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The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or the “Superfund Law”) states that a person who “arranged for disposal” of hazardous substances may be liable for remediation costs at an inactive hazardous waste site. Courts have generally interpreted “arranged for disposal” broadly to include anyone who had responsibility for the hazardous substances. The Eighth Circuit’s decision in United States v. Aceto Agricultural Chemicals Corp. represents perhaps the most expansive reading of arranger liability, holding that a corporation can be liable even though the corporation never possessed the waste and made no decisions regarding disposal. The Aceto theory of arranger liability has been followed by several other federal circuit courts of appeals.

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

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1 Partner, Forchelli, Curto, Crowe, Deegan, Schwartz, Mineo & Cohn LLP, Uniondale, New York. Adjunct Faculty, University of Phoenix Online Campus.
3 Id. at §9607(a)(3) (imposing liability on “any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances”).
4 872 F.2d 1373 (8th Cir. 1989).
5 The Aceto decision is discussed in section II infra.
6 See, infra section II B and accompanying text (discussing the Court of Appeals decisions that have followed the Aceto theory of liability).
8 520 F.3d 918 (9th Cir. 2008).
limiting arranger liability to actions intended to dispose of hazardous substances because
“arrange” means to make a plan and one cannot make a plan accidentally. 9

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

I. Background

A. Development of the Arranger Concept

The Superfund Law does not define “arrange” or include any discussion of what it means
to arrange for disposal. There is no legislative history directly addressing the meaning of
arranger liability. 10 The only legislative history that might suggest a meaning for the arranger
concept is the legislative history that discusses the concepts Congress discussed, rejected and
appears to have replaced with the arranger concept. 11

One bill that could be seen as a predecessor to the Superfund Law provided that a waste
generator is liable for remediation costs. 12 Generator, unlike arranger, was a familiar

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9 129 S. Ct. at 1879.
10 A number of courts have noted that CERCLA was “hurriedly” put together and passed with
“very little debate” so that the legislative history provides little help in understanding the phrase.
See, e.g., Aceto, 872 F.2d at 1380 and New York v Shore Realty Corp., 759 F2d 1032, 1039 (2d Cir.
1986).
11 See, Allan J. Topol and Rebecca Snow, Superfund Law and Procedure (West 1992) at 1.1
(stating that “there are no committee or conference reports addressing the version of the
legislation that ultimately became law” and “ reports pertaining to the prior version of the
legislation are of little value. See also, Grad, A Legislative History of the Comprehensive
(Subtitle (b) of section 3041) defines the term “responsible party” to mean “any person who .
. . generated or disposed of a substantial portion of the hazardous waste treated, stored or
disposed of at the inactive site.” )
environmental law concept because the Resource Conservation and Recovery Act (“RCRA”)\textsuperscript{13} already imposed significant waste management obligations on the waste generator.\textsuperscript{14} A competing bill did not impose liability on generators or arrangers, but instead used a causation concept—the person who caused or contributed to the contamination would be liable for the cleanup costs.\textsuperscript{15}

Because the debate between generator liability and causation liability seems to have resulted in arranger liability, a closer look at those concepts may shed light on the intended scope of arranger liability. The primary difference between RCRA and CERCLA is that RCRA regulates hazardous waste activities,\textsuperscript{16} while CERCLA provides a liability system for inactive hazardous sites—places where waste was disposed of in the past.\textsuperscript{17} The key regulated party under RCRA is the waste generator.\textsuperscript{18} Anyone who has a manufacturing or industrial process that results in the creation of hazardous waste is the generator of that waste and RCRA tells that person how to store, handle and dispose of hazardous waste.\textsuperscript{19} CERCLA, on the other hand,\textsuperscript{13} 42 U.S.C. §§6901-6992K (2000). Generator is defined at §6903(6).

\textsuperscript{14} Id. at §6922 (standards for generators of hazardous waste).

\textsuperscript{15} H.R. Rep. No. 96-1016, pt 1, at 14-15 (proposed text) and at 68 (stating that basing liability on “causation” would be more fair than imposing liability on generators because “mere generation of waste does not cause a release to the environment”).

\textsuperscript{16} 42 U.S.C. 6921 through 6939e deal with hazardous waste management and include the definition of hazardous waste (6921), standards for generators of hazardous waste (6922), standards for owners and operators of hazardous waste treatment, storage and disposal facilities (6923)).

\textsuperscript{17} See, Sen. Robert T. Stafford, Why Superfund Was Needed, EPA 3, June 1981 (discussing the goals of CERCLA). See also, Topol and Snow, supra note II at 2.1 (noting that Superfund primarily addresses present conditions that are the result of past acts).

\textsuperscript{18} RCRA generators must identify which of their wastes are hazardous (40 C.F.R part 261 addresses waste identification), handle them in a manner that reduces exposure (40 C.F.R. part 262C addresses packaging, labeling and other pre-transport requirements) and document proper disposal (40 C.F.R. Part 262B deals with waste tracking).

\textsuperscript{19} 42 U.S.C 6903 (6) defines “hazardous waste generation” as “the act or process of producing hazardous waste.”
describes how to clean up inactive hazardous waste sites and who can be held liable for the cleanup costs. It does not regulate business activities.

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

The alternative considered by Congress followed more of a tort model imposing liability on all who caused or contributed to the contamination without regard to how the waste came into existence. If the problem being addressed by Congress was the presence of inactive hazardous waste sites, it makes sense to place responsibility for the problem on those who caused the existence of the inactive hazardous waste sites. Tort law has long provided for strict liability for those involved in ultra hazardous or unreasonably dangerous activities. Some courts have

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20 42 U.S.C. 9604 requires the preparation of a National Contingency Plan “which shall establish procedures and standards for responding to releases of hazardous substances.”
21 Id. at 9607 (describing who can be liable for the costs of responding to the release of hazardous substances).
22 See, United States v. Northeastern Pharmaceutical and Chemical Co., 810 F. 2d 726, 733-34 (8th Cir. 1986) (discussing the legislative history of CERCLA and stating that Congress intended to impose the costs on “those parties who created and profited from the sites”).
23 Id. at 733-34 (noting that the proposed text retains common law causation principles).
25 See, e.g. Restatement of Torts (2d) 519-520 (noting that the Restatement uses the phrase ultra hazardous even though most jurisdictions continue to use the phrase unreasonably dangerous.)
included the handling of hazardous substances as such an activity.\textsuperscript{26} Thus, liability for all who cause or contribute to the contamination at an inactive hazardous waste site would not have been a significant change in existing law.

Both the generator and causation concepts are inadequate for the job intended by Congress. Generator is too limited a concept because Congress decided not to limit the Superfund Law to remediation of hazardous waste.\textsuperscript{27} Many of the sites that needed to be cleaned up were contaminated with hazardous substances that might not meet the RCRA definition of hazardous waste.\textsuperscript{28} Because the RCRA generator concept relates to waste and not to substances, generator was too limited a concept to describe all of the people that Congress intended to be liable for remediation costs.\textsuperscript{29}

While the generator concept was too limited based on the types of sites Congress wanted remediated, it may also have been too broad from a fairness perspective. If a company generated the waste, but played no role in the decision to dispose of it at a particular facility, should they have liability? For example, Company A generates waste, which they determine can be reused and they sell the waste to Company B who intends to reuse it. Company B reuses some of it and

\textsuperscript{26} See e.g., Yommer v. McKenzie 255 Md. 220, 257 A.2d 138 (1969 (storage of flammable materials); Luthringer v Moore, 31 Cal.2d 489, 190 P.2d 1 (1948) (cyanide gas); Holman v Athens Empire Laundry Co. 149 Ga. 345, 100 S.E. 207 (1919) (noxious emissions).
\textsuperscript{27} CERCLA uses the phrase “hazardous substances” and the definition of hazardous substance includes hazardous waste as a subset of hazardous substance. 42 U.S.C. 9601 (14).
\textsuperscript{28} The RCRA regulations identify many hazardous wastes based on the process that created them. At many inactive hazardous waste sites, there was a mixture of substances whose origin or prior use could was difficult to determine. Additionally, spills or releases of virgin chemicals (not waste) could create the same dangers as hazardous waste. Thus, the need to clean up a mess should not be dependent on whether the mess is hazardous waste. See, United States v Alcan Aluminum Corp., 964 F2d 252, 259-260 (3d Cir. 1992) (discussing whether Congress’ intent regarding the difference between hazardous waste and hazardous substances).
\textsuperscript{29} See, Alcan, 964 F2d at 260 (discussing Congress’ intent regarding why the CERCLA definition of hazardous substances is broader than the RCRA definition of hazardous waste).
disposes of the rest. Is there any reason that Company A, the waste generator, should be responsible for Company B’s disposal?\textsuperscript{30}

Causation was a familiar tort concept and a logical candidate for the source of liability. If the goal is to determine who should clean up the mess, how the mess was created is very important. Indeed, one could make the case that how the waste got there is more important to the liability issue than who created the waste. The focus on causation, however, suggests that the person is liable because they have done something wrong. Congress was careful not to base Superfund on the notion of wrong.\textsuperscript{31} For example, the owner and operator of the facility are liable for remediation costs without regard to whether they ever had anything to do with hazardous substances.\textsuperscript{32} Additionally, most of the hazardous substances that needed to be remediated were disposed of legally. The responsible parties were often engaged in the ordinary course of business at a time when no environmental regulations existed. Congress did not want to indicate that what most corporations were doing was tortious. Therefore, they set up a system of liability without fault—the message is that this has to be cleaned up regardless of how it got there.

The bill that became the Superfund Law did not contain “generator” liability and did not provide for liability based on causation.\textsuperscript{33} Instead it contained this “arranger” concept. As one

\textsuperscript{30} See, H.R. Rep. No. 96-1016, pt 1, at 68 (stating that basing liability on “causation” would be more fair than imposing liability on generators because “mere generation of waste does not cause a release to the environment”).

\textsuperscript{31} See, e.g. Allan J. Topol and Rebecca Snow, Superfund Law and Procedure §4.2 (West 1992) (stating that courts have “unanimously concluded that the appropriate standard under CERCLA is strict liability,” citing several pages worth of cases.)

\textsuperscript{32} 42 U.S.C 9607(a)(1) provides liability for the “owner or operator of a vessel or facility”) and 9607(a)(2) provides liability for “any person who at the time of disposal of hazardous substances owned or operated . . . . . . . .”.\textsuperscript{32}

\textsuperscript{33} For an explanation of how new concepts could be found in the final version without explanation, see, Topol and Snow, supra note 11 at 5 (describing “‘last minute, unrecorded compromises and acceptance of deliberate ambiguity in some of the bill’s more controversial provisions.’”). See also, United States v Price, 577 F.Supp. 1103, 1109 (D. N.J. 1983) (“even the
court described it, “Congress did not, to say the least, leave the flood lights on to illuminate the
trail to the intended meaning of arranger status.” Nevertheless, the arranger is generally seen
as some combination of the generator and causation concepts. When a person causes waste to
be disposed of, the person has arranged for disposal of the waste. Similarly, because RCRA
defines waste as something that is to be discarded, once hazardous waste is generated, there is
little one can do with it other than arrange to have it discarded and when you arrange to have it
discarded you have arranged for disposal.

B. Early Arranger Cases Emphasized Generator Status Over Causation

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

In United States v. Wade, for example, generator defendants argued that to prove
arranger liability, the government needed to prove that a defendant’s disposal of waste at the site

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35 See, Aaron Gershonowitz, Superfund “Arranger” Liability: Why Ownership of the Hazardous
parties for arranging for disposal of hazardous substances and finding that the arranger concept
includes generators); United States v. Hardage, 761 F. Supp. 1501, 1511 (W.D. Okla. 1990) (citing
42 U.S.C. §9607(a)(3)) (noting that generator liability is imposed on one who arranged for
disposal of hazardous waste); Violet v. Picillo, 648 F. Supp. 1283, 1288 (D.R.I. 1986) (noting that
generator liability is imposed on one who arranged for disposal, treatment, or transport to
hazardous waste facility), overruled on other grounds by United States v. Davis, 794 F. Supp. 67,
37 See United States v. Picillo, 648 F. Supp. 1283, 1288 (D.R.I. 1986) (citing many other cases for the
proposition that the first element of proving “arranger” liability is “that the generator disposed of
hazardous substances.”)
caused the incurrence of cleanup costs.\textsuperscript{39} The defendants relied heavily on legislative history of the bill that would have based liability on causation. The court noted that the problem with that argument is that the provision enacted did not contain the causation language.\textsuperscript{40} Instead, the statute “specifies certain groups that were to be held liable.”\textsuperscript{41} Thus, causation is not a required element of arranger liability.

In United States v. Ward,\textsuperscript{42} the court addressed whether a generator could be liable as an arranger when he or she did not take the time or effort to make any arrangements regarding disposal. Defendant argued that he sold waste oil to a party who then made the decision to dispose of it.\textsuperscript{43} The court concluded that such generators must be liable as arrangers because we should not “allow generators of hazardous wastes to escape liability under CERCLA by closing their eyes to the method in which their hazardous wastes were disposed of.”\textsuperscript{44} It must be noted, however, that while Mr. Ward did not know how his waste was disposed of or where it was disposed of, he did pay someone to “get rid of” the waste and could therefore be seen as having arranged for disposal.\textsuperscript{45}

A generator is liable even if he or she did not cause the waste to be shipped to the site that is being remediated (and therefore did not cause the contamination). In United States v

\textsuperscript{39} Id. at 1332-1333 (describing the defendants’ argument as raising the question of whether traditional notions of proximate causation applied to CERCLA. The government argued that all that it was required to prove was that defendants’ waste was disposed of at the site.)
\textsuperscript{40} Id. at 1334 (stating “the problem with the generator defendants’ reliance on this report, however, is that the liability provision ultimately enacted bears no resemblance to the House-passed bill to which the report refers.”)
\textsuperscript{41} Id.
\textsuperscript{42} 618 F. Supp. 884 (E.D. N.C. 1985)
\textsuperscript{43} Id. at 895.
\textsuperscript{44} Id. See also United States v. Conservation Chemical Co., 619 F. Supp. 162 (W.D. Mo. 1985) (noting that it would be anomalous to hold liable those who designate a destination for their waste, but not those who ignore what happens to their waste.)
\textsuperscript{45} 618 F. Supp. at 895 (concluding that what defendant described as sale of a product was in fact disposal of a waste).
Hardage,\textsuperscript{46} for example, the court held that the generator could be liable even if he or she did not know that the waste was sent to the site and even if the generator intended the waste to be disposed of elsewhere.\textsuperscript{47} Thus, a generator of waste is liable as an arranger even if he or she did not arrange to have the waste disposed of waste at the site being remediated.

Based on the early cases, if asked whether the generator concept or the causation concept best explained arranger liability, the answer would have to be the generator concept. The generator of a hazardous waste necessarily has that waste in his or her possession and control at some point in time. If the waste is then disposed of, that disposal must have been the result of some action by the generator, if only the act of releasing it to someone for transport or disposal. Causation, however, was not seen as a requirement. The generator was held liable even if the waste was disposed of somewhere other than where the generator intended and even if the generator’s waste did not cause the response costs.

II. United States v. Aceto Agricultural Chemicals Corp.

A. Cause But Not Generator

Aceto was very different from the generator cases because the defendants did not generate the waste or make any waste-related decisions. The case arose out of contamination at a site owned and operated by Aidex Corporation, a pesticide formulator.\textsuperscript{48} Industry practice in the pesticide industry was for pesticide manufacturers to contract with formulators to mix the pesticide ingredients to produce commercial grade products for the manufacturer.\textsuperscript{49} Pesticide

\textsuperscript{46} 761 F. Supp. 1501 (W.D. Okla. 1990).
\textsuperscript{47} Id. See also, United States v Bliss, 667 F.Supp. 1298, 1306 (E.D. Mo. 1987).
\textsuperscript{48} 872 F.2d at 1375-76 (noting that Aidex had operated the site from 1974-1981 when it went bankrupt).
\textsuperscript{49} Id. The court noted that the “complaint alleges it is common practice in the pesticide industry for manufacturers of active pesticide ingredients to contract with formulators such as Aidex to produce a commercial grade product.”
manufacturers provided Aidex with ingredients and directions for formulation.\textsuperscript{50} Aidex processed the ingredients and returned commercial grade product to the manufacturers.\textsuperscript{51}

The United States Environmental Protection Agency (“EPA”) sought to hold six pesticide manufacturers liable for “arranging for disposal” of hazardous substances at the Aidex site.\textsuperscript{52} EPA’s theory was as follows: (1) the manufacturers owned the ingredients that contained the hazardous substances that were released or disposed of at Aidex\textsuperscript{53}; (2) the manufacturers knew that the formulation process would result in the creation of hazardous waste.\textsuperscript{54} Therefore the manufacturers arranged for disposal of the waste disposed of by Aidex at the Aidex site.\textsuperscript{55}

The court began its analysis by rejecting defendants’ argument that based on the dictionary definition of “arrange” defendants could only be liable if they intended to dispose of waste.\textsuperscript{56} Next, the court reviewed the legislative history of Superfund and concluded that “Congress intended that those responsible for the problem caused by disposal of chemical poisons bear the costs.”\textsuperscript{57} The court reasoned that this goal would be thwarted, if one could

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{50}] Id. There may have been some dispute as to the Aidex’s actual role, but the case reached the Court of Appeals after the District Court denied the defendants’ motion to dismiss. Thus, the court took the facts in the complaint as given.
\item[\textsuperscript{51}] Id. (noting that the defendants argued that they should not be liable because they hired Aidex to formulate, not to dispose).
\item[\textsuperscript{52}] Id. at 1376. Eight pesticide manufacturers were named as defendants, but the complaint alleged causes of action under RCRA against all eight of them and causes of action under CERCLA against six of them.
\item[\textsuperscript{53}] Id. at 1378. Indeed, the complaint alleged that the defendants owned the chemicals provided to Aidex, the work in progress and the resulting commercial grade product.
\item[\textsuperscript{54}] Id. at 1379. The complaint alleged that generation of hazardous wastes was an inherent part of the formulation process.
\item[\textsuperscript{55}] Id. (noting that the District Court relied on the principle that CERCLA should be interpreted broadly).
\item[\textsuperscript{56}] Id. at 1380. The court noted that Congress intended a broad reading of “arranged for disposal.”
\item[\textsuperscript{57}] Id. The court noted that S. 1480, the “Environmental Response Act” contained language that would have imposed liability on all who “caused or contributed to” the release of hazardous substances and that a Senate Committee had changed the language to “arranged for disposal.” The court noted that the reasons for the change were “not easy to divine,” but did not see the change in language as reflecting a change in policy.
\end{enumerate}
\end{footnotesize}
contract away their liability. The defendants argued that they had no control over Aidex operations and therefore could not have played a role in causing the disposal. The court responded to this argument by noting that each manufacturer maintained ownership of the chemicals, which meant they had authority to control what happens with those chemicals and could therefore have caused the disposal.

The causation argument addressed by the Wade court is very different from the causation argument made by the Aceto court. The Wade defendants argued that they could not be liable because their activities or their waste did not cause the response costs (the CERCLA equivalent of damages). In a sense their argument was, ‘I am not responsible for the costs because those costs would have been incurred even if my waste were not at the site.’ In Aceto, on the other hand, the issue was who caused the contamination, not who caused the need to clean up. The court understood the phrase “arranged for disposal” to mean is responsible for this waste being here. While the manufacturers may not have made any waste-related decisions, their business activities were, to a large extent, a cause of the creation of the contaminated site.

Ownership of the hazardous substances also played a role in the Aceto decision regarding whether the arrangement was an arrangement for disposal. The court noted that ownership implied the ability to control disposition of the chemicals and ability to control is the key to arranger liability. The court based its decision to a large extent on the Court of Appeals

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58 Id. at 1381. The court cited New York v General Electric Co., 592 F. Supp. 291,297 (N.D.N.Y 1984) and United States v A & F Materials, 582 F. Supp. 842, 845 (S.D. Ill. 1984) for the proposition that CERCLA liability could not be “circumvented” by calling a disposal a sale and that one could not “contract away” their liability.
59 Id. (noting that defendants contended that they should escape liability because they lacked of control over Aidex).
60 Id. The court noted that “(i)t is the authority to control the handling and disposal of hazardous wastes that is critical under the statutory scheme.”
61 See infra section II B.
62 872 F.2d at 1381 (noting that there was no transfer of ownership of the hazardous substances).
decision in United States v. Northeastern Pharmaceutical and Chemical Co., (‘NEPACCO’).\textsuperscript{63} NEPACCO was a generator case. The issue was whether corporate officers of a generator could be held liable as arrangers. The NEPACCO court held that such individuals can be held liable as arrangers because they had authority to control of the waste prior to disposal.\textsuperscript{64} The Aceto court reasoned that if there could be liability in NEPACCO, where defendants did not own the hazardous substances, then there should be liability for the Aceto defendants who did own the hazardous substances.\textsuperscript{65}

While the Aceto Court attempted to align its decision with the generator cases such as NEPACCO, the concern addressed by the Aceto court is fundamentally different from the concern addressed by NEPACCO. In NEPACCO the concern was that someone who controlled the waste could avoid liability by ignoring what happened to the waste he or she controlled. In Aceto, the defendants never controlled the waste. The court’s concern was that one could set up an elaborate set of contractual arrangements whereby one controls the process that creates the waste and thereby causes the site to be contaminated, but is nonetheless insulated from the liabilities related to the generation of the waste. The court was concerned that someone could cause the problem but avoid liability by hiring someone else to be the generator of the waste.

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

B. **Appellate Court Interpretations of Aceto**

\textsuperscript{63} 810 F.2d 726 (8th Cir. 1986), cert. denied 484 U.S. 848 (1987).
\textsuperscript{64} Id. at 743-744. The defendants argued that only persons who owned or possessed the hazardous substances could be liable under section 9607(a)(3) and the court rejected that notion, concluding that persons with authority to control could be liable even without ownership or possession.
\textsuperscript{65} 872 F.2d. at 1382.
The Second Circuit Court of Appeals interpreted Aceto in General Electric Co. v. AAMCO Transmissions, Inc. (“AAMCO”)\(^{66}\) as an application of the traditional tort concept of duty. In AAMCO, plaintiff alleged that a group of oil companies that sold petroleum products to service stations and had some ability to control activities at the service stations were liable as arrangers for the disposal of waste petroleum products at the service stations. The court rejected that argument, reasoning that the AAMCO case was distinguishable from Aceto because in Aceto the defendants controlled the process that generated the hazardous waste, while the AAMCO defendants merely had some ability to control.\(^{67}\) That difference, the court reasoned, imposed a duty on the Aceto defendants with regard to proper disposal of the waste, but did not impose a duty on the AAMCO defendants.\(^{68}\)

The AAMCO court further explained that Congress relied on “traditional notions of duty and obligation” in determining which parties would be liable under CERCLA.\(^{69}\) Thus, the obligation to control makes one an arranger while merely having the ability to control does not. The court did not specify what “traditional notion of duty” obligated a contracting party to control the waste handling of another party. That “obligation” appears to be unique to CERCLA and unique to the Aceto court’s view of CERCLA.

Traditional concepts of duty sound very much like negligence. Thus, the AAMCO court is showing support for the tort-based understanding of arranger liability that grows out of the Senate bill’s attempt to base liability on causation. While no one would suggest that the Aceto defendants had a negligence-type duty to prevent Aidex from polluting, the AAMCO court was

\(^{66}\) 962 F. 2d 281 (2d Cir. 1992).
\(^{67}\) Id. at 287 (citing Florida Power and Light Co. v Allis Chalmers, 893 F.2d 1313,1319 (11th Cir. 1990) (declining to hold a seller liable as an arranger when the seller could, by use of economic power, have forced its purchasers to properly dispose of waste).
\(^{68}\) 962 F.2d at 286 (distinguishing between the obligation to control and the mere opportunity to control).
\(^{69}\) Id. (noting that it is the obligation to exercise control that triggers liability).
taking the position that the Aceto decision means that when Congress used the “arranger”
language, it intended to impose liability on anyone whose relationship with the transaction that
led to the creation of the waste or that led to the contamination of the site was so such that it may
be seen as a cause of the contamination.

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

The Shell court accepted that definition, but disagreed with the oil companies regarding
the level of control exercised by the government. The court noted that in Aceto, the
manufacturers owned the products that Aidex was working on and controlled the process
employed by Aidex. That process necessarily included the generation of hazardous waste. In
such circumstances, the person who owns the products and directs the processing has an
obligation to take responsibility for the results of that process. The government in Shell, on the
other hand, never owned the raw materials. It was merely a purchaser of finished products.

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70 281 F3d 812 (9th Cir. 2002)
71 Id. at 816 (describing the degree of involvement the United States government had in the
production of avgas during World War II).
72 Id. at 823 (the court described this as the “broader” arranger liability theory and discussed the
applicability of Aceto).
73 Id. (noting that the government never owned any of the raw materials).
74 Id. (following through with the attempted Aceto analogy, the court said that the government
was more like a purchaser of the pesticides that a pesticide manufacturer).
Unlike the Aceto defendants, it did not contract out the waste generating step and then try to disclaim responsibility for the waste. It was not, therefore, a cause of the contamination.

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

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

The Sixth Circuit cited Aceto for the idea that courts should look beyond the parties’ characterization of the transaction to see if the transaction was in fact, an arrangement for

75 Id. (noting that the government did not “contract out a crucial and waste producing intermediate step in the manufacturing process and then seek to disclaim responsibility”).
76 390 F. 3d 433 (6th Cir. 2004).
77 Id. at 438-442. The relationship between the parties was more complex than in Aceto because in addition to joint ownership and operation of the facility, the purpose of the facility was to produce toluene di-isocyanate, which was a critical ingredient in GenCorp’s manufacture of urethane. Thus, GenCorp was funding the manufacture of a product it would purchase from the facility for use of its facilities.
The court recognized that intent is important because the word “arrange” means to make a plan. GenCorp. claimed it never owned or possessed the waste or made any decisions regarding arrangement for disposal. The court found those facts not necessarily relevant because it did knowingly participate in a transaction that included an arrangement for disposal. The court did not examine whether GenCorp. provided raw materials, purchased output or controlled the process. None of that was necessary because GenCorp. operated the facility that generated the waste. The court’s focus was on how to characterize the transaction – was it sale of a product or a transaction that included disposal. If the transaction included the generation and disposal of hazardous waste, each party to that transaction has arranged for disposal.

The Eleventh Circuit gave limited approval to the Aceto theory in South Florida Waste Management District v. Montalvo. The issue in Montalvo was whether farmers and ranchers who contracted for the aerial spraying of pesticides and herbicides on their properties could be liable as “arrangers” for the contamination at the air strip owned by the party who did the spraying. The sprayers tried to analogize their case to Aceto. The farmers owned the pesticides and knew that spillage was a necessary part of the application process. If not for the

78 Id. at 445-46 (noting that looking beyond the parties’ characterization of the transaction required a fact-driven inquiry).
79 Id. (quoting Webster’s New College Dictionary for its definition of “arrange”).
80 Id. at 446 (noting that arrange for disposal did not require an intent to dispose of waste; it required an intent to engage in a transaction that included the disposal of hazardous substances).
81 Id. (the court listed numerous facts that lead the District Court to correctly conclude that the transaction GenCorp participated in was not merely purchase of a product, but included preparations for waste disposal).
82 84 F.3d 402, 409 (11th Cir. 1996) (noting that reference to Aceto in prior 11th Circuit decisions “cannot be interpreted as a wholesale adoption of Aceto as the law of this circuit”).
83 Id. at 404-406. The government sued the sprayers and the sprayers brought a third party action against the farmers. The theory underlying the third party complaint was that the use and handling of hazardous substances by the sprayers was solely for the benefit of the farmers and the farmers knew that hazardous waste was a by-product of the sprayers’ activities. Therefore, the farmers arranged for disposal of waste.
84 Id. at 408 (noting that the sprayers argued that the farmers controlled the spraying).
process required by the farmers, there would have been no contamination. Thus, the farmers
were, effectively, the cause of the contamination.  

The court rejected that analogy, concluding that the relationship between the sprayers and
the farmers bore little resemblance to Aceto. In Aceto the manufacturers provided the
chemicals, specified what chemicals to mix, and retained ownership of the chemicals throughout.
From that, the court noted “it was possible to infer that the manufacturers exercised some control
over the formulator’s mixing process.” Additionally, while in Aceto the mixing process
“inherently involved the creation of hazardous waste,” the service contracted for by the farmers
did not necessarily include the creation of hazardous wastes. While the sprayers alleged that
waste was a necessary part of the process, the court noted that there was no reason to believe the
farmers knew this. The court recognized the need to look beyond the way the parties had
characterized their transaction to determine whether the facts indicate an arrangement for
disposal. In this case, however, the facts indicate that the farmers had merely contracted for a
service.

The GenCorp. and Montalvo courts understood Aceto differently than the AAMCO and
Shell courts did. AAMCO and Shell saw Aceto as representing the concept that one’s
relationship to the transaction that created the waste or the contamination can impose an

85 Id. at 407 (assessing the sprayers’ argument that the farmers should be liable on a common
law agency theory. The court cited Aceto for the proposition that common law agency theory
can be relevant to determining who is an arranger, but concluded that in this case, the sprayers
were not the agents of the farmers for purposes of waste disposal).
86 Id. at 407-08 (noting several factual distinctions between the case a bar and Aceto.)
87 Id. (noting that the key difference is that in Aceto it was possible to infer that the
manufacturers exercised some control of the formulator’s process, while that control was not
present in this case).
88 Id. The Court dealt with this issue in two ways. First, the court stated that spraying “does not
obviously involve the creation and disposal of hazardous waste.” Then, noting that plaintiffs had
alleged that creation of hazardous waste was inherent in the process and on a motion to
dismiss, the court is to accept the facts as plead, the court stated that the sprayers never
alleged that the farmers knew this.
89 Id.at 408-409 (citing Aceto for the importance of this knowledge).
obligation or responsibility regarding waste disposal. In GenCorp and Montalvo, on the other hand, Aceto stands for the proposition that a court must look beyond the parties’ characterization of the transaction to determine the true intent of the transaction – regardless of what the parties say, was this transaction an arrangement for disposal of hazardous waste?

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

If we compare these descriptions of Aceto we see that they directly address whether Congress intended arranger liability to be primarily based on causation or whether Congress intended it to be based primarily on the generator concept. The Second Circuit’s view based on duty takes the position that even though Congress did not include causation language, it intended essentially a tort based concept. The Sixth Circuit’s rule is essentially based on generator liability. Regardless of how the parties characterize their position, was the defendant in fact someone whose status was that of a generator.

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

III. Sale of a Useful Product As a Defense to Arranger Liability

A number of courts have recognized a defense to arranger liability where the defendant claims that it was not the generator of waste who arranged for its disposal or treatment; it was instead the seller of a product that contained hazardous substances that were later disposed of or
released by someone else. In *Freeman v. Glaxo Wellcome, Inc.*\(^{90}\) the Second Circuit explained why sellers of useful hazardous substances do not have “arranger” liability. Glaxo, upon closing a facility, sold chemical reactants used in its facility to FII, for use in FII’s business.\(^ {91}\) FII used some of the chemicals in its business, stored some of them and sold some of them. The stored chemicals became the source of a remedial action by the EPA at the FII facility and the EPA sued Glaxo claiming that Glaxo had arranged for disposal if its chemicals at the FII facility.\(^ {92}\) Glaxo’s defense was that it merely sold the chemicals.\(^ {93}\)

After going through the long list of cases holding that one cannot circumvent the Superfund Law by characterizing disposal as a sale,\(^ {94}\) the court noted that Glaxo had sold valuable products to FII for use or resale. These were virgin chemicals, not waste. Arrangement for disposal requires the presence of waste.\(^ {95}\) Therefore, Glaxo did not arrange for disposal at the FII facility.

In *Pneumo Abex Corp. v. High Point,*\(^ {96}\) the Fourth Circuit provided further analysis of how to determine whether a transaction is a “sale” or an arrangement for disposal. The court explained that to determine “whether a transaction was for the discard of hazardous substances or for the sale of valuable materials,” the key factors to examine are the intent of the parties and the usefulness of the product.\(^ {97}\)

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\(^{90}\) 189 F.3d 160 (2d Cir. 1999).

\(^{91}\) Id. at 162. Mr. Freeman inspected the chemicals and purchased them “both for use in the Freeman laboratories and for resale.”

\(^{92}\) Id. at 163. Glaxo moved for summary judgment and the district court granted the motion.

\(^{93}\) Id. (the court noted that “it is uncontroverted” the Glaxo merely sold chemicals).

\(^{94}\) Id. at 164 (citing Pneumo Abex v High Point, 142 F.3d 769 (4th Cir. 1998); Florida Power and Light Co. v Allis Chalmers, 893 F.2d 1313 (11 Cir. 1990) and Aceto).

\(^{95}\) Id. (noting that “because the definition of disposal refers to waste, only transactions that involve waste constitute arrangements for disposal”).

\(^{96}\) 142 F.3d 769 (4th Cir. 1998).

\(^{97}\) Id. at 775 (noting that whether the materials were to be reused in their entirety played a role in determining intent and the value of the goods sold plays role in determining whether the materials are, in fact, waste).
The transaction in Pneumo was the sale of used bearings to be processed into new bearings. The processing generated waste, but the court found that the essence of the transaction was payment in exchange for bearings; not an attempt to dispose of unwanted metal. Thus, the seller did not arrange for disposal.

The Sixth Circuit in United States v. Cello-Foil Products, Inc., addressed a more complex transaction in which there were elements of both sale of a useful product and disposal of waste. The court recognized that if the material at issue (the subject of the transaction) is waste, the transaction is arrangement for disposal, and conversely, if the material at issue is a useful product, the transaction is not arrangement for disposal.

In Cello-Foil, the defendants were purchasers of solvents. The contract of sale provided that Thomas Solvents, the seller, would deliver solvents in reusable drums, and the price included a drum deposit. The purchasers used the solvents and returned the drums to Thomas, who cleaned and reused the drums. The government argued that the arrangement was impliedly an arrangement for disposal of waste because the drums that were returned contained some solvent residue, which was the source of the contamination at the Thomas

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98 Id. at 772 (noting that the “conversion agreements” provided that used journal bearings were shipped to Pneumo’s foundry for processing and the seller of the used bearings received a credit against the purchase price of new bearings based on the weight of the bearings).
99 Id. (citing several cases that examined what was being sold as the means to determine the intent of the parties and noting that the waste generated by the reclamation of the bearings was incidental to the reclamation of the bearings and not the essence of the transaction).
100 100 F.3d 1227 (6th Cir. 1995).
101 Id. at 1230 (noting that the defendants were purchasers of solvents in a transaction that was the sale of a useful product, but the transaction required the defendants to return the used drums to the seller and this return of the used drums with some waste residue was alleged to be the arrangement for disposal).
102 Id. at 1232 (citing AM International v International Forging Equipment, Corp., 982 F2d 989,999 (6th Cir. 1993)).
103 Id. at 1230 (describing the terms of defendant’s sale of solvents).
104 Id. (when purchasers returned the used drums and purchased more solvent, the deposit was credited against the purchase price).
105 Id. (noting that the contents of the returned drums varied, with some as empty as possible and some containing as much as 15 gallons of solvent).
The defendants argued that they could not be liable because they lacked the intent to dispose of the waste.

The court began its analysis by noting that the legislation does not define the phrase “arrange for.” The court noted that the Seventh Circuit had defined “arrange for” to include an element of intent in Amcast Industrial Corp. v. Detrex, where Judge Posner reasoned that the phrase “arrange for disposal” contemplates a case in which a person wants to get rid of something. Thus, if the defendant did not intend to get rid of a hazardous substance, there has been no arrangement for disposal. The Cello-Foil court expanded on this concept, concluding that intent is a requirement because arrangement embraces concepts similar to contract and agreement. To arrange means to “make preparations or plan,” both are actions that include an intent requirement. Thus, what the parties intended can determine how the transaction will be characterized. To determine what the parties intended, courts look to the totality of the circumstances, not to how the parties characterize their transaction. Thus, in Cello-Foil, the court noted that by leaving solvents in the drums, which the defendants knew Thomas would take away and dispose

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106 Id. at 1230 (noting that the contamination at issue was the result of this arrangement whereby reusable drums were used and the drums were returned to the seller with some remaining solvent that was disposed of or released to the environment by the seller).
107 Id. at 1231.
108 2 F3d 746 (7th Cir. 1993).
109 Id. at 751 (concluding Detrex arranged for transport of hazardous substances but cannot be said to have arranged for them to spill).
110 100 F3d at 1231 (noting that the statute connects arranged for disposal with the phrase “by contract, arrangement or otherwise”).
111 Id. at 1232 (noting that an intent requirement is not inconsistent with strict liability because the intent is used only to determine whether the person is a potentially responsible party and if he or she is, then strict liability applies).
112 Id. at 1233 (concluding that defendants are not liable under section 107(a)(3) without a showing that they intended to dispose of hazardous substances).
of, one could infer the intent to dispose of those solvents. In Amcast, on the other hand, the court found that when a seller of solvents gives the solvents to a transporter to deliver to a user, the seller has not arranged for disposal of solvent accidentally spilled by the transporter. The transaction was a sale of a useful product and did not include intent to dispose of anything.

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

IV. Burlington Northern and Santa Fe Railroad Co. v. United States

A. The Court’s Decision

Burlington Northern is the first Supreme Court decision addressing the definition of “arrange for disposal.” The case arose out of contamination at a site owned and operated by Brown & Bryant, Inc (B&B), a small chemical distributor. Shell sold a number of products to B&B, including pesticides known as D-D and Nebagon. Various spills and releases at the B&B site resulted in contamination of the soil and groundwater. The State of California and

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113 Id. at 1233 (denying defendant’s motion for summary judgment because issues of fact exist regarding whether there was an intent to dispose of waste).
114 2 F3d 746, 751 (7th Cir. 1993).
115 129 S.Ct. at 1874-1875. B&B had begun operations in 1960 on an approximately 3.8 acre parcel. B&B stored chemicals on-site and applied them to customers’ farms.
116 Id. at 1875. (noting that because D-D was corrosive, it resulted in numerous tank failures and spills).
EPA undertook remedial efforts at the site and after B&B went out of business, the State named Shell and Burlington Northern as responsible parties. Shell was alleged to have arranger liability because chemicals it sold to B&B were alleged to have spilled on delivery. Burlington Northern was alleged to be liable as an owner because a portion of the B&B facility was on property B&B leased from Burlington Northern.

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

The District Court held Shell liable as an arranger and the Ninth Circuit Court of Appeals affirmed. The court noted that although Shell was not a “traditional” arranger, in the sense that it did not transact with B&B to dispose of hazardous waste, it could be held liable under the “broader” arranger theory, where disposal is not the goal of the transaction, but is a foreseeable by product. The court discussed whether arranger liability needed to be purposeful and concluded that it did not because “disposal” is defined in CERCLA to include activities such as

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117 Id. The California Department of Toxic Substances Control began investigating the site in 1983. The site was added to the National Priorities List in 1989.
118 The Ninth Circuit Court of Appeals held that Burlington Northern was jointly and severally liable for all of the cleanup costs even though it did not contribute to the contamination and it only owned a portion if the site for a portion of the time the site operated. The Court reversed, holding that CERCLA liability is not joint and severable where, as here, there is some reasonable basis for allocating the costs.
119 520 F.3d 918 (9th Cir. 2008).
120 Id. at 948 (defining “broader” arranger liability as cases in which a person does not contract directly for disposal, but engages in a transaction that indirectly results in the disposal of hazardous substances).
leaking that could occur accidentally.\textsuperscript{121} The court also noted that Shell had sent directions for handling the delivery process to try to limit the amount of spillage.\textsuperscript{122} These directions were seen by the court as an element of Shell’s control of the delivery process.

The Supreme Court reversed, holding that Shell was not liable as an arranger. The Court began its analysis of the arranger issue by looking to the statute, noting that the language of CERCLA makes clear that one who enters a transaction “for the sole purpose of discarding” a hazardous substance, “arrange[s] for disposal.”\textsuperscript{123} At the same time, if one merely sells a useful product and the purchaser, “unbeknownst to the seller, disposed of the product” the seller has not arranged for disposal.\textsuperscript{124} The intermediate cases, the Court stated, are more difficult. Two intermediate cases mentioned by the Court are (1) where the seller has some knowledge of the buyer’s planned disposal and (2) where the seller’s motive for sale of the substance is less than clear. In such cases, courts require a “fact-intensive inquiry that looks beyond the parties’ characterization of the transaction . . . to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA’s strict liability provisions.”\textsuperscript{125} The cases cited by the Court indicate that the issue is whether the transaction is, in essence, a sale or a disposal.\textsuperscript{126}

The Court cautioned against taking that “fact-intensive inquiry” beyond the limits of the statute.\textsuperscript{127} Because Congress did not define arrange for disposal, the Court looked to the

\textsuperscript{121} Id. (discussing the definition of disposal, which includes “leaking,” which can occur accidentally).
\textsuperscript{122} Id. at 950-51 (Shell’s change of its delivery practices to reduce spillage showed that it knew of the spillage and that it had some control).
\textsuperscript{123} 129 S. Ct. at 1878.
\textsuperscript{124} Id. Freeman was among the cases cited for this proposition.
\textsuperscript{125} Id at 1879.
\textsuperscript{126} The Court cited, Freeman, Pneumo and Florida Power & Light v Allis Chalmers Corp. 893 F.2d 1313, 1318 (11th Cir. 1990). All of the cases cited could be seen as raising the defense of sale of a useful product.
\textsuperscript{127} This is probably a reference to the cases that focus on whether the defendant has some element of responsibility for the waste even though one cannot say that they made an arrangement for disposal.
common understanding of the phrase. For the common understanding of the word “arrange” the Court looked to the Merriam-Webster College Dictionary, which defined arrange as “to make preparations for: plan . . . to bring about an agreement or understanding concerning.” Based on this, the Court concluded that an entity “may qualify as an arranger under §9607 when it takes intentional steps to dispose of hazardous substances.”

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

The Court recognized that there may be circumstances where knowledge that the product will be spilled or disposed of will show intent to dispose of hazardous substances. However, knowledge alone does not create such an inference. To be liable, the Court stated, “Shell must have entered into the sale of D-D with the intent that at least a portion of the product be disposed

128 Id. The Court stated that when a statute does not define a concept, courts are to give the concept its ordinary meaning, citing, Crawford v Metropolitan Government of Nashville and Davidson Cty., 555 U.S ___ (2009) and Perrin v United States, 444 U.S. 37, 42 (1979).
129 129 S. Ct. at 1879 (noting that that state of mind plays an indispensable role in determining whether a party has arranged for disposal of hazardous substances).
130 Id. (discussing the definition of “disposal”).
131 Id. (quoting the portion of the government’s brief that argued that Shell’s knowledge of the spills made Shell liable as an arranger).
132 Id. at 1880 (noting that knowledge alone, however, is never sufficient to prove that defendant planned for disposal).
133 Id. (noting that there may be circumstances in which knowledge of spills may lead to an inference that the transaction is an arrangement for disposal, knowledge alone is insufficient).
of during the transfer process.”134 Here, however, Shell took steps to prevent such spills.135 The spills could not, therefore, have been intended by Shell.136

B. Three Questions About Burlington Northern

To understand the Supreme Court’s decision, we need to closely examine three places where the Court appears to have used imprecise or uncertain language. First, the court stated that “an entity may qualify as an arranger under §9607(3) when it takes intentional steps to dispose of a hazardous substance.”137 The use of the word “may” is puzzling because based on the other portions of the decision, it would seem that anyone who takes intentional steps to dispose of a hazardous substance has necessarily arranged for disposal.138 Thus, we need to examine the decision to determine whether the Court’s position is that there are cases in which a person “takes intentional steps to dispose of a hazardous substance” and does not qualify as an arranger or whether the Court is telling us that “intentional steps to dispose” are not the only way to arrange for disposal.

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

Third, the Court sometimes used the phrase “intent to dispose” and sometimes it used the phrase “intentional steps to dispose.” Are those two different things? This distinction could be

134 Id. (noting that the facts of this case do not support such a conclusion.)
135 Id. (noting that Shell had provided safety manuals and required adequate storage in an attempt to reduce or prevent spillage).
136 Id. at 1881.
137 Id. at 1879 (noting that inquiry into state of mind is indispensible).
138 Id. at 1878 (stating that it is “plain from the language of the statute” that if one enters into a transaction the for the “sole purpose of discarding a used hazardous substance, liability would attach).
crucial because while intent is clearly required, the defendants in Aceto intentionally participated in a transaction that included disposal, but they did not have intent to dispose.

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

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

The Burlington Northern Court cited both cases favorably in its discussion of how to determine whether a defendant is liable as an arranger.\(^\text{139}\) Thus it could be that when the Court said that an entity “may incur arranger liability . . . when it takes intentional steps to dispose of a hazardous substance” it meant to inform us that intentional steps to dispose are not sufficient to create liability. A court must look to all the circumstances and determine whether the essence of the transaction was disposal. If so, the intentional steps will incur liability, if not, the intentional steps will not incur liability.

A second possible understanding of the Court’s use of the phrase “may qualify” instead of does qualify, addresses whether liability arises where the hazardous substance disposed of is not a waste. It is important to note that while most of CERCLA addresses the release of hazardous substances to the environment, §9607(3) may be limited to hazardous waste. Section

\(^\text{139}\) *Id.* at 1878-79 (citing each case more than once).
9607(3) incorporates the definition of “disposal” which means the “discharge, deposit, injection” of any “hazardous waste.” Indeed, in Burlington Northern, Shell argued that it could not have liability because the product that was spilled or released was not a hazardous waste.

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

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

A third possible understanding of the Court’s use of “may” is to inform us that intentional steps to dispose are not necessary to produce arranger liability. Think back to the early generator cases. In United States v. Ward, for example, there was no evidence that

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140 42 U.S.C. 9601(29).
141 Brief for Petitioner at 22 (arguing that the correct understanding of “arranged for disposal” must incorporate the statutory definition of disposal, and that 42 USC 9601(29) provides ties disposal to hazardous waste).
142 Id. at 1878-79 (where the phrase “hazardous substances” appears at least 7 times and hazardous waste is discussed only in responding to the government’s argument that disposal required hazardous waste).
143 The Court did not respond directly to Shell’s argument, but the Court’s consistent use of “substances” where it could have use “waste” implies that waste is not a requirement for liability.
144 129 S. Ct. at 1880 (stating that for there to be liability, Shell must have entered into the transaction with the intention that some of the product be disposed of during the transfer process).
145 Id. (discussing what facts may indicate an intent to dispose).
146 See section 1B supra.
147 618 F. Supp. 884 (E.D. N.C. 1985), discussed supra section 1B.
defendant made any arrangement for disposal. The court nevertheless found liability because defendant was the generator of the waste and one should not be able to escape liability by closing their eyes to what happens to their waste. The Burlington Northern Court’s use of the word “may” could mean, then, that intentional steps are not the only way to incur arranger liability.

Does the Court’s reasoning that arranger liability includes an intent element mean that one who negligently handles hazardous waste causing a release to the environment cannot be liable as an arranger? The policies underlying the Ward decision suggest no. There are numerous generator cases in which the generator mishandled the waste and that mishandling was seen as an arrangement for disposal.\(^{148}\) If the Court intended such a change in the law, the Court should have been explicit about it.

That explains why the court talked about “intentional steps to dispose” as opposed to intent to dispose. The Court was in fact being precise. If you dispose of a hazardous waste, you have arranged for disposal. That issue was not before the Court. The issue before the court was a transaction whereby the defendant is removed from the generation and disposal of waste. In such case you need intent to take steps toward disposal – the key being the purpose of the steps you took.

ii. Why Did the Courts Say “In Some Instances”

The Court stated that “in some instances” knowledge that the product being sold will be discarded may provide evidence of the entity’s intent to dispose of its hazardous wastes.\(^{149}\) The Court cited nothing for that proposition, thus leaving the reader with little evidence of what those

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\(^{148}\) See, e.g., Violet v Picillo, 648 F. Supp. 1283 (D.R.I. 1986) (reasoning that generators are liable regardless of whether carefully determined what would happen to the waste); United States v Monsanto, 858 F. 2d 160 (reasoning that United States has made out a prima facie case if it shows that the generator’s waste was shipped to the site); United States v Consolidated Rail Corp. 729 F. Supp. 1461 (D. Del. 1990 (reasoning that authority to make waste related decisions is sufficient to impose generator liability).

\(^{149}\) 129 S. Ct. at 1880.
instances are. This would have been an appropriate place for citing Aceto or other cases in that line, but the Court chose not to do so. In each of those cases, defendant knew that the transaction would generate hazardous waste. The Court, however, continued with a discussion of Shell’s activities. Shell took steps to reduce the likelihood that there would be spills. This showed Shell’s knowledge of the disposal. Unlike the Court of Appeals who saw this as rather damming evidence (Shell clearly knew that there would be spills and everyone intends the known or expected consequences of their actions), the Court saw this as evidence that Shell did not intend spills to occur. Thus, the phrase “in some instances” is meant as a limitation, a rejection of those decisions that saw knowledge that disposal would occur as always implying an arrangement for disposal.

There is a potentially significant difference between Shell’s knowledge that some spills would occur and Aceto’s knowledge that hazardous waste would be generated by the transaction. Shell’s knowledge is much less likely to indicate intent to dispose. Once a party knows that a transaction will generate hazardous waste, however, as opposed to hazardous substances, it may be that the transaction is an intentional step toward disposal. By only discussing spills of virgin product, as opposed to generation of waste, the Court has left open the possibility that Aceto-type cases are the “some instances” referred to by the Court.

The Court’s message, then, is this that knowledge that there will be spills or that material will be discarded is not sufficient to create liability. Knowledge is some evidence, but the goal of the inquiry is to determine the defendant’s intent when it entered the transaction. If the intent was disposal, then the transaction is an arrangement for disposal.
iii. Why Did the Court Say “Steps to Dispose” as Opposed to Intent to Dispose?

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

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

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

The Court’s response to the government’s argument about disposal supports the conclusion that intent to take steps toward disposal is the key. The government argued that “disposal” can occur accidentally and therefore, one can arrange for disposal accidentally. The

150 These cases are discussed in section III supra.
Court responded by focusing on the “ultimate purpose of the arrangement.” The question is not what happened, but what was “planned for.” Thus, the Court was being precise in addressing the nature of the arrangement rather than whether there was an arrangement. If the nature of the arrangement is one the court deems to be a disposal, defendant will have liability.

C. Burlington Northern: Generator or Cause

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

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

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

D. Where Does that Leave Aceto?

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

Justice Ginsburg, dissenting in Burlington Northern, can be seen as suggesting that Aceto lives. He noted that at oral argument, counsel for Shell was asked whether different shipping terms could have meant that Shell would have been the owner at the time the product was spilled. Counsel responded yes. Based on that, the dissent argued that there should be liability because the shipping terms should not be the determining factor in arranger liability. Underlying the dissent’s reasoning is the assumption that if Shell owned the hazardous substances at the time the substances spilled, Shell would have been liable. That premise is based on or at least consistent with Aceto, where ownership was a very important factor.

The dissent’s assumption that ownership would make a difference is not supported by the Court’s opinion. The Court said that courts should examine the purpose of the transaction to determine whether defendant had the requisite intent. The purpose of the transaction does not

\[151\] 129 S. Ct. at 1885.
\[152\] Id. Shipping terms could only be relevant if the dissent believed that ownership of the material would change the result.
change based on ownership of the hazardous substances. The Court made clear that intent of the parties to the transaction is important to determining whether there is an arrangement for disposal. Intent of the parties does change with a change in ownership.

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

Thus, the Second Circuit’s understanding of Aceto in the AAMCO decision\textsuperscript{153} cannot have survived. The Second Circuit understood Aceto to be based on traditional concepts of duty. In Burlington Northern, there is no discussion of duty. Indeed, one could have argued that Shell had a duty to take additional steps to prevent the spillage. Instead, the Court focused on whether Shell made a plan for or intended the spillage. Among the factors to be examined to determine intent is the nature of the transaction. If waste is the subject of the transaction, that could imply intent to dispose.

We noted above, however, that portions of the Aceto decision make Aceto look like a generator case. The Aceto court reasoned that the Aceto defendants should be liable just as the NEPACCO defendants were liable. In NEPACCO, the court reasoned that as generator, the defendant had control of the waste and that control (prior to disposal) implied an arrangement for disposal. The Eighth Circuit in Aceto reasoned that ownership and control of the process that generated the waste made the defendants de facto generators of that waste. As noted above, the Sixth Circuit in GenCorp and the Eleventh Circuit in Montalvo, understood Aceto as essentially a generator case. That leaves open the possibility that those cases that rely on Aceto could have

\textsuperscript{153} Discussed \textit{supra} in section II\(B\).
survived. A court could examine the Aceto fact pattern and conclude that by engaging in a transaction that they knew would generate hazardous waste that would have to be disposed of as part of the transaction, the defendants took intentional steps to dispose of hazardous substances.

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

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

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154 129 S. Ct. at 1880.
155 Id.
The Burlington Northern Court discussed the efforts made by Shell to reduce spillage. The Court inferred from those facts, that Shell did not intend the spillage. That could mean that a defendant in an Aceto-type case could reduce the likelihood of liability by giving the formulator instructions to avoid the accidental disposal of hazardous waste. If so, the advice counsel has been providing may change. Many have counseled clients not to get involved in other people’s waste handling matters because anything one says can lead to an inference of control and control can result in liability. Now, control is no longer a key to arranger liability, but intent is and actions taken to avoid disposal will indicate that disposal was not intended and thereby reduce the likelihood of liability.

Conclusion

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