardous substances."[16]

However, prior to *Burlington Northern*, the interpretation of CERCLA liability for arrangers was split. Some courts took a broad view of arranger liability,[17] while other courts took a narrow view.[18]

In its broad interpretation of arranger liability, one court relied on knowledge of the disposal to impose liability.[19] In *Cello Foil Products*, the Sixth Circuit held that the district court inappropriately granted summary judgment on the issue of arranger liability.[20] The plaintiffs claimed that the defendants arranged with a third party to pick up drums containing hazardous residue.[21] The third party would dispose of the drums and then credit the defendants with a drum deposit.[22] In its analysis, the Sixth Circuit relied solely on the party having the intent to be an arranger.[23] The court stated that, "[o]nce a party

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13 42 U.S.C. § 9607(a)(3) (2002).

14 *See id.* § 9607(a). *See also* Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp., 613 F.3d 910, 912–13 (9th Cir. 2010); *Burlington N.*, 556 U.S. at 608–09.

15 *See* United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1232 (6th Cir. 1996).

16 *Id.* at 1231 (quoting 42 U.S.C. § 9607(a)) (alteration in original).

17 *See id.*

18 *See* Carolina Power & Light Co. v. Alcan Aluminum Corp., 921 F.Supp.2d 488, 500 (E.D.N.C. 2013).

19 *Cello Foil Prods., Inc.*, 100 F.3d at 1233–34.

20 *Id.*

21 *Id.* at 1231.

22 *Id.*

23 *Id.* at 1232.

is determined to have the requisite intent to be an arranger, then strict liability takes effect."[24] The court further indicated that, if a party has the intent to be an arranger, the party cannot escape liability by simply claiming that it did not intend to dispose of the waste in a particular manner.[25] Ultimately, the Sixth Circuit determined that the district court erred and that there was a genuine issue of material fact on the issue of intent.[26]

Some courts, however, have taken a narrower view of arranger liability.[27] The *Carolina Power & Light Co.* court noted that several factors must be analyzed in determining whether arranger liability is appropriate.[28] Some of these factors include "[k]nowledge of disposal . . ., the value of the materials sold, the usefulness of the materials in the condition in which they were sold, and the state of the product at the time of transferral."[29] This type of analysis results in a narrower view of arranger liability; given this variety of considerations, it is generally less likely for a court to find a party liable.[30]

Post-*Burlington Northern*, it seems that little has changed. Interpretations are still both broad and narrow, and in both instances, the courts seemingly rely on *Burlington Northern* for their respective interpretations. To understand *Burlington Northern*'s impact, or lack thereof, it is first important to understand the Supreme Court's decision in *Burlington Northern*.

II. *BURLINGTON NORTHERN* DECISION

The facts of *Burlington Northern* are not particularly unique among CERCLA arranger liability cases. Brown & Bryant, Inc. (Brown & Bryant) operated a chemical distribution business.[31] Shell sold pesticides, D-D and Nemagon, to Brown & Bryant.[32] Shell arranged for delivery by common carrier.[33] When the pesticides arrived, they were transferred from tanker trucks to a storage facility located on Brown & Bryant's property.[34] Although the carrier used buckets to catch spills from hoses, the buckets sometimes overflowed and spilled onto the ground.[35] Shell was aware that the spills were common, so Shell took steps to encourage safe handling of the pesticides.[36] Shell provided detailed safety manuals and instituted a discount program for distributors that made improvements in the frequency of spills.[37] Later, Shell even required inspections

24 *Id.*
25 *Id.*
26 *Id.* at 1233–34.
27 *See* Carolina Power & Light Co. v. Alcan Aluminum Corp., 921 F.Supp.2d 488, 500 (E.D.N.C. 2013).
28 *Id.* at 496.
29 *Id.*
30 *See id.* at 498, 501.
31 Burlington N. & Santa Fe. Ry. Co. v. United States, 556 U.S. 599, 602 (2009).
32 *Id.* at 603.
33 *Id.*
34 *Id.*
35 *Id.* at 604.
36 *Id.*
37 *Id.*

and self-certification of compliance.[38] Brown & Bryant certified to Shell that it made the recommended improvements.[39]

Despite the improvements, Brown & Bryant continued to run a "sloppy" operation.[40] In 1983, the California Department of Toxic Substances Control (DTSC) and the U.S. Environmental Protection Agency (EPA) investigated Brown & Bryant's violations of hazardous waste laws.[41] These investigations uncovered contamination at the site.[42] Although Brown & Bryant made efforts to remediate the site, Brown & Bryant became insolvent in 1989 and ceased all operations.[43] Their facility was added to the National Priorities List (NPL),[44] and both the California DTSC and the EPA made cleanup efforts at the site.[45]

The agencies brought a recovery action against Shell and other responsible parties for recovery of cleanup costs.[46] The district court found Shell liable, but apportioned the costs among several responsible parties.[47] Shell appealed the finding of liability.[48] The Ninth Circuit, using an analysis broader than the district court's, found that Shell could be liable under "a broader category of arranger liability if the disposal of hazardous wastes [wa]s a foreseeable byproduct of, but not the purpose of, the transaction giving rise to arranger liability."[49] Specifically, the Ninth Circuit found:

> 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.[50]

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38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 605.

44 *Id.*; *Final National Priorities List (NPL)*, U.S. ENVTL. PROT. AGENCY (Jan 5, 2015), http://www.epa.gov/superfund/sites/query/queryhtm/nplfin1.htm, *archived at* http://perma.cc/TV73-RQFL. This list is prepared by the EPA and includes national priorities among the "known releases or threatened releases of hazardous substances, pollutants, or contaminants." National Priorities List for Uncontrolled Hazardous Waste Sites — Final Rule, 54 Fed. Reg. 41,015-01, 41,015 (Oct. 4, 1989) (codified at 40 C.F.R. pt. 300). The list is to be revised at least annually. *Id.*

45 *Burlington N.*, 556 U.S. at 605.

46 *Id.*

47 *Id.* at 605–06. Apportionment in a CERCLA case, let alone *sua sponte* apportionment, was a rarity prior to this case. 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, 283 (2010).

48 *Burlington N.*, 556 U.S. at 606.

49 *Id.* at 606–07 (alteration in original) (internal quotation marks omitted) (quoting United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 948 (9th Cir. 2007), *rev'd*, 556 U.S. 599 (2009)).

50 *Id.* at 607 (quoting *Burlington N.*, 520 F.3d at 950).

The Ninth Circuit concluded that arranger liability was not precluded simply because Shell transported "a useful and previously unused product."[51]

The Supreme Court took a different approach. The Court cautioned, "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."[52] The Supreme Court stated, "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."[53] The Court indicated that a fact-intensive analysis was required to determine whether the arrangement was a sale or a disposal.[54] The Court found that evidence produced at trial showed only that:

> [While] Shell was aware that minor, accidental spills occurred during the transfer of D-D from the common carrier to B & B's bulk storage tanks after the product had arrived at the Arvin facility and had come under B & B's stewardship, the evidence does not support an inference that Shell intended such spills to occur.[55]

The Court instead found that Shell took "numerous steps to encourage its distributors to reduce the likelihood of such spills," provided them with information on how to do so, and provided discounts for compliance.[56] The Court found that it was not necessary for Shell's efforts to be successful, and further, mere knowledge of spills and leaks was an insufficient ground to charge Shell with arranger liability.[57]

Thus, the Court absolved Shell of liability but did little to clarify the state of arranger liability.[58] What exactly does create arranger liability for parties in the middle of the spectrum the Court described? If one has knowledge of the spills, does that require the potential arranger to take steps to absolve himself of liability? These are examples of key questions left open in the wake of the Court broadening protection from CERCLA arranger liability.

III. OTHER COURTS' INTERPRETATION OF THE SUPREME COURT'S DECISION IN *BURLINGTON NORTHERN*

Given the variety of decisions that have come out of lower courts post-*Burlington Northern*, it is clear that *Burlington Northern* did little to provide a bright-line standard for courts to follow regarding arranger liability.[59] In fact, it appears that *Burlington Northern* caused confusion among scholars and courts alike. As one scholar argued, "it appears

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51 *Id.*
52 *Id.* at 612.
53 *Id.* at 610 (emphasis added).
54 *Id.*
55 *Id.* at 612–13.
56 *Id.* at 613.
57 *Id.*
58 *Id.*
59 *See infra* Part IV.A–B.

that the surest way for a company shipping hazardous materials to another facility to avoid arranger liability will be to take steps to encourage the recipient . . . to reduce the likelihood of spills."[60] However, lower courts have not clearly indicated that this is a line of demarcation between liability and non-liability.[61] In fact, the language in the *Burlington Northern* decision can be read to seriously narrow the scope of CERCLA liability.[62] However, other courts seem to indicate that *Burlington Northern* fits in neatly with the progression of decisions on arranger liability,[63] and some scholars even point to it as a case that provided much-needed clarification of arranger liability.[64]

While there have been several arranger decisions post-*Burlington Northern*, two cases in particular, *United States v. General Electric Co.*[65] and *Appleton Papers Inc. v. George A. Whiting Paper Co.*,[66] illustrate that arranger liability has apparently continued to be interpreted in a fashion similar to pre-*Burlington Northern* jurisprudence.

A. *United States v. General Electric*

Read too narrowly, *Burlington Northern* would eliminate most forms of arranger liability for the simple reason that most would-be arrangers lack the specific intent to simply dump hazardous wastes into the environment.[67] In fact, the Supreme Court itself recognized that "[i]t is plain from the language of the statute that CERCLA liability would attach under § 9607(a)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance."[68] In *General Electric*, the First Circuit continued to broadly interpret the arranger category despite the Supreme Court's analysis in *Burlington Northern*, which is most correctly read to narrow CERCLA liability.[69]

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60 Peter J. McGrath, Jr., Burlington Northern & Santa Fe Railway Co., et al v. United States: *Defining Environmental Law or Changing It?*, 3 CHARLOTTE L. REV. 85, 92 (2011).

61 *See generally* United States v. Gen. Elec. Co., 670 F.3d 377, 389–90 (1st Cir. 2012); Appleton Papers Inc. v. George A. Whiting Paper Co., 776 F.Supp.2d 857, 863–64 (E.D. Wis. 2011), *on reconsideration*, No. 08-C-16, 2011 WL 2633332 (E.D. Wis. July 5, 2011) *and opinion clarified*, No. 08-C-16, 2011 WL 4585343 (E.D. Wis. Sept. 30, 2011) *and aff'd in part, vacated in part*, NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682 (7th Cir. 2014).

62 *See* Shea, *supra* note 12.

63 *See generally* Gen. Elec. Co., 670 F.3d at 384.

64 Katherine E. Vogt, *Do Polluters Truly Pay? A Chip in the "Potentially Responsible Parties" Analysis for Hazardous Waste Cleanup* Celanese Corporation v. Martin K. Eby Construction Company, Inc., 18 MO. ENVTL. L. & POL'Y REV. 570, 579 (2011).

65 United States v. Gen. Elec. Co., 670 F.3d 377 (1st Cir. 2012).

66 Appleton Papers Inc. v. George A. Whiting Paper Co., 776 F.Supp.2d 857 (E.D. Wis. 2011).

67 *See* Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 612 (2009) ("While it is true that in some instances an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes, 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.").

68 *Burlington N.*, 556 U.S. at 609–10.

69 *Compare Gen. Elec. Co.*, 670 F.3d at 384, *with* Shea, *supra* note 12, at 42–43.

General Electric (GE) manufactured electric capacitors that contained Pyranol.[70] GE refined "virgin" polychlorinated biphenyls (PCBs) into Pyranol, a substance used in manufacturing electric capacitors.[71] To be of use, the Pyranol had to meet certain purity specifications.[72] Pyranol that did not meet these standards was stored away in fifty-five gallon drums in scrap areas.[73] Over time, GE accumulated an abundance of scrap Pyranol.[74] At some point, GE came into contact with Fred Fletcher, a local "chemical scrapper."[75] Fletcher and GE eventually entered into an informal agreement under which Fletcher purchased scrap Pyranol from GE to use as a plasticized additive for his paints.[76] Fletcher regularly purchased fifty-five gallon drums of Pyranol from GE for approximately ten years.[77]

Initially, one of Fletcher's employees would retrieve the scrap Pyranol from the GE plants, but as the transfers increased, Fletcher and GE hired a third party to haul the Pyranol barrels in larger trucks.[78] Beginning in early 1966, Fletcher began missing payments.[79] In August 1967, GE notified Fletcher via a collection letter that his account was delinquent by over six thousand dollars.[80] GE, however, continued to deliver more shipments of the scrap Pyranol to Fletcher.[81] In 1968, the relationship finally ended when Fletcher responded to GE's collection attempts by noting that many of the scrap Pyranol shipments were of such poor quality as to render them useless.[82] The EPA discovered the Fletcher Site in 1987, with hundreds of drums of scrap Pyranol.[83] In 1989, the Fletcher Site was added to the NPL, and in 1991, the United States initiated an action against GE to recoup costs associated with the Fletcher Site's cleanup.[84]

At the outset, the First Circuit seemed to carefully track the Supreme Court's analysis in *Burlington Northern*.[85] It began by indicating that, in the spectrum of liability, the case at bar definitely fell in the middle.[86] The First Circuit then provided the Supreme Court's *Burlington Northern* definition of arranger: "an entity may qualify as an arranger under § 9607(a)(3) when it takes *intentional steps* to dispose of a hazardous substance."[87]

GE argued that the district court applied the wrong legal standard to the case and that *Burlington Northern* only clarified that CERCLA liability attaches "where a person

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70 *Gen. Elec. Co.*, 670 F.3d at 380.
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.* at 380–81.
83 *Id.* at 381.
84 *Id.*
85 *Id.* at 382–83.
86 *Id.* at 382–383.
87 *Id.* at 383 (alteration in original) (quoting Burlington N. & Santa Fe. Ry. Co. v. United States, 556 U.S. 599, 611 (2009)).

or entity has the distinctly apparent objective of disposing of its hazardous substances."[88] Consequently, the court responded that *Burlington Northern* should not be read so narrowly; GE's reading only defined one end of the spectrum in this argument.[89] The First Circuit then analyzed GE's claim using the "useful product doctrine" outlined by the Supreme Court in *Burlington Northern*.[90] In doing so, it explained that in *Burlington Northern*, Shell was disposing of a new and useful product, but ultimately, GE viewed the scrap Pyranol as waste material; the profit they derived from its sale to Fletcher was "subordinate and incidental to the immediate benefit of being rid of an overstock of unusable chemicals."[91] According to the court, the facts revealed that GE viewed the scrap Pyranol as waste; this was evidenced by GE's behavior in labeling the drums of scrap Pyranol, giving away scrap Pyranol to employees, dumping Pyranol into the Hudson River, and taking Pyranol to landfills.[92] The court also noted that GE did not provide quality control over what was sent to Fletcher or attempt to market scrap Pyranol.[93]

Compared to *Burlington Northern*, the First Circuit's analysis seems strikingly broad for several reasons. First, the court viewed GE selling scrap Pyranol to local government entities for use as a dust suppressant as evidence against finding that GE sold the scrap Pyranol as a useful product.[94] This seems to indicate that GE was, in fact, selling a useful product to Fletcher. Additionally, the court cited no authority for making the lack of marketing a factor in the analysis of scrap Pyranol as a useful product.[95] Furthermore, the court indicated that the lack of a viable market should also be considered a factor in determining whether a party is an arranger under CERCLA.[96] Thus, the First Circuit seemed to start using the *Burlington Northern* analysis, but then strayed from this analysis and emphasized factors absent from the *Burlington Northern* opinion.[97]

After noting initially that the useful product test was a substitute for determining intent, the First Circuit went on to analyze GE's actions in terms of satisfying the intent requirement for CERCLA arranger liability.[98] In this part of its analysis, the court relied heavily on a letter from Fletcher and indicated that this letter "upends" GE's claim that it was selling Pyranol for a useful and legitimate purpose.[99] Here, the First Circuit seemed to turn the analysis on its head because, instead of focusing on GE's intentions, the court focused on Fletcher's view of what GE sent.[100]

The First Circuit's analysis further departed from *Burlington Northern* when it analyzed what it deemed to be a "crucial distinction" between Shell and GE.[101] The court

88 *Id.* at 384.
89 *Id.* at 384–86.
90 *Id.* at 385–86.
91 *Id.*
92 *Id.*
93 *Id.* at 385–86.
94 *Id.* at 385.
95 *See id.* at 386.
96 *Id.*
97 *See generally* Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 609–13 (2009).
98 *Gen. Elec. Co.*, 670 F.3d at 385–91.
99 *Id.* at 388–89.
100 *Id.*
101 *Id.* at 389.

indicated that one important factor in *Burlington Northern* was Shell's active steps to reduce spillage and that no spills were intended in the first place.[102] GE, on the other hand, took steps that would ultimately *increase* the likelihood of improper disposal.[103] First, GE tried to corroborate the claims Fletcher made about the poor quality of the scrap Pyranol.[104] An internal GE letter stated: "This certainly is not the material that [Fletcher] agreed to buy at $3.75 per drum."[105] While this corroborates that the quality was poor, it does little to advance the First Circuit's theory that GE *intended* to get rid of a useless product. Rather, it merely shows that the product GE sold was poor quality.[106]

The court's second point of analysis was that GE forgave Fletcher's debt.[107] The court indicated that forgiving this debt was evidence of the "calculus that accounted for the fact that GE viewed scrap Pyranol as a waste product that should have been discarded and the company stood to benefit financially by leaving Fletcher to deal with the issue of disposal."[108] The court's final evidence on this point against GE was that GE made "no effort, either then or at a later date, to retrieve, cleanup, or otherwise properly dispose of the thousands of drums of scrap Pyranol Fletcher had claimed were unusable to him."[109]

While the court made valid points against GE, noting that GE *should* have acted differently,[110] these points seem to again highlight as an important factor a point that *Burlington Northern* did not.[111] After summarizing the points against GE, the First Circuit then seemed to write out of the equation the supposedly important intent analysis by stating: "Though the initial arrangement (informal as it was) may not have, in express terms, *directed* Fletcher to dispose of GE's scrap Pyranol, GE certainly understood this would be the result of its actions and took the conscious and intentional step of leaving Fletcher to dispose of the materials."[112] This seems to be an attempt to rewrite what was said in *Burlington Northern* to fit the First Circuit's opinion. The court argued that, although initially GE did not demonstrate the intent to sell a useless product to Fletcher, once GE discovered that the product was useless, GE's failure to take steps to help Fletcher should peg GE with liability.[113] Thus, while the First Circuit was careful to quote *Burlington Northern*, the court's analysis does not seem to track what the Supreme Court actually held.[114] Because it focused on factors not emphasized by the Supreme

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102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.* (alteration in original).
106 *See id.*
107 *Id.*
108 *Id.*
109 *Id.* at 390.
110 *See id.* at 389–90.
111 *See generally* Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 609–13 (2009).
112 *Gen. Elec. Co.*, 670 F.3d at 391.
113 *Id.*
114 *See id.* (citing *Burlington N.*, 556 U.S. at 610; "However, because the statute does not define what it means to arrange for disposal of a hazardous substance under § 9607(a)(3), there remains a middle ground between these two extremes—to which we can comfortably say this case belongs—in which a seller entity will have *some* knowledge of [a] buyers' planned

Court in *Burlington Northern*, the First Circuit's opinion appears to indicate a return to a broad interpretation of CERCLA arranger liability.[115]

B. *Appleton Papers Inc. v. George A. Whiting Paper Co.*

Appleton Papers Inc. v. George A. Whiting Paper Co.[116] provides a distinct contrast to *United States v. General Electric*. While both cases relied on *Burlington Northern*,[117] a comparison of these cases illustrates how the Supreme Court's language in *Burlington Northern* has caused confusion among lower courts and, in some cases, weakened the strength of CERCLA's typically robust strict liability. This opinion decided the defendants' motions for summary judgment;[118] thus, while there is not an ultimate determination on arranger liability, the opinion provides an example of how lower courts interpret arranger liability inconsistently.

In *Appleton Papers*, a paper company produced carbonless copy paper by creating a PCB-laden emulsion.[119] The company sent this emulsion to Appleton Coated Paper Company (ACPC), which used the emulsion to coat the paper according to plaintiff NCR Corporation's specifications.[120] This process resulted in a waste product consisting of "paper scrap and trimmings" known as "broke."[121] ACPC sold this product to paper recycling companies for use in their respective papermaking facilities.[122] The recycling process resulted in the discharge of PCBs into the Fox River Site.[123] The district court addressed whether ACPC could be held liable as an arranger under CERCLA in light of the Supreme Court's decision in *Burlington Northern*.[124] The court focused on ACPC's intent in selling the broke.[125] The court determined that it was ACPC's "intent to 'dispose' of the broke in a general sense."[126] The court noted that "it simply wanted to get rid of it — but it is much less clear that it intended to dispose of the product in the § 6903(3) sense, which is what matters."[127] ACPC argued that, while it intended to get

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disposal or whose motives for the 'sale' . . . are less than clear.") (alteration in original) (internal quotation marks omitted).

115 *Id.* at 611-613.

116 776 F.Supp.2d 857, 863–64 (E.D. Wis. 2011), *on reconsideration*, No. 08-C-16, 2011 WL 2633332 (E.D. Wis. July 5, 2011) *and opinion clarified*, No. 08-C-16, 2011 WL 4585343 (E.D. Wis. Sept. 30, 2011) *and aff'd in part, vacated in part*, NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682 (7th Cir. 2014).

117 *See Gen. Elec. Co.*, 670 F.3d, 382-387; *Appleton Papers*, 776 F.Supp.2d at 861-65.

118 Multiple defendants in the case filed motions for summary judgment on the issue of arranger liability. *Appleton Papers*, 776 F.Supp.2d at 859.

119 *Id.* at 861.

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.* at 861–62.

125 *Id.* at 862.

126 *Id.*

127 *Id.* (The CERCLA definitions of Section 6903(3) point to the Resource Conservation and Recovery Act's (RCRA) definition of disposal. Under RCRA, "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

rid of the broke, it never intended for it to end up in the river.[128] Thus, ACPC argued it was not liable as an arranger.[129]

Interestingly, the court used overly-narrow language to begin its analysis, but ultimately reached a conclusion consistent with the Supreme Court's analysis in *Burlington Northern*.[130] The court indicated that the Supreme Court's conclusion in *Burlington Northern* could not be read as narrowly as ACPC proposed.[131] Rarely, if ever, will an entity actually intend that a hazardous substance be disposed of into the environment as technically required by Section 6903(3).[132] The court argued that reading *Burlington Northern* "too narrowly" would eliminate most forms of arranger liability "for the simple reason that most would-be arrangers lack the specific intent that their waste end up in the environment."[133] The court further noted that "'knowledge alone' of leaks or discharges is not enough."[134] Instead, "[t]he only possible basis for arranger liability [in *Burlington Northern*] was that Shell knew there would be some accidental leaks, but the court concluded that was not sufficient to demonstrate intent, particularly when Shell took steps to *prevent* those leaks."[135]

The district court then applied *Burlington Northern*.[136] ACPC argued that, because it *sold* the broke instead of hiring a disposal company to take it away, the broke was a valuable product rather than waste.[137] The court noted that courts in other CERCLA cases had warned against turning the sale of a useful product into arranger liability.[138] The court was wary of the potential slippery slope of that type of decision.[139] For instance, it quoted *G.J. Leasing v. Union Electric Co.*, in which the court opined that "the sale of a product which contains a hazardous substance cannot be equated to the disposal of the substance itself or even the making of arrangements for its subsequent disposal."[140] ACPC asserted that it was further removed from responsibility because it sold to brokers rather than disposal companies or recyclers.[141]

While the court did not find a lack of arranger liability, this decision was a "close question" and a "fact-intensive one."[142] The court characterized this as a "mixed motives" case in which the arranger intended to dispose of waste materials and also make money doing so.[143] While the court made clear that a product's having a scrap value does

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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) (1992)).

128 *Appleton Papers*, 776 F.Supp.2d at 862.
129 *Id.*
130 *Id.* at 864.
131 *Id.* at 863.
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.* at 863–64.
140 *Id.* at 864 (quoting G.J. Leasing v. Union Elec. Co., 54 F.3d 379 (7th Cir. 1995)).
141 *Id.*
142 *Id.*
143 *Id.*

not remove arranger liability, it determined that it would be possible to conclude in light of the evidence that ACPC did not arrange for disposal of their waste product.[144] The court again pointed to *Burlington Northern* for the proposition that "knowledge alone" is not enough, but explained that it was still possible that ACPC could have arranger liability.[145] The court ultimately found, however, that the facts were not strong enough to grant the defendants' motion for summary judgment on the issue of arranger liability.[146]

IV. The Current State of Arranger Liability

It is clear from the comparison of these two opinions that, after *Burlington Northern*, courts still interpret arranger liability inconsistently. This inconsistency presents a troubling issue for practitioners. However, some guidance exists for practitioners when faced with a potential case of arranger liability. First, practitioners should consider the potential impact of the most recent Supreme Court CERCLA case. Second, practitioners can follow guidelines specific to CERCLA arranger liability.

A. Supreme Court CERCLA Developments

In analyzing any CERCLA case, it is important to consider the language in the Supreme Court's most recent CERCLA cases. In *CTS Corp. v. Waldburger*, the Supreme Court came even closer to definitively stating that a broad interpretation of CERCLA is inappropriate.[147] While the *Waldburger* decision specifically related to CERCLA's statute of limitations,[148] the language of the opinion could be applied to other aspects of CERCLA. The Supreme Court's decision did not provide closure on whether courts are allowed to construe CERCLA liberally,[149] but *Waldburger* still contains important lessons for interpreting CERCLA cases generally.

First, in *Waldburger*, the Supreme Court criticized a lower court's broad construction of CERCLA.[150] In *Waldburger*, the Supreme Court was interpreting 42 U.S.C. § 9658, CERCLA's statute of limitations.[151] The fact that the Supreme Court criticized a broad interpretation of CERCLA is significant because, as opposed to the Court's narrow reading of CERCLA in *Burlington Northern*, the Court stated that a broad interpretation of CERCLA without a proper foundation in the text or legislative history was inappropriate.[152] However, given this phrasing, *Waldburger* cannot be read to have provided a definitive answer as to whether CERCLA should be broadly interpreted.

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144 *Id.*
145 *Id.*
146 *Id.*
147 134 S.Ct. 2175 (2014).
148 *Id.* at 2179.
149 *Id.* at 2186.
150 *See id.* at 2185.
151 *Id.*; 42 U.S.C. § 9658 (1986).
152 *Waldburger*, 134 S.Ct. at 2185.

Second, the Court did not definitively specify that a broad interpretation of CERCLA was inappropriate.[153] Rather, the Court criticized one circuit court's use of the remedial canon of construction in reference to CERCLA.[154] The Court noted that "[t]he Court of Appeals was in error when it treated this as a substitute for a conclusion grounded in the statute's text and structure. After all, almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem."[155] However, the Court did not take a definitive stance that a broad interpretation was not appropriate.[156] Rather, the Court indicated that Congressional intent should be discerned from the statutory text, and if the Court were to adopt that presumption in this instance, there would be a presumption in favor of state sovereignty.[157]

Waldburger in some ways seems to build on *Burlington Northern*. In *Burlington Northern*, the Supreme Court suggested a narrower interpretation,[158] and in *Waldburger*, the Court criticized a broad interpretation outright.[159] Thus, practitioners should note that the Supreme Court criticized the use of the remedial purpose canon of construction as applied to CERCLA, although it did not definitively state that a broad interpretation was inappropriate.[160]

B. FIFTH CIRCUIT DEVELOPMENTS

Notably, in January 2015, the Fifth Circuit decided a CERCLA case on arranger liability in *Vine Street LLC v. Borg Warner Corp.*[161] In *Vine Street*, one of Borg Warner's former subsidiaries, Norge, sold dry cleaning machines and an initial supply of perchloroethylene (PERC), the chemical used in the dry cleaning machines, to another business.[162] Because PERC was expensive, Norge took steps to preserve as much PERC as possible; for instance, Norge used water separators that would release the wastewater and recycle the PERC.[163] Despite this precaution, some of the PERC was "discharged into the sewer along with the wastewater."[164] The plaintiff, who had purchased the property at issue, sued Borg Warner, among others, to recover cleanup costs.[165] The district court held that, under the useful product doctrine,[166] Borg Warner was liable as an arranger

153 *See generally id.* at 2185 ("In any event, were the Court to adopt a presumption to help resolve ambiguity, substantial support also exists for the proposition that the States' coordinate role in government counsels against reading federal laws such as § 9658 to restrict the States' sovereign capacity to regulate" in areas of traditional state concern.") (citations omitted) (internal quotations omitted).

154 *Id.*

155 *Id.*

156 *See id.*

157 *Id.*

158 Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 610 (2009).

159 *Waldburger*, 134 S.Ct. at 2185.

160 *Id.*

161 No. 07-40440, 2015 WL 178981, *1 (5th Cir. Jan. 14, 2015).

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.* at *2.

166 Applying the useful product doctrine, the Fifth Circuit had previously "held that a party is not liable as an arranger if it were engaged in the mere sale of a useful product that is not

under CERCLA.[167] Applying *Burlington Northern*, the Fifth Circuit reversed, finding that Norge did not intend to dispose of a hazardous substance, but rather that "the transaction centered around the successful operation of a dry cleaning business."[168]

As the facts of *Vine Street* closely parallel those in *Burlington Northern*, it would seem that *Vine Street* does not provide guidance for cases that fall elsewhere in the range of CERCLA arranger liability. However, in its analysis, the Fifth Circuit cited *General Electric* with approval, noting that "the CERCLA defendant in *General Electric* attempted to dispose of excess waste products through the guise of a legitimate transaction."[169] The Fifth Circuit's approval of *General Electric* is important for guiding practitioners in cases where the lines between intentional disposal of a product and the sale of a useful product begin to blur.

C. Arranger Liability Revisited

General Electric and *Appleton Papers* provide two possible but disparate readings of the *Burlington Northern* decision. While some have argued that *General Electric* was a "slam dunk case" of arranger liability,[170] the *General Electric* decision creates inconsistency with *Burlington Northern*. Ultimately, what is important for both practitioners and potential defendants is an understanding of what constitutes arranger liability. *Burlington Northern* did not provide a bright-line standard for parties, and given that confusion about many aspects of arranger liability has troubled courts since the statute's inception, it is unlikely that Congress will provide that clarification.

Therefore, taking a bird's eye approach, parties facing liability and practitioners searching for guidance should first look to the respective jurisdictions of federal courts deciding matters of arranger liability. For example, one 2014 district court arranger liability case from the Idaho took a narrow approach, consistent with *Appleton Papers*, and cited to a 2011 Ninth Circuit case that similarly took a narrow approach.[171] On the other hand, cases from the First Circuit seem to consistently call for a broad interpretation of arranger liability.[172] Thus, knowing how arranger liability cases are decided within a particular circuit, or even a particular district court, is critical for practitioners because of lower courts' inconsistency in applicable precedent.[173]

Second, parties should consider the approach that the Supreme Court took in *Burlington Northern*. The Court in *Burlington Northern* indicated that a fact-intensive analysis

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properly considered 'waste.'" *Id.* at *3 (citing Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co., 906 F.2d 1059, 1065–66 (5th Cir. 1990)). However, the Fifth Circuit did not require an intent to dispose of waste, but the Fifth Circuit "imposed liability as long as there was a sufficient 'nexus' between the purported arranger and the disposal of waste." *Id.* (citing Geraghty & Miller, Inc. v. Conoco Inc., 234 F.3d 917, 929 (5th Cir. 2000)).

167 *Vine Street LLC*, No. 07-40440, 2015 WL 178981, *1-2.

168 *Id.* at *5.

169 *Id.* at *5 (citing United States v. General Electric Co., 670 F.3d 377 (1st Cir. 2012)).

170 *See, e.g.*, Paul G. Gosselink, *RCRA/Solid Waste Issues—Tombstone*, 2-3, 24th Annual Texas Environmental Superconference (Aug. 2012).

171 *See* United States v. Fed. Res. Corp., 30 F.Supp.3d 979, 995 (D. Idaho 2014) (citing Team Enters., LLC v. W. Inv. Real Estate Trust, 647 F.3d 901 (9th Cir. 2011)).

172 *See Gen. Elec. Co.*, 670 F.3d at 382–91.

173 *See supra* Part IV.A–B.

was important to each case.[174] Thus, there is not a safe harbor in the *Burlington Northern* opinion that will provide specific guidance.[175] Both *General Electric* and *Appleton Papers* pointed to the fact-intensive analysis, and this seems to be a critical point regardless of jurisdiction.[176] The best way to avoid CERCLA arranger liability seems to be to point to facts consistent with *Burlington Northern* or perhaps point to the fact that the defendant had no knowledge of spills.

V. CONCLUSION

The Supreme Court's decision in *Burlington Northern* is problematic on two levels. First, *Burlington Northern* contains language that can be read to narrow the category of arranger liability.[177] This has resulted in some courts reading that language to reduce the ability of plaintiffs to hold parties liable under CERCLA.[178] It is clear from past cases that many federal courts have consistently interpreted CERCLA arranger liability broadly.[179] The key question is whether *Burlington Northern* marks a narrowing in the Court's interpretation of CERCLA or whether decisions like *General Electric* were what the Court actually envisioned.

This leads to the second problem with the *Burlington Northern* decision: it is apparent from the comparison of *General Electric* and *Appleton Papers* that *Burlington Northern* has caused confusion among lower courts. The area of arranger liability, instead of being clearer post-*Burlington Northern*, remains muddled and uncertain. Nevertheless, there are broad guidelines to follow and important aspects to consider when a practitioner undertakes a case of potential arranger liability. These guidelines and considerations provide some guidance in navigating arranger liability.

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174 Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 610 (2009).

175 *See generally id.* at 599.

176 *Gen. Elec. Co.*, 670 F.3d at 384; Appleton Papers Inc. v. George A. Whiting Paper Co., 776 F.Supp.2d 857, 863–64 (E.D. Wis. 2011), *on reconsideration*, No. 08-C-16, 2011 WL 2633332 (E.D. Wis. July 5, 2011) *and opinion clarified*, No. 08-C-16, 2011 WL 4585343 (E.D. Wis. Sept. 30, 2011) *and aff'd in part, vacated in part*, NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682 (7th Cir. 2014).

177 *See supra* Part IV.B.

178 *See supra* Part IV.B.

179 *See supra* Part I.