Burlington Northern & Santa Fe Railway Co. v. United States: The Supreme Court Arranges for Disposal of CERCLA's Strict Liability

I. OVERVIEW

The City of Arvin is located in Kern County, California, about eighty-six miles northwest of Los Angeles.[1] Previously known as an "Okie" town following the massive migration of famished and dispossessed Dust Bowl farmers, as of the year 2000, Arvin boasted a population that was 87.5% Hispanic or Latino, compared to a national average of 12.5% and a California average of 32.4%.[2] Although Arvin has described itself as an idyllic, small town on a mountainside, more than 32% of its population (32.6%) survives on an income below the poverty threshold, compared to a national average of 12.4% and a California average of 13% in 2001.[3] In this sense, far from idyllic, Arvin has come to the attention of the U.S. Environmental Protection Agency

1. The City of Arvin, California Home Page, http://www.arvin.org/ (last visited Nov. 1, 2009).

2. Oklahomans first coined and used the term "Okie" to jovially refer to themselves by their place of origin. After the 1930s, when thousands of farming families were forced to move west by declining agricultural conditions and harsh droughts, the term "Okie" became a stigma that "almost ethnicize[d], almost create[d] a notion that an Okie was a different nationality, a different ethnic group, certainly a different social class and an unwelcome[d] person." *The First Measured Century* (PBS television broadcast Dec. 20, 2000), *available at* http://www.pbs.org/fmc/interviews/gregory.htm (interviewing James Gregory, Harry Bridges Endowed Chair of Labor Studies Professor, Dept. of History, Univ. of Wash.); *see also* U.S. Census Bureau, American FactFinder Factsheet, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited Oct. 17, 2009); U.S. Census Bureau, Census 2000 Data for the State of California, http://www.census.gov/census2000/states/ca.html (last visited Oct. 17, 2009) [hereinafter U.S. Census Bureau, Census 2002 Data for California]; PUB. POLICY INST. OF CAL., JUST THE FACTS: POVERTY IN CALIFORNIA 1 (2009), http://www.ppic.org/content/pubs/jtf/JTF_PovertyJTF.pdf; JAMES N. GREGORY, AMERICAN EXODUS: THE DUST BOWL MIGRATION AND OKIE CULTURE IN CALIFORNIA 152-53 (1991).

3. *See* U.S. Census Bureau, Census 2002 Data for California, *supra* note 2; PUB. POLICY INST. OF CAL., *supra* note 2.

(EPA) and its Office of Environmental Justice as one of the nation's most polluted communities.[4]

It was there that, in 1960, the Brown & Bryant Partnership—later Brown & Bryant, Inc. (B & B)—located its agricultural chemicals distribution business.[5] B & B's operations involved the purchase of pesticides and other chemical products from suppliers such as Shell Oil Company (Shell) and the subsequent application of these products to its customers' agricultural lands.[6] In particular, B & B's purchases of Shell agricultural chemical products included the halogenated aliphatic compound Dichloropropene-Dichloropropane (D-D), a soil fumigant manufactured by Shell in Norco, Louisiana, and Deer Park, Texas.[7] Upon receipt of B & B's orders, Shell would arrange for the shipment of D-D from its storage facilities at the GATX Annex Terminal in San Pedro, California, to B & B's Arvin operations by common carrier "F.O.B. destination."[8]

B & B's mode and quantity of purchases changed over the years as Shell constrained sales to D-D distributors to bulk volumes and switched from the sale of drums to the transfer of the chemicals from tanker trucks

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4. *See* Sudhin Thanawala, *Small California Town Has Nation's Smoggiest Air*, ST. LOUIS POST-DISPATCH, Aug. 10, 2007, at A8 (reporting EPA's finding that Arvin is the Nation's smoggiest community, with ozone levels that exceeded the amount considered acceptable "on an average of seventy-three days per year between 2004 and 2006"); *see also* Memorandum from Theodore J. Kim, Legal Counsel, Office of Envtl. Justice (OEJ)/Office of Enforcement and Compliance Assurance (OECA), to Charles Lee, Acting Dir., OEJ/OECA 8 (June 29, 2007), *available at* http://www.epa.gov/compliance/resources/newsletters/ej/ejnews/ejnews-june29-2007.pdf.

5. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1874 (2009); Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., No. CV-F-92-5068OWWDLB, 1995 WL 866395 at *1 (E.D. Cal. Nov. 15, 1995) (discussing some relevant factual background in suit brought by Burlington Northern and Santa Fe Railway Company's predecessor-in-interest against B & B).

6. *Burlington*, 129 S. Ct. at 1874.

7. *Id.* at 1875; United States v. Atchison, Topeka & Santa Fe Ry. Co., Nos. CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228 OWW, 2003 WL 25518047 *4 (E.D. Cal. July 15, 2003).

8. *Burlington*, 129 S. Ct. at 1875, 1875 n.2 ("F.o.b. destination means 'the seller must at his own expense and risk transport the goods to [the destination] and there tender delivery of them. . . .' U.C.C. § 2-319(1)(b) (2001)."); *Atchison, Topeka & Santa Fe Ry. Co.*, 2003 WL 25518047, at *4. Since 1991, the GATX Annex Terminal has been the subject of extensive site remediation, supervised by California's Department of Toxic Substances Control, for contamination of soil and groundwater resulting from the storage of bulk chemicals—including halogenated compounds—in aboveground tanks within its premises. CAL. DEP'T OF TOXIC SUBSTANCES CONTROL, PUBLIC NOTICE: FIVE-YEAR REVIEW OF SITE REMEDY, http://www.dtsc.ca.gov/SiteCleanup/Projects/upload/GATX_PN_5-Year-Review_Site-Remedy.pdf (last visited Oct. 17, 2009); *see also* Cal. Dep't of Toxic Substances Control, GATX Annex Terminal—San Pedro, http://www.envirostor.dtsc.ca.gov/public/profile_report.asp?global_id=19420029 (last visited Oct. 17, 2009).

onto its distributors' storage tanks.[9] Shell's transformed sales model inevitably led to the spilling of the delivered chemicals as part of each transfer—whether to B & B's or to Shell's own D-D bulk storage facilities—through hoses connected to the delivery trucks, through gaskets connecting the delivery hoses to the dispensing and receiving tanks, and from buckets used by delivery personnel to gather the spills.[10] To offset the product losses expected as part of the process of delivery and storage, Shell provided its distributors with a monetary allowance.[11]

After almost twenty-eight years of operations, the California Department of Health Services, California's Department of Toxic Substances Control (DTSC), and the EPA discovered that B & B's operations had produced "significant contamination of soil and groundwater" with hazardous substances that threatened to leach into a supply of potential drinking water.[12] Among these hazardous substances were components of D-D, which is listed as a "hazardous substance" under regulations promulgated pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or the Act).[13]

Although B & B undertook certain remediation efforts at the site, it soon became insolvent, forcing the DTSC and the EPA to take on cleanup efforts at this member site of the National Priorities List.[14] EPA later issued an administrative order to the defendant railroads as site owners, directing them to perform certain remedial tasks therein.[15] Although the railroads undertook these obligations, they soon brought

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9. *Burlington*, 129 S. Ct. at 1875; *see also* United States v. Burlington N. & Santa Fe Ry. Co., 479 F.3d 1113, 1122 (9th Cir. 2007); *Atchison, Topeka & Santa Fe Ry. Co.*, 2003 WL 25518047, at *17-18.

10. *Burlington*, 129 S. Ct. at 1875; *Atchison, Topeka & Santa Fe Ry. Co.*, 2003 WL 25518047, at *18-26 ("A report on the first wave of inspections that included the B & B Arvin plant and some of Shell's Western Farm Services plants stated: 'This series of inspections found that not one of the customers visited had a totally satisfactory spill containment system.'").

11. *Atchison, Topeka & Santa Fe Ry. Co.*, 2003 WL 25518047, at *22.

12. *Burlington*, 129 S. Ct. at 1875-76; *Atchison, Topeka & Santa Fe Ry. Co.*, 1995 WL 866395, at *2.

13. *Atchison, Topeka & Santa Fe Ry. Co.*, 2003 WL 25518047, at *9; *see* 40 C.F.R. § 302.4 app. A (2002); Comprehensive Environmental Response, Compensation, and Liability Act § 101(14)(B), 42 U.S.C. § 9601(14)(B) (2006) ("The term hazardous substance means any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title."). The EPA has also determined that D-D components 1,3-Dichloropropene and 1,2-Dichloropropane are B2 probable human carcinogens. *See* Tech. Transfer Network, U.S. EPA, 1,3-Dichloropropene, http://epa.gov/ttn/atw/hlthef/dichl-pe.html (last visited Oct. 18, 2009); Tech. Transfer Network, U.S. EPA, 1,2-Dichloropropane, http://www.epa.gov/airtoxics/hlthef/di-propa.html (last visited Oct. 18, 2009).

14. *Burlington*, 129 S. Ct. at 1875-76.

15. *Id.* at 1876.

suit under CERCLA against B & B for the recovery of response costs.[16] That suit was later consolidated with two CERCLA recovery actions instituted by the EPA and the DTSC against Shell and the railroads.[17] After a bench trial, the United States District Court for the Eastern District of California held that "the Railroads and Shell were potentially responsible parties (PRP) under CERCLA," based upon their ownership of a portion of the contaminated site and upon their arrangement for disposal of hazardous substances through their sale and delivery methods, respectively.[18]

Shell appealed the trial court's judgment to the United States Court of Appeals for the Ninth Circuit.[19] The Ninth Circuit affirmed the lower court's holding that Shell had been properly found liable as a PRP under the theory of "arranger liability," because the disposal of hazardous substances was a known, necessary, and immediate byproduct of its delivery transactions with B & B.[20]

After a denial for a rehearing en banc, Shell filed a petition for writ of certiorari with the United States Supreme Court, seeking review of its designation as a CERCLA PRP that had "arranged for disposal" of hazardous substances.[21] The Supreme Court granted certiorari and *held* that an entity's knowledge that actions constituting disposal under CERCLA will transpire during the delivery of its useful, though hazardous products is not sufficient to impose "arranger liability" absent a showing of specific, purposeful intent to dispose.[22] *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870, 1880, 1883-84 (2009).

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16. *Id.*

17. *Id.*

18. *Id.* The district court also found that the site contamination constituted a single harm capable of apportionment. The district court apportioned liability based upon percentage of site ownership, duration of possession, and inferences regarding proportion of hazardous requiring remediation. *Id.*

19. *Id.* at 1877.

20. *Id.* The government filed its own appeal on the issue of apportionment. The court of appeals—while agreeing with the district court that the harm was capable of apportionment—reversed its actual apportionment, finding that the record had not established a reasonable basis for the allocation of liability. It thereon held the Railroads and Shell jointly and severally liable for the totality of the government response costs. *Id.*

21. *Id.* The Court also granted a petition for certiorari to determine whether the court of appeals' imposition of joint and several liability for all government response costs was appropriate in light of the evidence. *Id.*

22. With respect to the apportionment, the Court *held* that apportionment of liability under CERCLA is appropriate—even when a liable party has not requested it at trial—as long as there is some evidence upon which to do so. *Id.* at 1883-84.

II. BACKGROUND

CERCLA was enacted in 1980 to address concerns about the serious risks that the release of hazardous substances into the environment represent to human and environmental health.[23] CERCLA confers upon the EPA broad response authority over any actual or threatened releases into the environment of any hazardous substances, pollutants, or contaminants that may present an imminent and substantial danger to the public health or welfare.[24] In the fulfillment of its responsibilities to protect the public health and welfare or the environment, the EPA is authorized to undertake any removal, remedial action, or any other response measures consistent with the National Contingency Plan.[25] The EPA may then seek reimbursement for all or some of the costs incurred by the U.S. government from any PRP.[26]

CERCLA adopts the Clean Water Act's standard of strict liability[27] and broadly delineates four categories of PRPs, or "covered persons," which may be liable for government costs and damages, subject to certain defenses, when a release or a threatened release from a facility leads to the incurrence of response costs.[28] These include: (1) current owners or operators of a contaminated facility, (2) owners or operators of a facility at the time the contamination occurred, (3) transporters, and (4) arrangers.[29] Arrangers are identified as entities who, by contract, agreement, or otherwise, arranged for the treatment or disposal of a hazardous substance at a facility owned or operated by another, or arranged with a transporter for the transportation of hazardous

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23. *See* United States v. Bestfoods, 524 U.S. 51, 55 (1998) (citing Exxon Corp. v. Hunt, 475 U.S. 355, 358-59 (1986)).

24. 42 U.S.C. § 9604(a) (2006); *see also id.* § 9601(14) (defining "hazardous substance"); *id.* § 9601(22) (defining "release"); *id.* § 9601(33) (defining "pollutant" or "contaminant").

25. *Id.* § 9607; *see also id.* § 9601(23) (defining "removal"); *id.* § 9601(24) (defining "remedial action"); *id.* § 9601(25) (defining "response"); *id.* § 9605 (describing "National Contingency Plan").

26. *See id.* § 9607(a), (c). Under CERCLA, the amount of government costs for which PRPs may be held liable depends upon factors that include whether the release occurred on land or in U.S. navigable waters as well as upon the type of facility where the release occurred. *Id.* § 9607(c)(1)(A)-(D). In addition to these costs, PRPs may be held liable for varying amounts of additional damages for any injuries, destruction, or loss of natural resources—including the reasonable costs of assessing these—and for the costs of any health assessment or health effects study carried out under CERCLA authority. *See id.* §§ 9607(a), 9604(i)(5)(D).

27. *Id.* § 9601(32); *see* New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) ("Section 9601(32) provides that 'liability' under CERCLA 'shall be construed to be the standard of liability' under section 311 of the Clean Water Act, 33 U.S.C. § 1321, which courts have held to be strict liability, *see, e.g.*, Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979), and which Congress understood to impose such liability.").

28. 42 U.S.C. § 9607(a)(1)-(4), (b).

29. *Id.* § 9607(a)(1)-(4).

substances to such treatment or disposal facility.[30] In addition, CERCLA contemplates a fifth category of potentially liable parties, which includes third parties other than the defendant's employees, agents or entities "whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant."[31]

CERCLA defines various terms within its liability delineations equally broadly. CERCLA, for instance, defines "facility" to include architectural or engineering structures (for example, buildings, structures, installations, impoundments, wells, and landfills), formations that may be man-made or naturally occurring (for example, pits, ponds, lagoons, or ditches), instrumentalities of commerce (for example, pipelines, motor vehicles, rolling stock, or aircrafts, but not vessels), and "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."[32] The Act also adopts a broad definition of "disposal" that includes discharging, depositing, injecting, dumping, spilling, leaking, or placing any discarded material into land or water so that the material or any of its constituents may enter the environment.[33] The statute, however, does not define the phrases "arranged for" or "arranged with."

Given the broad terms of the Act, it became the role of the courts to infuse these phrases with meaning and to determine the scope of conduct proscribed by CERCLA's "arranger liability," a process that resulted in wide disparities among the appellate courts. One approach to its interpretation—widely known as the "strict liability approach"—is exemplified in *United States v. Aceto Agricultural Chemicals Corp.*[34] In *Aceto*, the United States Court of Appeals for the Eight Circuit relied on a number of sources in interpreting the Act. These included: (1) the expansive "otherwise" language enacted in the Act's section 9607(b)(3) to accompany the statutory liability phrases "arranged for" and "arranged with" (arrangement phrases), (2) CERCLA's broad definition of

30. *Id.* § 9607(a)(3).

31. *See id.* § 9607(b)(3).

32. *Id.* § 9601(9).

33. *Id.* § 9601(29). CERCLA adopts the definition of "disposal" found in section 1004 of the Solid Waste Disposal Act. *See also* Solid Waste Disposal Act § 1004(3), 42 U.S.C. § 6903(3) (1992) (defining "disposal"); *id.* § 6903(5) (defining "hazardous waste"); *id.* § 6903(27) (defining "solid waste").

34. United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373 (8th Cir. 1989); *see, e.g.*, Randy Boyer, Note, Morton International, Inc. v. A.E. Staley Manufacturing Co.*: The Third Circuit Establishes a Standard for CERCLA Arranger Liability*, 17 TUL. ENVTL. L.J. 201, 205 (2003); David W. Lannetti, *"Arranger Liability" Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Judicial Retreat from Legislative Intent*, 40 WM. & MARY L. REV. 279, 291 (1998).

"disposal" as enacted in the Act's section 9601(29), (3) existing judicial interpretation, and (4) well-established common law principles as contextualized by CERCLA's environmental concerns and legislative purpose to reach as wide a spectrum of entities and activities as has created the Nation's pervasive hazardous contamination.[35]

In reviewing CERCLA's concerns and purpose, the Eight Circuit followed the analysis of the congressional logic and intent behind arranger liability articulated by the United States Court of Appeals for the First Circuit in *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, and by the United States Court of Appeals for the Second Circuit in *New York v. Shore Realty Corp.*[36] In particular, the *Aceto* court adopted these circuits' understanding that the broad language of CERCLA's liability provisions was intended to reflect Congress's purpose that causation should play no role in the adjudication of liability and thus to reinforce the congressionally enacted strict liability standard.[37] Given the statute's broadminded language, the Eight Circuit rejected Aceto Agricultural Chemicals' argument that CERCLA's "arranger liability" should be interpreted narrowly and imposed only upon those with specific intent to dispose of a waste product.[38]

The court in *Aceto* thereon embraced common law principles compatible with CERCLA's liability scheme as guidelines to its interpretation.[39] In particular, it applied to the facts principles imposing vicarious and direct liability upon an enterprise for the tortious acts of its independent contractors as articulated under the Restatement (Second) of Torts.[40] It thus held that an entity may be liable as an "arranger" where it has chosen to surrender hazardous substances to another, under terms and specifications that it deemed appropriate, but which it knew would inherently result in the "disposal" of the hazardous substances in question, regardless of the entity's avowed specific intent.[41]

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35. *Aceto*, 872 F.2d at 1379-82 (involving EPA's action to recover response costs for the cleanup of a site highly contaminated with a manufacturer's pesticide products, which had been released upon the land by another and therein seeped into groundwater).

36. *Id.* at 1380; *see* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."); New York v. Shore Realty Corp., 759 F.2d 1032, 1032 (2d Cir. 1985) ("Congress intended that responsible parties be held strictly liable.").

37. *Aceto*, 872 F.2d at 1380 n.8 ("The reasons for Congress' preference for 'arranged for' over 'caused or contributed to' are 'not easy to divine,' although elimination of the concept of 'cause' is consistent with the imposition of strict liability." (citations omitted)).

38. *Id.* at 1380-81.

39. *Id.* at 1382.

40. *Id.*

41. *Id.* at 1384.

The United States Court of Appeals for the Seventh Circuit adopted a more constricting interpretation of *arranger liability* in *Amcast Industrial Corp. v. Detrex Corp.*[42] The court's analysis of arranger liability in *Amcast* began much like the analysis in *Aceto*, with a review of the statute's language.[43] The panel's analysis, however, rejected defining the contours of arranger liability around the expansive statutory definition of "disposal," which it acknowledged includes accidental spilling.[44] Instead, the court construed CERCLA's "arrangement" phrases as reflecting a seemingly intentional tone that, in turn, it deemed critical to judicial interpretation.[45] The pitch of this uncovered intent thereon precluded the *Amcast* court's consideration of the statutory definitions of "disposal" encompassing unintentional, accidental acts because, it believed, only under special circumstances could one arrange for the occurrence of a fortuitous event.[46] The court, however, emphasized that both its requirement of intent and its restriction of the definition of "disposal" were unique to the context of arranger liability.[47]

As applied by the panel, the uniqueness of this specific intent standard would require the imposition of liability upon a seller for the accidental spillage of a hazardous substance when it delivers the substance to the purchaser, but would preclude liability when the seller contracts away the delivery of the same substance, resulting in a spill under otherwise similar circumstances and for similar reasons.[48] Thus, although the panel recognized that the language of the statute could be construed to impose arranger liability for fortuitous, unintentional events and without the need to make a finding on intent, it did not find itself compelled to do so.[49] Instead, the panel preferred to narrow CERCLA's arranger liability by applying to arrangers common law principles that reject the imposition of strict liability upon transporters of hazardous substances.[50] Yet, these Illinois common law principles are based upon a

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42. Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746 (7th Cir. 1993); *see* Lannetti, *supra* note 34, at 296 (describing *Amcast*'s approach as "narrow"); Beth A. Caretti, Amcast Indus. Corp. v. Detrex Corp.*: The Shippers Exception to CERCLA and How It Compares in "Arranging For" Environmental Liability*, 41 WAYNE L. REV. 227, 239-40 (1994) (describing Seventh Circuit's approach as restrictive and asserting that the *Amcast* decision renders CERCLA's arranger liability provision meaningless).

43. *Amcast*, 2 F.3d at 751.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 750-51.

49. *Id.*

50. *Id.* at 751 (citing Ind. Harbor Belt R.R. v. Am. Cyanamid Co., 916 F.2d 1174, 1180-81 (7th Cir. 1990).

theory of strict liability that focuses not upon the hazardousness of the substance but upon that of activities, and are therefore irrelevant to, and incompatible with, CERCLA's focus on hazardous substances.[51]

Other courts, however, refused to adopt either the strict liability standard in *Aceto* or the specific intent approach in *Amcast*, choosing instead to adopt alternative approaches such as the United States Court of Appeals for the Eleventh Circuit's "totality of the circumstances" test.[52] Yet even while numerous courts adopted this approach,[53] additional disparities among the appellate courts arose when courts used a combination of the "totality of the circumstances" approach and either the *Amcast* or *Aceto* approach.[54] The Ninth Circuit, for example, had until recently considered intent to dispose determinative, but not necessary to the imposition of arranger liability.[55] Courts within this circuit had favored the scrutiny of factors including actual or presumed knowledge, control, and the inherent nature of leaks, spills, or other forms of disposal to the parties' transactions.[56]

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51. *See Ind. Harbor Belt R.R.*, 916 F.2d at 1181 ("[U]ltrahazardousness or abnormal dangerousness is, in the contemplation of the [common] law at least, a property not of substances, but of activities.").

52. *See* S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 406-07 (11th Cir. 1996) (holding that arranger liability should be determined by weighing pertinent but nondeterminative factors that include ownership; nature of substance; articulated nature of transaction transferring substance's possession; knowledge of facts surrounding substance's disposal; and party's involvement, authority, or control over the disposal decision); Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990) (rejecting a per se rule that only those who make the critical decisions on the methods, timing, and location of disposal of a hazardous substance may be held liable as arrangers in favor of a scrutinizing analysis of the facts underlying the parties' roles in the relevant transactions).

53. *See, e.g.*, Concrete Sales & Servs., Inc. v. Blue Bird Body Co., 211 F.3d 1333, 1336-37 (11th Cir. 2000); United States v. Mountain Metal Co., 137 F. Supp. 2d 1267, 1274-75 (N.D. Ala. 2001); Mathews v. Dow Chem. Co., 947 F. Supp. 1517, 1525 (D. Colo. 1996).

54. *See, e.g.*, Morton Int'l, Inc. v. A.E. Staley Mfg., Co., 343 F.3d 669, 676-77 (3d Cir. 2003) (finding that Congress intended "arranger liability" to be broadly construed and adopting *South Florida Water Management District*'s fact-sensitive, multifactor analysis, while primordial importance to actual or constructive knowledge that environmentally harmful spillage was inherent to a transaction); United States v. Cello-Foil Prod., Inc., 100 F.3d 1227 (6th Cir. 1996) (concluding that CERCLA's statutory language on "arranger liability" compelled a finding of intent to arrange as a predicate to determining status as a PRP, but requiring an evaluation of a "totality of the circumstances" that would allow intent to be inferred from indirect or circumstantial evidence).

55. United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 948-49 (9th Cir.), *rev'd*, 129 S. Ct. 1870 (2009); *cf.* Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 881 (9th Cir. 2001) ("[H]ad Congress intended 'disposal' to include only releases directly caused by affirmative human conduct, then it would make no sense to establish a strict liability scheme . . . .").

56. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co.*, 520 F.3d at 950, 952; United States v. Shell Oil Co., 294 F.3d 1045 (9th Cir. 2002) (adopting test proposed by defendant oil companies that considered nature of the transaction, retained ownership or control over the hazardous

Like other appellate courts, the Ninth Circuit assumed as the starting point of its statutory construction of CERCLA's arranger liability the idea that the role of judicial interpretation is to effect the provisions of lawful legislative enactments.[57] In particular, the Ninth Circuit arrived at its interpretation through a series of nuanced analyses of CERCLA's statutory language and structure and of the congressional intent as gleaned from the statute itself to ensure that its interpretation did not create internal inconsistencies.[58] For instance, in *Jones-Hamilton Co. v. Beazer Materials & Services*, the court approached statutory construction by reference to enacted statutory definitions.[59] In their absence, the court then addressed the meaning of the "arrangement" phrases by reference to the context within which Congress placed them.[60] It thereon concluded that the statutory language envisioned the imposition of arranger liability upon an entity that transferred possession of hazardous substances to another as part of a transaction that contemplated the spillage of the substances, even if spillage or disposal was the not the driving purpose of the transaction.[61]

Similarly, in *Catellus Development Corp. v. United States*, the Ninth Circuit relied for its interpretation upon statutory definitions, the larger liability scheme, and its understanding of the Act's underlying policies.[62] The court recognized that, under certain circumstances, a determination that disposal of a hazardous substance has transpired may require a finding of affirmative action.[63] The court, however, refused to hold that

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substance, and how inherent the generation of waste was to the transfer of virgin materials); Jones-Hamilton Co. v. Beazer Materials & Serv., 973 F.2d 688, 695 (9th Cir. 1992) (emphasizing retained ownership and contractual provision offsetting spillage losses).

57. *See, e.g.*, Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1081 (9th Cir. 2006); Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 565 n.4 (9th Cir. 1994); United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989); United States v. Waste Indus., Inc., 734 F.2d 159, 165 (4th Cir. 1984) ("Congress expressly intended that ["disposal language"] and other language of the Act close loopholes in environmental protection. Limiting the government's enforcement prerogatives to cases involving active human conduct would open a gaping hole in the overall protection of the environment envisioned by Congress, a protection designed to be responsive to unpredictable [sic] occurrences." (citations omitted)).

58. *See, e.g.*, *Pakootas*, 452 F.3d at 1081; *Jones-Hamilton*, 973 F.2d at 694-95; *cf. Carson Harbor Vill.*, 270 F.3d at 878-79 (concluding that given the inclusion of unintentional processes such as leaking within CERCLA's statutory definition of "disposal," liability under CERCLA was neither limited nor premised upon a party's intent to dispose).

59. *Jones-Hamilton*, 973 F.2d at 694-95.

60. *Id.*

61. *Id.* at 695; *see also* United States v. Burlington N. & Santa Fe Ry. Co., 502 F.3d 781, 808 (9th Cir. 2007) (holding that CERCLA's language along with its liability structure contemplated the imposition of arranger liability for the unintentional disposal of a hazardous substances inherent to commercial transactions), *rev'd*, 129 S. Ct. 1870 (2009).

62. Catellus Dev. Corp. v. United States, 34 F.3d 748 (9th Cir. 1994).

63. *Id.* at 750.

such finding must be predicated upon a party's continued control or ownership, because that "would allow defendants to simply 'close their eyes' to the method of disposal of their hazardous substances, a result contrary to the policies underlying CERCLA."[64]

III. THE SUPREME COURT'S DECISION

In the noted case, the Supreme Court began its analysis of CERCLA's arranger liability provision and the permissibility of its imposition upon Shell by contextualizing its scrutiny within a spectrum of opposites.[65] On one end of the Court's articulated spectrum, CERCLA's statutory language plainly imposes liability upon any entity entering a commercial transaction for the sole purpose of discarding a hazardous substance that, after its useful life, has been rendered a waste.[66] At the other end, CERCLA's arranger liability does not reach an entity based upon its sale of a new and useful, though hazardous, substance that, without the seller's knowledge, the purchaser disposes of at a later unspecified time by means that allow the substance to enter and contaminate the environment.[67] As the Court contemplated the myriad factual permutations of arrangements arising between these delineated possibilities, it rejected without explanation reliance upon congressional intent as an interpretative aid, suggesting that CERCLA sets boundaries far narrower, and thus compels results far different than what Congress believed it had drafted.[68]

Having excluded congressional intent as a tool of statutory construction, the Court relied upon selected passages from *Merriam-Webster's Collegiate Dictionary* to articulate an authoritative interpretation of CERCLA's "arranged for" phrase that requires intentional, purposeful action to dispose of a substance, thus adopting the Seventh Circuit's intonations of specific intent rationale in *Amcast Industrial Corp*.[69] The Court's fact-intensive analysis then emphasized that the spills of D-D occurred after the common carrier arrived at B & B's premises to deliver useful and unused products, F.O.B. destination, and that Shell, while indisputably aware that the spills were inherent to the delivery of its products, took steps to encourage others to reduce their

64. *Id.* at 752 (citations omitted).
65. *Burlington*, 129 S. Ct. at 1878.
66. *Id.*
67. *Id.* (citing Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160, 164 (2d Cir. 1999); Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990)).
68. *Id.* at 1879.
69. *Id.*

incidence.[70] Applying a specific, purposeful intent approach to these facts, the Supreme Court concluded that the imposition of arranger liability on Shell based upon Shell's knowledge and control of the terms and conditions of transportation and delivery would be impermissible absent specific, purposeful intent to dispose.[71]

Justice Ginsburg's dissenting opinion placed particular attention on the intransitive, passive voice acts and occurrences explicitly incorporated in the Act's definition of "disposal."[72] Given the validation of this enacted statutory language, the dissent's construction of arranger liability and its scope was not confined by extraneous sources to purposeful actions or perverse motives. This allowed the dissent to concentrate instead on Shell's temporal ownership, knowledge, and control over the hazardous substance.[73] Of particular note to the dissent was Shell's exclusive discretion over the means and methods employed in the packaging, delivery, transfer, and storage of its products, its exclusive control over the specifications of delivery, and its knowledge of the inherently and immediately detrimental effects that the exercise of its exclusive discretion had on the sound distribution of its hazardous products and on the soils and water supplies of Arvin, California.[74] Based on its fact-specific evaluation, the dissent found sufficient grounds to uphold the imposition of arranger liability upon Shell and thus to place on Shell, rather than upon the taxpayers, the costs of remediation.[75]

IV. ANALYSIS

Given the Supreme Court's ruling in the noted case, the only discernible potentially liable parties under a theory of arranger liability appear to be entities who enter into commercial transactions with the specific intent to discard hazardous substances. This reconstruction of CERCLA's strict arranger liability into an intentional environmental torts scheme is intriguing as much for what it relies on as for what it does not.

In its formulation of statutory meaning, the Supreme Court considered the issue of arranger liability in light of what it identified as an implication, or possible significance, embodied in the word "arrange" as defined by *Merriam-Webster's Collegiate Dictionary* and first adopted

70. *Id.* at 1880.
71. *Id.*
72. *Id.* at 1884-85 n.1 (Ginsburg, J., dissenting).
73. *Id.* at 1885.
74. *See id.*
75. *Id.*

by the Seventh Circuit in *Amcast*.[76] Among the dictionary possibilities, the Court selected those that it believed suggested a connection between specific, purposeful intent and actions that "bring about" desired results.[77] Assuming the imperative of adopting this definitional possibility, the Supreme Court—like the *Amcast* panel—rejected an interpretation of arranger liability that could reach those passive, intransitive, and even accidental events included in the enacted definition of disposal.[78]

In its "fact intensive and case specific" analysis, the Court emphasized that the hazardous substances had been shipped "F.O.B. destination" and that the leaks and spills occurred in *Arvin* during the transfer of the hazardous substances from the tanks of Shell's selected common carrier into those of its distributor.[79] The Court's analysis also considered Shell's knowledge of the spills and the steps Shell undertook to reduce the likelihood of future spills.[80] The Court concluded that Shell's mere knowledge did not render it an arranger, because it did not enter into these commercial transactions with the specific intent that at least a portion of the hazardous substance would be disposed of during the transfer process.[81]

The majority's succinct opinion, however, did not address various intriguing aspects of its adopted approach and factual analysis. For instance, in relying upon the Seventh Circuit's *Amcast* approach, the Supreme Court effectively relied upon one state's common law reluctance to impose strict liability upon transporters of hazardous substances. Yet, this principle is not universally followed and was as unequivocally irreconcilable with CERCLA's congressionally enacted strict liability regime in 1980 as it was in 1996 when *Amcast* was decided, and as it remains today.[82] The adoption of this unexplained

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76. *See id.* at 1879 ("[T]he word 'arrange' implies action directed to a specific purpose." (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 64 (10th ed. 1993)); Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993)); *see also* MERRIAM-WEBSTER ONLINE DICTIONARY (2009), http://www.merriam-webster.com/dictionary/implication (defining an "implication" as a "possible significance").

77. *See Burlington*, 129 S. Ct. at 1879.

78. *Id.* at 1879-80.

79. *Id.* at 1880.

80. *Id.*

81. *Id.*

82. *See, e.g.*, Nat'l Steel Serv. Ctr. v. Gibbons, 693 F.2d 817, 818-19 (8th Cir. 1982) ("We note, however, that we are committed to a broader application of the strict liability doctrine of *Rylands v. Fletcher* than is reflected in the Restatement. We do not limit it to 'ultrahazardous activity.'" (citation omitted)); *see also* 2 DAN B. DOBBS, THE LAW OF TORTS 951 (2001) ("As first understood, strict liability could attach to those who introduce something onto the land that had

extrapolation of principles incongruous with the Act is rendered additionally noteworthy by the majority's silence regarding the *Amcast* panel's recognition that, notwithstanding its preferred and adopted approach, CERCLA's language does permit the imposition of strict liability upon shippers for accidental spillage. In leaving these issues unaddressed, not only does the opinion generate an amended standard of liability for arrangers, but it is also likely to generate a systemic overhaul of liability for all CERCLA PRPs.

The Court's reliance on the United States Court of Appeals for the Sixth Circuit's *United States v. Cello-Foil Products, Inc.* is only slightly less intriguing.[83] Although *Cello-Foil Products, Inc.* certainly supports the incorporation of state of mind into the determination of an entity's "arranger" status, the Sixth Circuit therein held that the defendant need *not* be in control of the process leading to the release of a hazardous substance at the time of disposal for arranger liability to attach.[84] It also held that because an actor may be assumed to intend the natural consequences of its acts, the intent to dispose of unused hazardous substances could be presumed from circumstantial evidence, such as what actually happened.[85] Yet, in the noted case, the Court rejected this "oldest rule of evidence" and thus the possibility of holding the defendant responsible for the consequences known likely to follow as if it had intended to achieve them.[86]

With respect to its factual analysis, there are at least two interrelated aspects of the Court's decision that create a significant uncertainty regarding the noted case's true impact upon a future trial court's "fact-intensive and case-specific" determinations. The initial and fundamental source of this uncertainty lies in the Court's unexplained emphasis upon what the dissent dubbed a "shipper-fixable specification" of delivery, i.e., the "F.O.B. destination," as such term was defined by Uniform Commercial Code's (U.C.C.) *repealed* section 2-319(1)(b).[87] As reflected by the Legislative Notes to the Uniform Commercial Code currently in

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not been naturally found therein and that later inflicted a foreseeable harm upon another." (citing Rylands v. Fletcher, (1868) 3 L.R. 330 (H.L.) (U.K.))).

83. *See Burlington*, 129 S. Ct. at 1879.

84. United States v. Cello-Foil Prod., Inc., 100 F.3d 1227, 1232-33 (6th Cir. 1996).

85. *Id.* at 1233.

86. *See* Giles v. California, 128 S. Ct. 2678, 2698 (2008) (Breyer, J., with Stevens, J., and Kennedy, J., dissenting) ("[P]erhaps the oldest rule of evidence—that a man is presumed to intend the natural and probable consequences of his acts—is based on the common law's preference for objectively measurable data over subjective statements of opinion and intent." (quoting United States v. Falstaff Brewing Corp., 410 U.S. 526, 570 n.22 (1973) (Marshall, J., concurring in result))).

87. *See Burlington*, 129 S. Ct. at 1875 n.2; *id.* at 1885 n.2 (Ginsburg, J., dissenting).

effect, as well as in effect at the time of oral arguments, the Code has eliminated section 2-319 because of its inconsistency with modern commercial practices.[88] The alternative approach advanced by the Official Comments to the section's repeal provides that the shipping terms such as "F.O.B." must be interpreted in light of any agreements, course of performance, or dealings between the parties.[89] The majority's failure to articulate the weight of dissuasion that this repealed section had upon its determina-tion, if any, and the extent to which the Court felt itself compelled to apply it because the transaction transpired before its repeal, calls into question the precedential value of the Court's opinion.

A related and compounding source of uncertainty arises from the absence of any discussion of the trial court's findings regarding testimony by Shell's William Haverland. Mr. Haverland stated that "there was a monetary allowance to B & B for product Shell expected to be lost in the process of delivery and storage" and that Shell's own bulk D-D storage facilities, "which had to operate as profit centers, . . . did not comply with safety and environmental requirements."[90] While this silence could be construed as an indication that these admissions were irrelevant to the Court's decision, the lack of discussion leaves unresolved whether their irrelevance stems from the Court's application of the repealed U.C.C. provision, from the Court's independent judgment that Shell's own conduct under similar circumstances is irrelevant, or from the Court's conclusion that Shell's spillage allowance did not entail an assumption of the risk of loss of the spilled but still unused, hazardous product during the transfer process.

As stated before, the Supreme Court's reconstruction of CERCLA's strict arranger liability into an intentional environmental torts scheme is also intriguing for those factors upon which it does not rely. To begin with, the Court's approach in the noted case represents a pronounced departure from the interpretative methodology it had employed in previous CERCLA decisions. For instance, finding itself unable to rely upon statutory language to define the confines of CERCLA liability, the Supreme Court in *United States v. Bestfoods* willingly engaged in an "enquiry into the meaning Congress presumably had in mind when it used" specific terms otherwise left undefined by the statute.[91] In

88. U.C.C. § 2-319 legislative notes (2008).

89. *Id.*

90. United States v. Atchison, Topeka & Santa Fe Ry. Co., Nos. CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228 OWW, 2003 WL 25518047, at *4, *22, *25 (E.D. Cal. July 15, 2003).

91. See United States v. Bestfoods, 524 U.S. 57, 71 (1998); *cf.* Exxon Corp. v. Hunt, 475 U.S. 355, 379-80 (1986) (Stevens, J., dissenting) ("If this purely literal reading of [CERCLA]

contrast, in the noted case, the Court explicitly, but without an explanation, rejected the consideration of Congress's intent, and therefore its expectation, that in enacting a strict liability regime, the courts would adjudicate liability without consideration of fault or intent.[92]

Almost a decade after *Bestfoods*, the Court's interpretation of CERCLA's liability scheme in *United States v. Atlantic Research Corp.* relied upon a reading of the statute as a whole, infusing one provision with meaning by reference to another within the scheme.[93] Acknowledging the broad language of CERCLA's definition of PRP, the Supreme Court there rejected a "textually dubious construction" of CERCLA that would have severely restricted the categories of PRPs and rendered part of its liability scheme a "dead letter."[94] In the noted case, however, the opinion affirmatively rejected the possibility that the word "arrange" could be infused with meaning by reference to the enacted definitions of accompanying statutory terms and implicitly rejected a similar possibility with respect to other subsections of the Act's liability section.[95] It is entirely likely that the vast differences in the factual scenarios underlying *Atlantic Research Corp.* and the noted case could explain the differing approaches. Nevertheless, the opinion's failure to articulate that only accentuates the extent to which the majority's chosen interpretative methodology inherently creates incongruities between its new standard for arranger liability and the statute's contemplated burdens of proof and persuasion. That is to say, since the statutorily enacted limited defenses are predicated upon a *defendant*'s ability to establish by a preponderance of the evidence that a force or an individual without any legal or

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resulted in manifest injustice, or were plainly at war with the probable intent of Congress, I would reject it.").

92. *See Burlington*, 129 S. Ct. at 1879; H.R. REP. No. 96-1016, pt. 1, at 34, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6137; *see also* H.R. REP. No. 99-253, pt. 1, at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856 ("No change has been made in the standard of liability that applies under CERCLA. As under section 311 of the Federal Water Pollution Control Act, 33 U.S.C. 1321, liability under CERCLA is strict, that is, without regard to fault or willfulness." (discussing amendments to CERCLA, and their absence, under Superfund Amendments and Reauthorization Act of 1986)).

93. *See* United States v. Atl. Research Corp., 551 U.S. 128, 136-37 (2007) (citations omitted); *cf.* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1517 (2009) (Stevens, J., dissenting) ("When interpreting statutory silence in the past, we have sought guidance from a statute's other provisions.").

94. *Atl. Research Corp.*, 551 U.S. at 137 ("We must have regard to all the words used by Congress, and as far as possible give effect to them." (quoting Louisville & Nashville R.R. v. Mottley, 219 U.S. 467, 475 (1911))); *see also Entergy Corp.*, 129 S. Ct. at 1521 (Stevens, J., dissenting) (citing Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

95. *See Burlington*, 129 S. Ct. at 1879-80.

contractual ties to the PRP is the *sole* cause of environmental harm and that such harm transpired despite the defendant's due care and its precautions against foreseeable acts or omissions of such unrelated forces or third parties, the new standard of "arranger liability" reverses the enacted burdens of proof and persuasion.[96]

V. CONCLUSION

The implications of the Supreme Court's decision in the noted case are at once elusive and apparent. Given the avowed fact-intensive and case-specific nature of CERCLA adjudications, it is conceivable that unique considerations drove the Majority's opinion. In particular, these could have included the possible weight of dissuasion of the repealed U.C.C. provisions and its concomitant implication that Shell did not retain the risk of loss of the hazardous substances, notwithstanding the monetary allowance system through which Shell either never effectively charged its distributors for the spilled substances or reimbursed them for the loss. Otherwise, little else on the record elucidates the Court's rejection of what even the most restrictive interpretations of "arranger liability" have recognized is a permissible interpretation, indeed one that may be compelled under legal regimes such as CERCLA that focus not upon activities, but upon substances.

The decision's implications, however, are also apparent. Whether purposefully or fortuitously, the Supreme Court's decision normalizes and rewards careless and incompetent business models not only through its redrafting of CERCLA's liability standards, but also through its characterization of the defendant's precautionary measures—which it may not have even enforced against itself—as sufficient and efficient. As such, it has also effectively lowered the standards of due care and precaution that all other types of PRP defendants will need to meet as part of an effective defense (and, incidentally, lowered their operating costs).

In social terms, the adoption of this degraded standard of care to the public commons, generally, and to the health and welfare of Arvin's impoverished minority residents, ultimately, suggests that as long as litigants are able to articulate self-serving, profit-driven motives, little attention will be placed upon such symptoms of environmental degradation as the wheezing coughs, stinging rashes, chronic stomach

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96. *See* 42 U.S.C. § 9607(b) (2006); *see also* H.R. REP. No. 96-1016, pt. 1, at 34, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6137 (discussing defendant's need to demonstrate that it exercised "due care in the selection and instruction of a responsible contractor" and that it properly packaged its hazardous substances in order to avail itself of third-party defense).

pain, bladder infections, and liver malfunctions of Arvin's Hispanic farm workers. In legal terms, the Court's application of a liability regime that focuses on activities rather than substances suggests that the majority may be setting the stage to arrange for the disposal of all of CERCLA's strict liability.

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