NOTES

Morton International, Inc. v. A.E. Staley Manufacturing Co.: The Third Circuit Establishes a Standard for CERCLA Arranger Liability

I. OVERVIEW

F.W. Berk & Co. operated a mercury processing plant in Wood Ridge, New Jersey, from 1929 until 1960.[1] During that time, the plant was the largest producer of intermediate inorganic mercury compounds—including red and yellow oxides of mercury (ROM and YOM)—in the United States.[2] These mercury compounds were produced in part from prime virgin mercury (PVM).[3] In addition, the plant reprocessed contaminated mercury (dirty mercury) which it then converted into intermediate compounds for some of its customers.[4] For decades the plant released hazardous wastes into the environment as a result of its operations.[5]

The plant was transferred to the Wood Ridge Chemical Corporation (a subsidiary of the Velsicol Chemical Corporation (Velsicol)) in 1960 and subsequently to the Ventron Corporation (Ventron) in 1968.[6] After the plant's closing in 1974, Ventron went through a series of merger transactions eventually becoming Morton International Incorporated (Morton).[7] In the 1970s, the New Jersey Department of Environmental Protection filed an action in federal court against Morton, Ventron, Velsicol, and other parties for the cleanup and removal of mercury from

1. Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 673 (3d Cir. 2003).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

the former plant site (Site).[8] That court found Velsicol and Morton strictly liable, jointly and severally for the cleanup, and the judgment was upheld following numerous appeals.[9]

After the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980 and the listing of the Site on the federal Superfund list in 1984, Morton, Velsicol, and various other entities were required to perform a remedial investigation and feasibility study.[10] Since that time, Morton has been financing its cleanup efforts under various judicial orders.[11] Morton filed suit in 1996 in the United States District Court for the District of New Jersey, seeking contribution from various former customers of the plant, including Tenneco, under CERCLA, the Resource Conservation and Recovery Act (RCRA), the New Jersey Spill Compensation and Control Act (Spill Act), and common law.[12] The company sought to recover some of the costs it incurred, and continues to incur, in its efforts to clean up the Site.[13] Morton argued that the contractual agreements with the defendants, whereby the plant processed the customers' PVM into ROM and YOM, and the dirty mercury transactions rendered the defendants liable as *arrangers* under CERCLA section 107(a)(3).[14]

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8. *Id.*

9. *Id.*; *see* Morton Int'l, Inc. v. Gen. Accident Ins. Co., 629 A.2d 831, 880 (N.J. 1993) (finding that Morton's predecessors had intentionally discharged hazardous wastes over a long period of time); State Dep't of Envtl. Prot. v. Ventron Corp., 468 A.2d 150, 161-62 (N.J. 1983) (concluding that defendants had violated the statute prohibiting the discharge of detrimental material into waters by intentionally allowing mercury-laden effluent to escape onto surrounding lands).

10. *Morton Int'l*, 343 F.3d at 673-74. Under CERCLA, the EPA is authorized to incur expenses responding to imminent threats to health or the environment under its removal authority; however, it can only spend money on remediation for sites that is has placed on the National Priority List (or Superfund list). *See* CERCLA § 104, 42 U.S.C. § 9604 (2000). The removal provision provides, in relevant part: "When the President determines that [the removal] will be done properly and promptly by the owner or operator of the facility . . . the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with [the Act]." *Id.*

11. *Morton Int'l*, 343 F.3d at 674.

12. *Id.*

13. *Id.*

14. *Id.* Section 107(a)(3) imposes 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.

CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (emphasis added).

In April 2000 Tenneco and the other defendants filed for summary judgment in an omnibus motion.[15] The district court denied the motion with respect to CERCLA, the Spill Act, and common law.[16] However, the court granted the defendants' motion to dismiss Morton's RCRA claim.[17] Several months later, Tenneco filed a renewed motion for summary judgment on its own behalf, which the court granted as to all claims.[18] Morton sought review of the decision on appeal and the district court asked the court of appeals to "definitively address" the standard for arranger liability under section 107(a)(3).[19] The United States Court of Appeals for the Third Circuit *held* that a party faces liability as an arranger if it (1) owns or possesses hazardous material and (2) knows that the processing can or will result in the release of hazardous waste, or (3) the party otherwise has control over the production process. Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 679 (3d Cir. 2003).

II. BACKGROUND

In 1980 Congress passed CERCLA.[20] The enactment of CERCLA was largely the result of public outcry to incidents such as Love Canal, which garnered national media attention and illustrated the consequences of many years of hazardous waste mismanagement.[21] CERCLA is an extension of the common law principles of strict liability for abnormally dangerous activities and exists as a comprehensive statute authorizing the

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15. *Morton Int'l*, 343 F.3d at 674.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 675. The Third Circuit previously considered the issue of CERCLA arranger liability in *FMC Corp. v. United States Dep't of Commerce*, No. 92-1945, 1993 WL 489133 (3d Cir. 1993). In that case, the court adopted the *Aceto* view of arranger liability. *See id.* However, the decision was later vacated and in a subsequent rehearing the court, sitting en banc, held the government liable without discussion because it was "equally divided on [the issue of arranger liability]." FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 845-46 (3d Cir. 1994) (en banc). Accordingly, until the noted case, the Third Circuit had neither definitively ruled on the validity of the *Aceto* test for arranger liability nor established its own test. *Morton Int'l*, 343 F.3d at 675 n.4.

20. CERCLA §§ 101-127, 42 U.S.C. §§ 9601-9627 (1980).

21. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 223-24 (4th ed. 2003). In 1953, the Hooker Chemical and Plastics Corporation sold a sixteen-acre tract of land to the Niagara Falls Board of Education for the price of one dollar. *Id.* The company admitted that it buried chemicals on the site and covered the chemicals with a layer of clay. *Id.* The deed of sale provided that Hooker would not be liable for any future injuries that might result from the buried waste. *Id.* Subsequently, a school and 100 homes were built on the site, which became known as Love Canal. *Id.* After heavy rains in 1978, chemicals began seeping into residential basements. *Id.* More than 80 chemical compounds were discovered, and among them were many known carcinogens. *Id.* Ultimately, 1000 families were forced to move and all homes along the canal were destroyed. *Id.*

President to command government agencies and private parties to clean up hazardous waste sites.[22] In 1986 Congress amended CERCLA with the Superfund Amendments and Reauthorization Act (SARA), adding a provision expressly creating a cause of action for contribution.[23]

The heart of CERCLA lies in its liability provisions.[24] Section 107 of CERCLA identifies four classes of potentially responsible parties who bear cleanup liability under SARA's cost recovery provisions: (1) current owners and operators of the contaminated site, (2) owners and operators of the site at the time of the waste disposal, (3) generators of the waste found at the site, and (4) persons who transported waste to the site.[25]

Falling within the meaning of a waste "generator" are those persons "who by contract, agreement, or otherwise *arranged for* disposal or treatment . . . of hazardous substances owned or possessed by such person . . . at any facility . . . owned or operated by another party."[26] In the absence of a statutory definition of "arranged for," the courts have been left largely on their own to determine its meaning within the context of CERCLA. This has resulted in a split among the circuit courts of appeal in the interpretation of what "arranged for" means. The courts currently follow one of three different approaches: (1) a strict liability

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22. *Id.*; *see also* CERCLA § 104, 42 U.S.C. § 9604 (2000). The RESTATEMENT SECOND OF TORTS provides, in relevant part:

> One who carries on an abnormally dangerous activity is subject to liability for harm to the person . . . of another resulting from the activity, although he has exercised the utmost care to prevent the harm. This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous. In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 519-520 (1974).

23. *Morton Int'l*, 343 F.3d at 675. Section 113(f) of CERCLA provides, in relevant part:

> Any person may seek contribution from any other person who is liable or potentially liable under . . . this title, during or following any civil action under . . . this title. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

CERCLA § 113(f), 42 U.S.C. § 9613(f).

24. PERCIVAL ET AL., *supra* note 21, at 224.

25. *Id.* at 225.

26. *Id.* at 247 (quoting CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (emphasis added)).

approach, (2) a specific intent approach, and (3) a "totality of the circumstances" or case-by-case approach.[27]

The leading authority for a broad interpretation and the imposition of strict liability under CERCLA is *United States v. Aceto Agricultural Chemicals Corp.*[28] The defendants in *Aceto* were pesticide manufacturers who hired a formulating company to mix and package pesticides for them.[29] After the formulating company went bankrupt their plant site was found to be highly contaminated.[30] The United States filed an action against the manufacturers contending that because (1) they had retained ownership of their pesticides throughout the formulation and packaging process and (2) the generation of wastes containing hazardous substances was an inherent part of the formulation process, the manufacturers had "arranged for disposal" of hazardous substances and were thus liable under CERCLA.[31]

The United States Court of Appeals for the Eighth Circuit began its analysis by stating that a broad interpretation of CERCLA was consistent with the "overwhelmingly remedial" scheme of the statute.[32] The court went on to interpret the phrase "otherwise arranged for" in light of the dual purpose of CERCLA: (1) to provide the federal government with tools for prompt and effective responses to the problem of hazardous waste and (2) to ensure that those responsible for the problems caused by the disposal of toxic pollutants bear the costs and responsibility for remedying the harmful conditions they create.[33] The Eighth Circuit looked beyond the manufacturer's characterization of their relationship with the formulating company to determine if the transactions involved an arrangement for the disposal of hazardous substances.[34] The court concluded that the complaint alleged facts that sufficiently established that the pesticide manufacturers had "arranged for" the disposal of hazardous wastes.[35] In so doing, the court found that, under CERCLA, "arranged for" did not require a specific intent to dispose of hazardous waste.[36] It emphasized that requiring such a finding of intent would

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27. *See* United States v. Gordon Stafford, Inc., 952 F. Supp. 337, 339-40 (N.D. W. Va. 1997).
28. *See* 872 F.2d 1373 (8th Cir. 1989).
29. *Id.* at 1375-78.
30. *Id.* at 1375.
31. *Id.* at 1375-76.
32. *Id.* at 1380 (quoting United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986)).
33. *Id.* at 1380-81.
34. *Id.* at 1381.
35. *Id.* at 1382.
36. *Id.* at 1380-82.

frustrate CERCLA's goal of requiring responsible parties to pay for hazardous waste cleanup.[37] In short, the Eighth Circuit held that arranger liability may be imposed where (1) the party supplied raw materials to another, (2) the party owned or controlled the work done at the site, and (3) the generation of hazardous wastes was an inherent part of the production process.[38]

On the opposite end of the spectrum, the United States Court of Appeals for the Seventh Circuit established a specific intent approach regarding arranger liability in *Amcast Industries Corp. v. Detrex Corp*.[39] The plaintiff in *Amcast* was a manufacturer of copper fittings who sought recovery of cleanup costs from Detrex, a supplier of trichloroethylene (TCE)—a solvent and hazardous substance which the plaintiff used in its manufacturing process.[40] The plaintiff purchased TCE from Detrex in liquid form, which was either delivered by Detrex's own tanker trucks or by a common carrier hired by Detrex.[41]

The complaint arose after TCE was discovered in the groundwater near the plaintiff's property.[42] Evidence in the record indicated that both Detrex's and the common carrier's drivers sometimes spilled TCE accidentally on the plaintiff's premises while filling its storage tanks, some of which eventually found its way into the groundwater.[43] The court concluded that Detrex was liable as a "responsible person" for the spillage from its own trucks but not the spillage from the hired common carrier's trucks.[44] It determined that the words "arranged for" implied an intentional action and that Detrex had only arranged for the common carrier's delivery of TCE, not for any spillage of the chemical on the plaintiff's property.[45] The court further reasoned that the word "disposal" excludes any accidental spillage because no one would "arrange for" such an occurrence.[46] The Seventh Circuit therefore concluded that a party did not "arrange for" the disposal of a hazardous substance when it did not intentionally arrange for the hazardous substance being delivered by a hired shipper to be spilled onto its premises.[47]

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37. *Id.*
38. *Id.*
39. 2 F.3d 746 (7th Cir. 1993).
40. *Id.* at 747-48.
41. *Id.*
42. *Id.* at 748.
43. *Id.*
44. *Id.* at 750-51.
45. *Id.* at 751.
46. *Id.*
47. *Id.*

The United States Court of Appeals for the Eleventh Circuit found a middle ground between the strict liability and specific intent approaches when it decided *South Florida Water Management District v. Montalvo*.[48] The case involved a pesticide formulating and aerial spraying service provider (the sprayer).[49] After having been found jointly and severally liable for the cleanup of its airstrip and storage site, the sprayer sought contribution under CERCLA from landowners that had contracted for spraying services.[50] The airstrip and storage site were contaminated with pesticide wastes due to spillage during the sprayer's mixing and loading operations and during rinsing of its planes' applicator tanks.[51]

The court distinguished the facts of the case from those considered by the Eighth Circuit in *Aceto*.[52] It stated that because the manufacturers in *Aceto* had supplied chemicals to the formulator, provided mixing instructions, and retained ownership of the hazardous substances throughout the formulating process, a court could infer that the manufacturers maintained some level of control over the formulator's process.[53] In addition, the court noted that the process in *Aceto* "inherently" involved the creation of hazardous wastes such that the manufacturers should have expected the formulator to dispose of these wastes as part of the services it was purchasing.[54] In contrast, the *Montalvo* court found that although the landowners owned the pesticides during the application process, this alone did not suggest the type of control over the sprayer's application process that the manufacturers in *Aceto* had retained.[55] Reasoning that it could not infer that the landowners in *Montalvo* knew that spraying pesticides entailed spilling hazardous substances and draining rinse water, the court did not impose arranger liability on the landowners.[56] The Eleventh Circuit held that when determining whether a party has "arranged for" the disposal of hazardous wastes within the meaning of CERCLA, the courts must focus on all of the facts in the particular case.[57]

The Eleventh Circuit's decision in *Montalvo* marked a departure away from an earlier case in which that court took a position more in line

48. 84 F.3d 402 (11th Cir. 1996).
49. *Id.* at 404.
50. *Id.* at 405.
51. *Id.* at 404.
52. *Id.* at 408-09.
53. *Id.* at 408.
54. *Id.*
55. *Id.*
56. *Id.* at 408-09.
57. *Id.* at 409.

with the Eighth Circuit in *Aceto*.[58] In *Florida Power & Light Co. v. Allis Chalmers Corp.*, the appellant electric company had purchased transformers from the appellee manufacturers.[59] At the end of the transformers' useful life, the appellant electric company sold them to an appellant steel company as scrap.[60] The transformers in dispute contained a mineral oil with traces of polychlorinated biphenyls, a hazardous substance.[61] Those substances spilled and contaminated the appellant steel company's site.[62] Two lawsuits were brought against the electric and steel companies.[63] Subsequently, the electric and steel companies instituted a lawsuit seeking contribution under CERCLA from the manufacturers.[64]

The manufacturers argued that they were absolved of liability because they did not own the hazardous waste or make the crucial decision as to how it should be disposed.[65] They further asserted that any manufacturer who sells a useful product can never "arrange for disposal" and thus can never be held liable under CERCLA.[66] Relying on *Aceto*, the Eleventh Circuit stated that courts were not hesitant to look beyond a defendant's characterizations of a purported sales transaction to determine whether it in fact involved an arrangement for the disposal of hazardous wastes.[67] While stopping short of expressly adopting the ruling of *Aceto*, the Eleventh Circuit relied heavily on the Eighth Circuit's decision to hold that a manufacturer who did not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed may nevertheless face arranger liability under CERCLA.[68]

The Third Circuit was likewise persuaded by the *Aceto* decision when it passed on the issue of arranger liability in *FMC Corp. v. United States Department of Commerce*.[69] The suit involved a section 113(f)

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58. *See* Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1316-18 (11th Cir. 1990).

59. *Id.*

60. *Id.* at 1315.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 1318. The useful product defense holds that if a party merely sells a product, without any additional evidence that the transaction includes an "arrangement" for the ultimate disposal of hazardous wastes, CERCLA liability will not be imposed. *See id.* at 1317.

67. *Id.* at 1318 (citing United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1381 (11th Cir. 1989)).

68. *Id.* at 1316-18.

69. No. 92-1945, 1993 WL 489133 (3d Cir. 1993), *superseded by* FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833 (3d Cir. 1994).

action for contribution brought by FMC against the United States.[70] FMC acquired the plant site involved in the dispute from its prior owner, American Viscose.[71] The plant, constructed in 1940, was originally designed for the production of textile rayon.[72] Following the bombing of Pearl Harbor in 1941, the government determined that it had an increased need for high tenacity rayon (HTR) for use in manufacturing war-related products.[73] The War Production Board commissioned American Viscose to convert its plant to produce HTR, and the company complied.[74] Inspections of the plant site in 1982 revealed the presence of carbon disulfide, a precursor to HTR, in the groundwater beneath the plant.[75] In addressing the government's argument against CERCLA liability, the Third Circuit noted that the court in *Aceto* had found that liability could be imposed on a person or entity who (1) supplied raw materials to another and (2) owned or controlled the work done at the site, where (3) the generation of hazardous substances was an inherent part of the production process.[76] Applying the three-part *Aceto* test, which the court found to be a "reasonable construction of the statute," the Third Circuit concluded, "the government clearly was an arranger" within the meaning of CERCLA.[77] However, the Third Circuit, in an en banc opinion, superseded the judgment in *FMC*.[78] The court, because it was evenly divided, affirmed the district court's finding of arranger liability without discussion.[79]

III. THE COURT'S DECISION

In the noted case, the Third Circuit considered the issue of arranger liability in light of the plain language of CERCLA and the various approaches previously taken by the different circuit courts of appeal.[80] The court began by discussing the congressional purpose behind the enactment of CERCLA and the later amendments under SARA.[81] Next, the court described the interrelationship between sections 107 and 113 of CERCLA, focusing on those individuals falling within the scope of

70. *Id.* at *1.
71. *Id.* at *2.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at *11.
77. *Id.*
78. 29 F.3d 833 (3d Cir. 1994).
79. *Id.* at 845-46.
80. *See* Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 675-77 (3d Cir. 1994).
81. *Id.* at 675-76.

"potentially responsible persons."[82] Noting the lack of a definition for "arranged for" as expressed in section 107(a)(3), the court turned to the plain meaning of the statutory language for guidance and concluded that Congress had intended this particular category of potentially responsible person to be broadly construed.[83]

After considering the different standards adopted by its companion courts, the Third Circuit concluded that the most important factors to the arranger liability analysis were (1) ownership or possession of a material by the defendant and (2) the defendant's knowledge that the processing of that material could or would result in the release of hazardous waste, or (3) the defendant's control over the production process.[84] First, the court explained that the statute required proof of ownership or possession; however, it was quick to caution that a finding of ownership or possession alone would not be a sufficient ground for asserting liability.[85] Relying, in part, on *Aceto*, the court found that a defendant's knowledge that hazardous waste could or would be released as part of the production process provided a strong basis for holding the defendant liable since it demonstrated a knowing contribution to the hazardous waste contamination.[86] In addition, the court explained that proof of the defendant's control was valid to the arranger liability inquiry because it could establish that the defendant was responsible for the release of hazardous wastes.[87] As a final note, the court cautioned that the factors it laid out should serve only as a base-line for the analysis of arranger liability, and that other relevant factors must be considered as well.[88]

The court next stated that it would review each of Morton's claims under its newly established arranger liability standard to determine if the district court had correctly granted summary judgment to Tenneco.[89] Beginning with the PVM transactions, the Third Circuit concluded that the district court's finding that Morton had used the "conversion" transactions solely for the purpose of minimizing its financial risk in a volatile mercury market inappropriately resolved an issue of material fact.[90] The court further found that there were disputed facts with respect to Tenneco's knowledge of hazardous waste releases during the PVM

82. *Id.*
83. *Id.* at 676.
84. *Id.* at 676-79.
85. *Id.* at 677-78.
86. *Id.* at 678-79.
87. *Id.* at 679.
88. *Id.*
89. *Id.* at 679-85.
90. *Id.* at 680-81.

process as well as the level of Tenneco's control over the process.[91] However, it noted that in making the "knowing" inquiry, it was fair to infer from Tenneco's involvement with mercury oxides at its own facility that it had some knowledge about the environmental hazards involved in Morton's PVM process.[92]

The court next addressed Tenneco's useful product defense.[93] It agreed with Tenneco's argument "that the sale of PVM alone or the purchase of ROM and YOM alone—without evidence of ownership or possession, knowledge, and control—would not be sufficient grounds on which to impose 'arranger liability.'"[94] The court did not conclude, however, that the PVM transactions were merely sales of a "useful product" given the factual disputes regarding Tenneco's knowledge and level of control.[95] The court then considered Morton's assertion that Tenneco shipped its own dirty mercury to the plant for processing into usable mercury, a transaction the court reasoned would clearly qualify Tenneco for arranger liability.[96] Again the court found that there was evidence sufficient to create a disputed fact with respect to each of the principle arranger liability factors.[97]

In addressing Morton's Spill Act claim, the court recognized that the act was the "New Jersey analog to CERCLA" and thus the standards of liability were the same.[98] Finally, the Third Circuit concluded that the district court had properly granted summary judgment to Tenneco with respect to Morton's common law contribution claim because that claim had been preempted by section 113(f) of CERCLA.[99]

IV. ANALYSIS

In the noted case, the Third Circuit took a markedly different stance on the issue of arranger liability from its earlier position in *FMC* where

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91. *Id.* at 680-83.

92. *Id.* at 682.

93. *Id.* at 683-84; *see also* Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317-18 (11th Cir. 1990) (explaining the useful product doctrine).

94. *Morton Int'l*, 343 F.3d at 684.

95. *Id.*

96. *Id.* at 684-85.

97. *Id.* at 685.

98. *Id.* (quoting SC Holdings, Inc. v. A.A.A. Realty Co., 935 F. Supp. 1354, 1365 (D.N.J. 1996)); *see also* N.J. STAT. ANN. § 58:10-23.11 (1992).

99. *Morton Int'l*, 343 F.3d at 685. Section 113(f) of CERCLA provides, in relevant part, "In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal Law." CERCLA § 113(f)(3)(C), 42 U.S.C. § 9613(f)(3)(C) (2000).

the court applied the three-part *Aceto* test to find that the government was "clearly" an arranger.[100] The court in *FMC* found that the government (1) had supplied certain raw materials used in the process, (2) owned the work in progress as well as the final product and that it controlled the process by which the finding was made, and (3) that it was aware that the process inherently produced hazardous waste.[101] The facts of *FMC* were such that the elements of the *Aceto* test were easily satisfied; however, the court could have imposed liability on the government on an even lesser showing.[102] In contrast, in the noted case the Third Circuit emphasized that in conducting the arranger liability analysis, "a court should not lose sight of the ultimate purpose of Section 113, which is to determine whether a [purported arranger] was sufficiently responsible for hazardous-waste contamination so that it can *fairly* be forced to contribute to the costs of cleanup."[103]

With reasoning adverse to *Aceto*, the court stated that any rule holding proof of ownership or possession sufficient to ground arranger liability "could broaden the sweep of section 107(a)(3) beyond the bounds of fairness."[104] As the court articulated, "imposing liability on [a] defendant under those circumstances would go beyond Congress's intent to require those 'actually responsible for any damage, environmental harm, or injury from chemical poisons' to share in the cost of cleanup."[105]

The Third Circuit's change in position respecting the *Aceto* standard mirrors the evolution of arranger liability in the Eleventh Circuit. Relying on *Aceto* for support, the court in *Florida Power & Light* held that arranger liability could attach to a manufacturer who does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed.[106] When it later reconsidered the issue in *Montalvo*, the Eleventh Circuit noted that although it had previously stated that the "arranged for" language must be given a liberal construction to promote CERCLA's remedial scheme, "CERCLA

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100. *See* FMC Corp. v. United States Dep't of Commerce, No. 92-1945, 1993 WL 489133, at *11 (3d Cir. 1993), *superseded by* 29 F.3d 833 (3d Cir. 1994). The case was vacated and the issue unresolved until the noted case.

101. *Id.*

102. *See id.* (outlining the three-part *Aceto* test). The *Aceto* test does not require that the defendant be aware that the process inherently involved the release of hazardous wastes, only that such a release be inherent in the process; thus, the court in *FMC* could have imposed liability on the government based on its ownership of the material alone.

103. *See Morton Int'l*, 343 F.3d at 678 (emphasis added).

104. *Id.*

105. *Id.* (quoting United States v. Bestfoods, 524 U.S. 51, 55-56 (1998)).

106. *See* Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990).

liability . . . [was] not boundless."[107] The court in *Montalvo* went on to hold that when making the arranger liability inquiry, courts must consider all of the facts in a particular case.[108]

When read in the light of their predecessor decisions, the holdings in both *Montalvo* and the noted case indicate a new trend in judicial analysis of CERCLA arranger liability. Courts are now moving away from the *Aceto* strict liability standard in favor of the more fact sensitive totality of the circumstances or case-by-case approach to CERCLA arranger liability issues. Whether such an approach is consistent with Congress's intent is difficult to determine, given the lack of a detailed legislative history, but there is some support for such an interpretation.[109] It is also difficult to predict how courts will apply this case-by-case standard in the future. While the Third Circuit said that ownership, possession, knowledge, and control are the most relevant factors to consider, it stressed that other relevant factors should also be considered.[110] Furthermore, the Eleventh Circuit in *Montalvo* instructed that courts must focus on all the facts in a particular case when undertaking an arranger liability determination and cautioned that factors such as a party's knowledge, ownership, and intent are not necessarily determinative of liability in every case.[111] In this light, the case-by-case approach does not provide much guidance to potentially responsible parties seeking to protect themselves from CERCLA arranger liability. Under such a reading, disparate outcomes are likely to result from similar

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107. *See* S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 409 (11th Cir. 1996).

108. *Id.*

109. *See* H.R. REP. NO. 96-1016, pt. 1, at 33 (1980). The House Committee, in enacting the original CERCLA legislation stated that "[w]hether a person caused or contributed to a release [of hazardous waste into the environment] is a factual inquiry to be determined with reference to the particular circumstances of the case." *Id.*

110. *See Morton Int'l*, 343 F.3d at 679. Some of the other relevant factors the Third Circuit considers "helpful in determining whether the defendant was sufficiently responsible for hazardous-waste contamination so that [he] can fairly be forced to contribute to the costs of cleanup" include

> (1) whether a sale involved the transfer of a "useful" or "waste" product; (2) whether the party intended to dispose of a substance at the time of the transaction; (3) whether the party made the "crucial decision" to place hazardous substances in the hands of a particular facility; (4) whether the party had knowledge of the disposal; and (5) whether the party owned the hazardous substances.

Id. at 678 n.5 (quoting Concrete Sales & Servs., Inc. v. Blue Bird Body Co., 211 F.3d 1333, 1336-37 (11th Cir. 2000)).

111. *See Montalvo*, 84 F.3d at 407.

facts depending on what factors the court decides to weigh more heavily.[112]

Despite the inherent problem of unpredictability, the case-by-case approach adopted by the Third Circuit is favorable to the *Aceto* strict liability standard. The *Aceto* standard has the effect of providing an incentive for potentially responsible parties to take a lax approach to hazardous waste management.[113] Under the *Aceto* standard, an operator found liable under CERCLA can easily shift some of its cleanup costs to any number of parties that it can prove to be an "arranger" by simply showing that the alleged "arranger" had ownership over the material at one time or another. On the other hand, the approach taken by the Third Circuit in the noted case makes it more difficult for parties found liable under CERCLA to pass their cleanup responsibilities on to others. Such an approach encourages a more proactive response to hazardous waste management by placing a greater burden of proof on those parties who are in a better position to protect against serious environmental harm *before* it actually occurs.[114]

V. CONCLUSION

The court's ruling in *Morton International, Inc. v. A.E. Staley Manufacturing Co.* preserves the overall goals of CERCLA in the absence of further directives from Congress or the Supreme Court. However, after the decision, potentially responsible parties are left with little guidance as to what precautions will be necessary to protect themselves against potential arranger liability. Nonetheless, by adopting a multi-factored approach to arranger liability, the court's decision will ensure a more equitable result than could be had under the overly inclusive standard of *Aceto*. Although the *Morton* decision leaves many questions unanswered, one thing is certain: given the high costs of hazardous waste cleanup, the many parties and complex factual scenarios often involved in contribution litigation, and the fact-sensitive standard that it has committed itself to, the court is likely to have many

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112. *See* David W. Lannetti, Note, *"Arranger Liability" Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Judicial Retreat from Legislative Intent*, 40 WM. & MARY L. REV. 279, 304 (1998).

113. *See, e.g.*, Richard A. Epstein, *Causation and Financial Compensation: Two Fallacies in the Law of Joint Torts*, 73 GEO. L.J. 1377, 1385-86 (1985).

114. *See, e.g.*, *id.* at 1387-88.

opportunities in the coming years to further define the scope of CERCLA arranger liability in the Third Circuit.

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