Deciphering CERCLA's Vocabulary: United States v. Burlington - Reasonable Division and Arranger Liability

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DECIPHERING CERCLA’S VOCABULARY: UNITED STATES V. BURLINGTON — "REASONABLE" DIVISION AND "ARRANGER" LIABILITY

I. INTRODUCTION

In response to the pollution problems caused by toxic waste sites throughout the United States, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980.\footnote{See Mark Yeboah, Case Comment, United States v. Atlantic Research: Of Settlement and Voluntary Incurred Costs, 32 Harv. Envtl. L. Rev. 279, 279 (2008) (discussing purpose and background of CERCLA); see also Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2006) (detailing rules, regulations and definitions under law).} CERCLA’s objectives are to enable the government to quickly respond to environmental pollution, facilitate immediate cleanup of hazardous waste sites and, after cleanup is complete, force parties originally responsible for the pollution to reimburse the government for its expenditures.\footnote{See generally Martin A. McCroy, Who’s on First: CERCLA Cost Recovery, Contribution, and Protection, 37 Am. Bus. L.J. 3 (1999) (discussing problems CERCLA meant to address). For a further discussion of the history and purpose of CERCLA, see infra notes 50-53 and accompanying text.} CERCLA is a strict liability statute;\footnote{See McCroy, supra note 2, at 10-11 (noting CERCLA defendants are held strictly liable for environmental contamination).} any proof that the defendant contributed to environmental contamination is sufficient to establish liability.\footnote{See Black’s Law Dictionary 934 (8th ed. 2004) (defining strict liability). A defendant is strictly liable even if there is no “actual negligence or intent to harm.” Id. Strict liability “is based on the Breach of an absolute duty to make something safe. . . . Strict liability most often applies to either ultrahazardous activities or in products liability cases.” Id.} Additionally, when two or more defendants are responsible for the contamination, a court may hold them jointly and severally liable.\footnote{See American Law Encyclopedia, Joint and Several Liability, http://law.jrank.org/pages/7842/Joint-Several-Liability.html (last visited Feb. 26, 2009) (defining joint and several liability). Joint and several liability is a form of liability that is used in civil cases where two or more people are found liable for damages. The winning plaintiff in such a case may collect the entire judgment from any one of the parties, or from any and all of the parties in various amounts until the judgment is paid in full. In other words, if any of the defendants do not have enough money or assets to pay an equal share of the award, the other defendants must make up the difference. Defendants in a civil suit can be held jointly and severally liable only if their concurrent acts brought about the harm to the plaintiff. The acts of the defendants do not have to be simultaneous: they must simply contribute to the same event. Id.}
Furthermore, a court may impose joint and several liability on a defendant even if a defendant contributed only minimally to the total contamination and acted with reasonable care. Joint and several liability, however, is not triggered automatically under CERCLA. In joint and several liability, harm is divisible among potentially responsible parties (PRP) under both common law principles and the Restatement (Second) of Torts (Restatement).

CERCLA has spawned prolific litigation against parties accused of “arranging” for the disposal of hazardous substances which are “owned or possessed” by the parties. Moreover, the fact that CERCLA does not specifically define “arrange for” makes litigation very contentious. Courts have tried to formulate how and when to apportion harm and how to define arranger liability in the numerous complex scenarios that are often at issue in CERCLA cases.

6. See Steven L. Feldman & Stephen L. Crane, Spill Splitting, LOS ANGELES DAILY J., May 30, 2007, available at http://www.gsalaw.com/article6.htm (discussing difficulties in avoiding joint and several liability); see also Black’s Law Dictionary 1061 (8th ed. 2004) (defining negligence). A party that fails to “exercise the standard of care that a reasonably prudent person would have exercised in a similar situation” and/or conduct that “falls below the legal standard established to protect others against unreasonable risk of harm” is negligent. Id.

7. See Lynda J. Oswald, New Directions in Joint and Several Liability Under CERCLA?, 28 U.C. DAVIS L. REV. 299, 325-26 (1995) (noting Congress and courts reject mandatory joint and several liability for CERCLA defendants). The actual statute does not mention joint and several liability, as Congress intended for courts to decide CERCLA cases “on a case-by-case basis” using principles of common law torts. Id.

8. See United States v. Agway, Inc., 193 F. Supp. 2d 545, 547-48 (N.D.N.Y. 2002) (finding evidence insufficient to prove divisibility). Agway, Inc. failed to present evidence to the court demonstrating that its contribution to the contaminated site requiring cleanup was divisible. Id. at 552. The court held that here, the volume of barrels of toxic substances that contributed to the total contamination was not a reasonable basis upon which to apportion relative harm among tortfeasors because it did not take into account the commingling of harmful chemicals, their migratory potential and relative toxicity. Id. The court was careful to point out however, that volume may be a reasonable basis for divisibility in some cases. Id.


10. See id. at 156-58 (discussing court’s reasoning in United States v. Cello-Foil Products, Inc., 100 F.3d 1227 (6th Cir. 1995)). The court in Cello-Foil, defined “arranger for” to include an element of intent; if there was no intent to dispose of a hazardous material, there was no arrangement for disposal. See Cello-Foil, 100 F.3d at 1230-32.

11. See id. at 149 n.10 (noting disagreements among circuit courts on how to determine arranger liability). The author cited two cases demonstrating approaches to arranger liability among circuit courts. Id. In one case, the Eleventh Circuit found the defendant liable as an arranger even though the defendant did not decide how, when or by whom hazardous wastes were to be disposed. Id. In the other case, the Eighth Circuit held a plant supervisor liable as an arranger
States v. Burlington N. & Santa Fe Railway Co. (Burlington) demonstrates the broad and harsh approach a court may take in finding CERCLA liability. In Burlington, the Ninth Circuit imposed joint and several liability on three private parties - two railroad companies (Railroads) and Shell Oil Company (Shell) - which supplied chemicals to a pesticide application facility in California. In its holding, the Ninth Circuit interpreted the term “arranger” broadly under CERCLA. The ruling’s expansive interpretation of arranger liability provoked a vigorous dissent due to the apparently severe burden the broad definition would place on CERCLA defendants. On October 1, 2008, the U.S. Supreme Court granted certiorari “regarding the proper standard of review” and method of dividing liability, under CERCLA, among parties that improperly disposed of hazardous substances, thereby causing environmental harm.

This Note will evaluate the Ninth Circuit’s decision to impose joint and several liability on the defendants in Burlington, as well as its finding that Shell was an arranger under CERCLA. Part II of this Note recounts the facts of Burlington and the case’s procedural because he “knew about, supervised, and was directly responsible for arranging for disposal of hazardous waste.”


13. See id. at 926 (refusing rehearing petition of prior decision en banc). The Ninth Circuit held all three defendants jointly and severally liable for the contamination at the parcel containing a pesticide storage and distribution facility, overturning a district court’s determination that the harm was divisible. Id. at 943, 946. Moreover, the Ninth Circuit found Shell Oil Company (Shell) liable as an arranger because it sold and transferred chemicals to the pesticide facility knowing that spillage of the chemicals was a part of the transfer process. Id. at 952.


15. See id. (noting broad interpretation of arranger liability). For a further discussion of the Ninth Circuit’s reasons for broadly applying arranger liability, see infra notes 140-49 and accompanying text.

16. See id. (noting dissent joined by eight judges). The author opined that the number of dissenting judges suggested the weakness of the majority’s reasoning in applying such a broad standard to find arranger liability. Id. at 19.


history. Part III examines the background and history of CERCLA and discusses important cases regarding its application. Part IV explains the Ninth Circuit’s reasoning behind its decision. Part V provides a critical analysis of why the imposition of joint and several liability was unwarranted and suggests that the Ninth Circuit defined “arranger” too broadly. Finally, Part VI looks at the impact Burlington may have on future CERCLA litigation should the Supreme Court uphold the Ninth Circuit’s decision.

II. FACTS

Brown & Bryant, Inc. (B&B), a now defunct company, owned and operated an agricultural chemical storage and distribution facility in Arvin, California (Arvin site). In 1996, after spending nearly eight million dollars to clean up soil and groundwater contamination at the Arvin site, the United States Environmental Protection Agency (EPA) and California’s Department of Toxic Substances Control (DTSC) brought a CERCLA suit against B&B and B&B’s chemical supplier, Shell Oil Company (Shell), to force the companies to pay cleanup costs. The EPA and DTSC also sued Burlington Railway Co. and Union Pacific Transportation Co. (Railroads), which jointly owned a parcel of land at the Arvin site and leased the parcel to B&B.

19. For a further discussion of the facts of Burlington, see infra notes 24-49 and accompanying text.

20. For further background information on CERCLA, see infra notes 50-103 and accompanying text.

21. For a narrative analysis of Burlington, see infra notes 104-57 and accompanying text.

22. For a critical analysis of the Ninth Circuit’s decision in Burlington, see infra notes 158-99 and accompanying text.

23. For a further discussion on the potential impact of Burlington, see infra notes 200-13 and accompanying text.


25. See id. at 423 (citing facts). The Ninth Circuit found B&B, Railroads and Shell jointly and severally liable for contamination at the Arvin site. Id. See also United States v. Atchison, Topeka & Santa Fe Ry. Co. (Atchison), 2003 U.S. Dist. LEXIS 23130, at *226 (E.D. Cal., July 14, 2003) (holding Railroads liable for contamination at Arvin site and Shell liable as arranger but apportioning costs of harm), aff’d in part, rev’d in part sub nom., United States v. Burlington N. & Santa Fe Ry. Co., 479 F.3d 1113 (9th Cir. 2007). The district court estimated the government’s cleanup costs to be $7,809,683.46 as of June 30, 1997, not including interest or attorneys fees. Id. For a further discussion of the facts of this case and the holding, see infra notes 23-24, supra notes 26-45 and accompanying text.

26. See Gleghorn, supra note 24, at 423 (reciting facts of ownership).
At the Arvin site, B&B stored chemical Dichloropropane-dichloropropene (D-D), a pesticide that can produce disease in animals and severe skin irritation and other maladies in humans.\(^2\) The chemical D-D, which is highly corrosive and can eat through steel, was stored in converted stainless steel milk trailers.\(^2\) Despite the potential hazards, B&B placed these leak-prone trailers throughout the Arvin site, including the Railroads’ parcel.\(^2\) At the same location, B&B also stored similar rigs filled with other chemicals, such as Nemagon and Dinoseb.\(^3\)

B&B purchased D-D from Shell, which transported the chemical to B&B’s facility “Free On Board’ (F.O.B.) Destination” by way of common carrier trucks.\(^3\) F.O.B. signifies that the seller promises to deliver goods “on board a vessel designated by the buyer” and that the seller fulfills its obligations once the goods “have passed over the ship’s rail.”\(^3\) When the trucks arrived at the Arvin site, B&B employees unloaded and transferred the chemical from the trucks to the B&B facility.\(^3\) The unloading process was done in a “messy” fashion, resulting in frequent chemical spills.\(^3\) Moreover, although there was no evidence that D-D spills occurred during actual transport from Shell to B&B, leaks and spills are “ex-
pected and inherent in the delivery... process.” The EPA and DTSC discovered repeated leaks and spills of potentially hazardous chemicals at the Arvin site and found that B&B did not fully comply with several hazardous waste laws.

The United States District Court for the Eastern District of California held that the Railroads and Shell were liable for the cleanup costs under CERCLA. The district court also ruled that the harm at the Arvin site was divisible. The court apportioned nine percent of the clean-up costs to the Railroads, which it determined by multiplying the percentage of land owned by the Railroads, percentage of time the land was owned in relation to the total number of years the B&B facility operated and the volume of hazardous substances attributed to the Railroads’ parcel. For Shell, the court approximated “the percentages of leakage from various activities attributable to Shell and multiplied them together to set Shell’s proportion of the total liability at six percent.” The district court assigned B&B “one hundred percent joint and several liability,” but, because the company was defunct by this time, the EPA and DTSC were stuck with the remainder of the cleanup costs.

35. See United States v. Aitchison, Topeka & Santa Fe Ry., Co., 2003 U.S. Dist. LEXIS 23130, at *64 (E.D. Cal. July 14, 2003) (discussing likelihood of leaks and spills). The district court carefully noted that leaks and spills are “expected and inherent in the delivery and the unloading process.” Id. (emphasis added). See also Burlington, 520 F.3d at 952, (Bea, J., dissenting) (noting no evidence of spills during actual transport from Shell to B&B).

36. See Gleghorn, supra note 24, at 423 (discussing EPA and DTSC findings). See also Burlington, 520 F.3d at 931 (discussing contamination at Arvin site). The EPA and DTSC found that B&B discharged contaminated wastewater into a pond located on its parcel. Id.

37. See Burlington, 520 F.3d at 932 (noting holding of district court). For a further discussion of the district court’s holding, see infra notes 34-36, supra note 38 and accompanying text.

38. See Burlington, 520 F.3d at 932 (citing district court holding).

39. See Gleghorn, supra note 24, at 423 (discussing apportionment of liability between Railroads and Shell); see also Burlington, 520 F.3d at 932 (discussing calculation method in apportioning clean-up costs to Railroads). The district court in calculating Railroads’ portion of clean-up costs did so based on three factors: (1) Railroads’ parcel was 19.1% of entire Arvin site; (2) B&B leased the parcel from the Railroads thirteen out of twenty-nine years the B&B facility operated (45% of total time); and (3) the fraction of hazardous substances traceable to the Railroads was 66%. Id. Multiplying these three factors equaled, when rounding upward, to 6% liability. Id. Moreover, the district court assumed a 50% rate of error and decided to raise the Railroads’ liability to 9%. Id.

40. Burlington, 530 F.3d at 932 (calculating apportionment of clean-up costs to Shell). For a further discussion of Shell’s liability according to the Ninth Circuit, see infra notes 136-49 and accompanying text.

41. See Dupont, supra note 14, at 16-17 (discussing facts of case); see also Burlington, 520 F.3d at 932 n.11 (discussing district court’s apportioning liability).
The EPA and DTSC appealed the district court's ruling, arguing that the district court should have held Shell and the Railroads jointly and severally liable for the entire judgment.\textsuperscript{42} Shell cross-appealed, arguing that it was not an arranger under CERCLA and that the district court was therefore wrong to impose any cleanup liability on the company.\textsuperscript{43}

On appeal, the Ninth Circuit held that the harm at the Arvin site was theoretically divisible, but the district court's method of apportionment was erroneous given that the evidence presented at trial was insufficient to establish a reasonable basis for apportioning the liability.\textsuperscript{44} The Ninth Circuit found the district court's apportionment calculation to be faulty because it did not reasonably establish "what part of the contaminants found on the land in question were attributable to the presence of toxic substances or to activities on the Railroad parcel."\textsuperscript{45} In response to Shell's arguments, the Ninth Circuit ruled that Shell could not reasonably demonstrate that its chemicals "had contaminated the soil in any specific proportion as compared to other chemicals spilled at the site."\textsuperscript{46}

\textsuperscript{42} See Gleghorn, supra note 24, at 423 (discussing theories of EPA and DTSC on appeal). The EPA and DTSC argued that Shell and the Railroads should be held jointly and severally liable for the harm at the CERCLA site. \textit{Id.}

\textsuperscript{43} See id. (discussing Shell's cross-appeal claim). Shell argued that it was not a CERCLA arranger because it did not possess the chemicals once they were transferred to B&B and because it did not control the disposal process. \textit{Id.}

\textsuperscript{44} See id. (summarizing Ninth Circuit holding on appeal); see also Burlington, 520 F.3d at 943 (discussing apportionment of Railroad's liability). The Ninth Circuit held that apportionment, if allowed, must be used in accordance with the Restatement approach. \textit{Id.} While finding that the district court's factual analysis regarding land area, time of ownership, and types of hazardous substances was "mostly correct," the district court's legal analysis using those facts was insufficient to avoid joint and several liability. \textit{Id.} For a further discussion of the Ninth Circuit's reasoning regarding imposition of joint and several liability, see \textit{infra} notes 104-49 and accompanying text.

\textsuperscript{45} \textit{Burlington}, 520 F.3d at 946 (stating faultiness of district court holding).

\textsuperscript{46} \textit{Burlington}, 520 F.3d at 946 (discussing Ninth Circuit's ruling on Shell's liability). See \textit{generally id.} at 946-48 (rejecting district court's apportionment of liability upon Shell and holding Shell jointly and severally liable). The Ninth Circuit criticized the district court's ruling regarding apportionment of liability to Shell, stating,

\[\text{[t]he district court assumed equal contamination and cleanup cost from all the chemicals' leakage. This methodology entirely failed to account for the pos}\]

\[\text{sibility that leakage of one chemical might contribute to more contamination than leakage of another . . . . [t]he district court's calculations were too speculative to support apportionment. \textit{Id. at 946}.\]

For a further discussion of the Ninth Circuit's divisibility analysis, see \textit{infra} notes 109-23 and accompanying text.
Thus, the Ninth Circuit agreed with the district court that Shell was an arranger under CERCLA. The Ninth Circuit ruled that a party could be an arranger even if the party had no intent to dispose of a hazardous substance. The court also determined that there was sufficient reason to impose arranger liability on Shell because Shell owned the chemicals at the time of sale to B&B, provided B&B with guidelines on how to handle the chemicals and generally seemed aware of B&B’s sloppy environmental record.

III. BACKGROUND

In 1980, Congress passed CERCLA to remedy the environmental problems caused by hazardous waste sites throughout the United States. CERCLA gives the United States government the power to take any action necessary to deal with the release, or potential release, of hazardous substances into the environment. Additionally, CERCLA empowers the government to force those potentially responsible for environmental pollution to pay all cleanup costs which the government has incurred. CERCLA’s key purpose is to shift environmental cleanup costs from taxpayers to the polluters who benefitted from disposing of hazardous substances in the first place. To establish a prima facie case for liability under CERCLA, a plaintiff must prove: (1) the alleged CERCLA site is a “facility;” (2) there is a “release or threatened release” of “hazardous substances” from the facility; (3) the release or threatened release of hazardous substances has incurred “response costs;” and (4)
fendant belongs to one of the four categories of "potentially responsible parties" (PRPs) described in CERCLA section 107.54

The majority of courts do not require the plaintiff to prove causation in a CERCLA case.55 The plaintiff need only show that the defendant's hazardous substances were,

deposited at the site from which there was a release, that the hazardous substances of the same type as the defendant's were found at the site, and that the release caused the incurrence of response costs or proof of a specific causal link between the costs incurred in the cleanup and the individual generator's hazardous substances. This is to advance CERCLA's goal of prompt cleanup before lengthy litigation apportioning liability. . . . [M]ost courts have held that consideration of causation is proper only in allocating response costs in contribution actions, not in determining liability.56

A. Strict Liability and Joint and Several Liability

CERCLA is a strict liability statute.57 Any proof that the defendant disposed of hazardous materials and that a plausible path existed for the substances to reach the contaminated site is sufficient to establish liability.58 A court can even impose joint and several liability on a defendant found to have released only "minute quantities of potentially hazardous material."59

While section 107 of CERCLA makes no explicit mention of joint and several liability, it is widely accepted that Congress in-

54. See MATTHEW BENDER & CO., INC., LEXISNEXIS GROUP, REGULATED SUBSTANCES AND WASTE MANAGEMENT, 5-31 ENVTL. L. PRAC. GUIDE § 31.01 (MB 2008) (listing factors to establish prima facie case under CERCLA).

55. See id. (discussing causation in CERCLA).

56. Id. (discussing role of causation in CERCLA cases). Some courts allow causation to be considered in divisibility of harm analysis "by holding that a defendant can escape liability where its hazardous substances did not contribute more than background contamination, cannot concentrate to increase the toxicity of the contamination, and did not exceed applicable state or federal environmental standards." Id. For a further discussion of causation as it relates to CERCLA, see supra notes 51-52 and accompanying text.

57. See Feldman & Crane, supra note 6 (noting CERCLA is strict liability statute).

58. See id. (explaining what is needed to be held liable under CERCLA). For a further discussion CERCLA strict liability, see infra notes 59-67 and accompanying text.

59. Feldman & Crane, supra note 6 (discussing ease in imposing joint and several liability under CERCLA). Because CERCLA is a strict liability statute, defendants have a higher burden in proving divisibility. Id.
tended joint and several liability to be available for courts to impose on PRPs.\textsuperscript{60} It was also inferred that Congress expected courts to use common law principles and wanted courts to develop a federal common law of joint and several liability in deciding CERCLA cases.\textsuperscript{61} Although joint and several liability is usually imposed in CERCLA cases, it is not required in all circumstances.\textsuperscript{62} The Restatement "is the starting point for divisibility of harm analyses in CERCLA cases." \textsuperscript{63} Nevertheless, the Restatement applies only to the extent that it is compatible with CERCLA provisions.\textsuperscript{64}

Under the Restatement, one can apportion the harm caused by two or more parties when "(a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm."\textsuperscript{65} A PRP can avoid joint and several liability if it can prove that the entire harm is divisible; however, such proof comes with a substantial burden.\textsuperscript{66} Furthermore, the Restatement notes that certain harms are often incapable of any reasonable or

\textsuperscript{60.} See McCrory, supra note 2, at 11-12 (discussing joint and several liability as it applies under CERCLA); see also 42 U.S.C. § 9607 (2006) (discussing liabilities of parties under CERCLA).

\textsuperscript{61.} See McCrory, supra note 2, at 11-12 (describing joint and several liability as it applies under CERCLA). While deciding joint and several liability for CERCLA defendants is generally guided by common law principles, CERCLA, "in sharp contrast to traditional common law torts... does not require proof of causation prior to the imposition of liability." \textit{Id.} at 13. See also \textit{United States v. Atchison, Topeka \& Santa Fe Ry., Co.}, 2003 U.S. Dist. LEXIS 23130, at *232 (E.D. Cal July 14, 2003) (discussing how to analyze divisibility in CERCLA cases). For a further discussion of the background on divisibility under CERCLA, see supra notes 57-60 and accompanying text, and infra notes 63-79, 104-39, 158-72 and accompanying text.

\textsuperscript{62.} See \textit{United States v. Agway, Inc.}, 193 F. Supp. 2d 545, 547-48 (N.D.N.Y. 2002) (noting joint and several liability is not mandatory). For a further discussion of the ruling in \textit{Agway}, see supra note 8 and accompanying text.

\textsuperscript{63.} \textit{Atchison}, 2003 U.S. Dist. LEXIS 23130, at *232 (stating Restatement is first step in divisibility analysis of CERCLA cases). The Restatement provides for apportionment of harm among two or more parties where "distinct harms" are shown or there is a reasonable basis to determine the contribution of each party to a single harm. \textit{Id.} at *233.

\textsuperscript{64.} See \textit{United States v. Hercules, Inc.}, 247 F.3d 706, 713-17 (8th Cir. 2001) (overturning district court's decision granting government motion for summary judgment on issue of joint and several liability and noting difference between Restatement and CERCLA). The court noted that whereas in the Restatement the plaintiff bears the burden to show causation, in a CERCLA case, once the government presents the essential elements of liability, the defendant bears the heavy burden of proving divisibility. \textit{Id.} at 718-19.

\textsuperscript{65.} \textit{Restatement (Second) of Torts}, § 433A (1965) (stating general principles and illustrations of apportioning harm among two or more parties).

\textsuperscript{66.} See \textit{Agway}, 193 F. Supp. 2d at 548 (stating Congress' intent that CERCLA make it difficult for PRPs to avoid joint and several liability). For a discussion of Congress' intent in formulating CERCLA, see supra notes 1-8 and accompanying text and \textit{infra} notes 68-73 and accompanying text.
accurate division and cautions courts against “making an arbitrary apportionment for its own sake.”

In *In re Bell Petroleum Services (Bell)*, the government brought a CERCLA suit to compel Bell and two other companies to pay the cleanup costs incurred by EPA while dealing with groundwater pollution caused by chromium discharge from a chrome-plating factory owned successively by the defendants. The Fifth Circuit looked to the Restatement to determine whether dividing the harm among the defendants was reasonable. The court noted that the Restatement only requires evidence “sufficient to permit a rough approximation” of harm contributed by each defendant to establish divisibility. The Fifth Circuit found that Congress “clearly” did not intend a more stringent standard that would result in automatic imposition of joint and several liability. Consequently, the Fifth Circuit ruled that the defendants met their evidentiary burden in proving that the harm was divisible.

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67. *Restatement (Second) of Torts*, § 433A cmt. i, illus. 14 (1965) (illustrating when divisibility is not possible); see also Atchison, 2003 U.S. Dist. LEXIS 23130, at **235-36 (discussing difficulty in proving divisibility of harm).
68. 3 F.3d 889 (5th Cir. 1993).
69. See id. at 892-893 (discussing facts of case). The three defendant companies were Bell, Sequa, and John Leigh. Id. They owned and operated the chrome plant successively from 1971 until 1977. Id. at 892.
70. See id. at 903 (stating Restatement allows for divisibility of harm even if evidence cannot show with certainty amount of harm contributed by each defendant).
71. See id. at 904 n.19 (replying to dissent's accusation that majority was asking for lesser standard than preponderance of evidence). The court's response to the dissent stated, “Squa is, of course, required to prove its contribution to the harm by a preponderance of the evidence... Our point is that such proof need not rise to the level of certainty.” Id.
72. See id. (holding CERCLA does not mandate joint and several liability); see also United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983) (rejecting claim that no joint and several liability exists in CERCLA). The court rejected the defendants' argument that, “because joint and several liability is not expressly provided for in CERCLA, there is no basis for its imposition.” Id. The court in Chem-Dyne stressed that under CERCLA, defendant always bears the burden of proof in showing that apportionment is possible. Id. Here, the court rejected volume evidence of hazardous wastes contributed by a particular defendant as a basis for apportionment because in this case it was not "the volume of waste of a particular generator is not an accurate predictor of the risk associated with the waste because the toxicity or migratory potential of a particular hazardous substance generally varies independently with the volume of the waste." Id. at 811.
73. See *Bell*, 3 F.3d at 904 (holding defendants proved reasonable basis for apportionment). The Fifth Circuit particularly noted that Sequa's use of volumetric evidence was a reasonable one with which to prove that the harm was divisible. Id.
In *United States v. Hercules, Inc. (Hercules)*, the government sued to compel Hercules, Inc. and Vertac Chemical Corp., to pay the cleanup costs of pesticide pollution from a chemical processing plant and storage facility that the two companies operated successively. On the issue of liability, the Eighth Circuit stated that any evidence showing divisibility must be "concrete and specific." Moreover, the Eighth Circuit stressed that if courts are in doubt about divisibility, they should impose joint and several liability instead of trying to make an approximation. Hercules presented the court with volumetric, chronological, and other types of evidence to prove divisibility. Consequently, the Eighth Circuit held that the evidence Hercules presented was sufficient to demonstrate a reasonable basis for divisibility.

B. Categories of PRPs and Arranger Liability

CERCLA provides four categories of PRPs: (1) the party that currently owns and/or operates a facility; (2) the party that controlled and/or operated a facility at the time hazardous substances were disposed; (3) a party that “arranged for disposal” of hazardous materials which the party owned or possessed; and (4) the party that accepted hazardous materials for transport to a facility to be disposed of, if that same party chose the disposal facility. CERCLA's definition of “disposal” includes “the discharge, deposit, in-

74. 247 F.3d 706 (8th Cir. 2001)

75. See id. at 710-13 (reciting facts of case). The government originally built the chemical processing factory. Id. at 711-12. In the 1940s it was owned by Reasor-Hill Corporation, which produced pesticides such as Dioxin. Id. at 712. Hercules bought the plant from Reasor-Hill in 1961, and proceeded to bury and store dioxin, but Hercules did not know of dioxin’s deleterious effects until 1965. Id. In 1975, Vertac began shipping chemicals to off-site landfills. Id. A year later, Hercules sold the landfill site to Vertac and by 1987 there were “nearly 29,000 waste-filled drums at the site that contained waste materials. . . . Many of these drums had corroded and leaked. . . .” Groundwater and soil contamination were found at the site and at the landfills, and there was pollution in nearby neighbors’ property. Id. at 712-13.

76. See id. at 717-19 (ruling evidentiary burden in proving divisibility in CERCLA cases is high). Defendants who hope to avoid joint and several liability must present enough evidence to do so, as Congress’ intent was to place the burden of proof on defendants in CERCLA litigation. Id.

77. See id. (recommending action for other courts in this circumstance to take).

78. See id. at 719 (holding evidence presented by Hercules provided reasonable basis for apportionment).

79. See Hercules, 247 F.3d at 719 (citing In re Bell Petroleum Servs., 3 F.3d 889, 895-96 (8th Cir. 1993)) (remanding case to trial court to reconsider divisibility of harm).

jection, dumping, spilling, leaking, or placing any solid waste or hazardous waste into or on any land or water so that such . . . waste. . . . may enter the environment or . . . be discharged into any waters, including ground waters." 81

In United States v. CDMG Realty Co. (CDMG), 82 the Third Circuit attempted to determine what “disposal” meant under CERCLA, 83 and whether “disposal” required affirmative human conduct. 84 In CDMG, HMAT Associates (HMAT), the owners of contaminated property (hereinafter, CERCLA site), sought contribution from the prior owner of the contaminated property, Dowel Associates (Dowel), after the government sued HMAT to compel it to pay cleanup costs. 85 HMAT advanced a “passive” disposal theory, arguing Dowel was a prior owner “at the time of disposal” because contaminants dumped on the land prior to Dowel’s ownership spread during its occupancy, even though it never actually dumped any hazardous materials on the property. 86 HMAT also argued that Dowel dispersed contaminants during soil investigations to deter-


82. 96 F.3d 706 (3d Cir. 1996).

83. Id. at 710 (discussing meaning of “disposal”).

84. See id. at 710, 715 (holding “disposal” has strong connotations of active conduct).

85. See id. (describing reasons for HMAT’s contribution action against Dowel). The EPA began investigating the property, located in Morris County, New Jersey, which was formerly a landfill that received large amounts of hazardous chemical wastes. Id. at 711. In the 1970s, the EPA investigated pollution from the landfill and finally listed it as a serious hazardous waste site in 1982, the year after Dowel had purchased the property. Id. In 1984, the EPA notified Dowel that it could potentially be liable for cleanup costs at the site. Id. at 712. In 1989, a CERCLA action was commenced against HMAT, the current owners of the property. Id. Dowel was not sued by the government, but HMAT filed a third-party suit against Dowel for contribution. Id. Dowel moved for summary judgment, claiming that because the company did not “actively engage in waste disposal during their ownership of the property,” it was not liable under CERCLA. Id. The United States District Court for the District of New Jersey granted Dowel’s motion for summary judgment, which HMAT appealed. Id.

86. Id. at 710 (describing HMAT’s theory of disposal); see also 42 U.S.C. § 9607(a)(1)-(4) (2006) (describing categories of potentially liable parties). The statute imposes liability on “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.” Id.
mine whether buildings could be constructed on the property. HMAT contended that these actions constituted a "disposal." The Third Circuit rejected HMAT's first theory, but vacated summary judgment and remanded the case to allow HMAT to present evidence on its second theory. Moreover, the court avoided the issue whether "disposal" always requires active human conduct. Nevertheless, using a common dictionary definition, the court found a strong argument for requiring "disposal" to include an affirmative act. According to the Third Circuit, the words in CERCLA surrounding "spilling" and "leaking" — "discharge," "dumping," "injection," and "placing" — all envision some human conduct, meaning Congress may have intended these words to denote affirmative acts.

Additionally, CERCLA fails to define "arranged for," creating another ambiguity for which the courts must furnish a definition.

87. See CDMG, 96 F.3d at 710 (discussing HMAT's arguments against Dowel).
88. See id. at 710 (describing HMAT's active theory of disposal). The district court ruled, "drilling activities did not cause a significant enough disturbance to trigger liability." Id. at 712.
89. See id. at 711 (vacating summary judgment and remanding case). The Third Circuit held that no threshold existed on what level of disturbance may constitute "disposal," and that HMAT may present evidence at trial that Dowel negligently conducted soil investigations, resulting in the spread of hazardous materials. Id.
90. See id. at 714 (avoiding issue of whether disposal always requires active human conduct).
91. See id. (noting strong argument for "disposal" to require active conduct). The court noted that the words used in CERCLA to give meaning to "disposal" such as spilling and leaking have been used by other courts to hold that passive migration of contaminants constituted disposal, since "leaking" and "spilling" are not words that generally denote active conduct. Id. The Third Circuit however looked to an ordinary dictionary definition and found that these words also have meanings that denote active human conduct. Id.
92. See CDMG, 96 F.3d at 714 (discussing Congressional intent from choice and context of words in CERCLA). The court noted that the words surrounding "leaking" and "spilling" in the CERCLA statute are "discharge," "deposit," "dumping," "injection," and "placing," all of which indicate some affirmative human action. Id. "Spilling" can also mean "to cause or allow to pour, splash, or fall out," and "leak" can mean "to permit to enter or escape through a leak." Id. Nevertheless, the court did not deny the possibility that these words could also apply to passive instances of disposal. Id. The court agreed that "leaking" and "spilling" do not always require active human conduct, that one definition of leak is "to enter or escape through a hole, crevice, or other opening", and that this was the definition most favorable to HMAT. Id. Nevertheless, HMAT did not offer evidence of any leaking drums from Dowel. Id.
While the "arranged for" provision certainly covers companies that send hazardous material to landfills, it is unclear whether this provision also covers companies that "arrange for disposal" of chemicals without the intent to dispose of them, "such as by sending useful chemicals to a facility for processing that results in spills... of some of those chemicals." In response to this ambiguity, three different approaches have emerged among the circuit courts: "(1) a strict liability approach; (2) a specific intent approach; and (3) a totality of the circumstances or case-by-case approach."

The Ninth Circuit in *United States v. Shell Oil Co.* (Shell Oil) ruled that control of the manner of disposal was critical in determining arranger liability. In *Shell Oil*, two oil companies contracted with the Federal Government to produce special high-octane fuel for the military, which produced toxic byproducts during the refining process. The byproducts, dumped at a landfill site, resulted in contamination that the government cleaned up. After the government sued the oil companies under CERCLA to recover the cleanup costs, the oil companies counter-claimed under a broad arranger theory; the companies argued that the government was liable because it had sufficient authority over the process that produced the hazardous wastes.

94. Hauge, *supra* note 93 (discussing arranger liability); see also Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 677 (3d Cir. 2003) (listing most important factors to determine arranger liability). The court stated "we conclude that the most important factors in determining 'arranger liability' are: (1) ownership or possession; and (2) knowledge; or (3) control. Ownership or possession of the hazardous substance must be demonstrated, but this factor alone will not suffice to establish liability." *Id.*

95. Boyer, *supra* note 51, at 204-05 (describing approaches taken by circuit courts in finding arranger liability). For a further discussion of arranger liability, see *supra* notes 75-87 and accompanying text.

96. 294 F.3d 1045 (9th Cir. 2002).

97. *See id.* at 1059 (holding control is critical element to determine arranger status); see also *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 744-46 (8th Cir. 1986) (holding anyone exercising some control and authority over hazardous substances and disposal may be liable under CERCLA).

98. *See Shell Oil*, 294 F.3d at 1045-51 (discussing facts of case).

99. *See id.* (describing facts of production and disposal of toxic byproducts). The oil companies and the government contracted for production of the high-octane petroleum during World War II. *Id.* at 1048. The government knew that the production process resulted in toxic byproducts and took "some actions to alleviate the problem of waste disposal." *Id.* at 1051. Nevertheless, the government did not specifically order the disposing of the toxic waste or issue any specific approval of where and/or how the wastes were to be disposed. *Id.*

100. *See Shell Oil*, 294 F.3d at 1055 (describing oil companies' theory of arranger liability). The oil companies argued that liability is imposed on a party when that party "has substantial control over a manufacturing process wherein a hazardous waste stream is generated and disposed of." *Id.* This leads to an obligation "to control the disposal of that waste stream." *Id.* The United States District
Despite the arguments proffered by the oil companies, the Ninth Circuit held that the government was not an arranger.\textsuperscript{101} Although the Ninth Circuit agreed that control is an essential element in determining arranger liability, the court nevertheless found the government never owned any of the waste products, did not exercise any control over waste disposal and did not even have an obligation to control the manner of waste disposal.\textsuperscript{102} The holdings in \textit{CDMG} and \textit{Shell Oil}, therefore, demonstrate that courts view arranger liability as involving some form of active participation in the disposal process.\textsuperscript{103}

IV. NARRATIVE ANALYSIS

In \textit{Burlington}, the Ninth Circuit reversed the district court’s ruling and held that the Railroads and Shell were both jointly and severally liable for the entire harm at the Arvin site.\textsuperscript{104} In so holding, the court rejected geographic considerations, time of ownership and volumetric evidence presented to support divisibility.\textsuperscript{105} The Ninth Circuit held that in this case, such factors were legally

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\textsuperscript{101} See \textit{Shell Oil}, 294 F.3d at 1056-59 (ruling government was not arranger under CERCLA).

\textsuperscript{102} See id. (ruling on arranger liability). The court noted the differences between this case and \textit{Aceto}. \textit{Id.} at 1056. Here, unlike in \textit{Aceto}, the government was the “end purchaser” of the fuel and thus more akin to a customer of the manufacturer in \textit{Aceto} than the manufacturer itself. \textit{Id.} In addition, the government never had ownership of the raw materials or its intervening products. \textit{Id.} It also never owned “unrefined petroleum, refined gasoline, fresh sulfuric acid, spent acid, or alkylate or any other additive.” \textit{Id.} Moreover, unlike Aceto, the government never contracted out “a crucial and waste-producing intermediate step in a manufacturing process, and then seek to disclaim responsibility for the waste generated during that step.” \textit{Id.}

\textsuperscript{103} For a further background discussion on arranger liability, see \textit{supra} notes 80-95 and accompanying text.

\textsuperscript{104} See \textit{United States v. Burlington N. & Santa Fe Ry. Co.}, 520 F.3d 918, 943-47 (9th Cir. 2008) (holding Shell and Railroads jointly and severally liable).

\textsuperscript{105} See \textit{id.} (finding no reasonable basis for divisibility).
insufficient. Additionally, the Ninth Circuit concluded that Shell was an arranger, even though it did not intend to dispose of the chemicals, because it owned the chemicals at the time of sale and transport to B&B and also provided guidelines for B&B to follow in handling the chemicals. Moreover, Shell seemed generally aware that chemical spills were occurring at the B&B facility.

A. Divisibility

In imposing joint and several liability on Shell and the Railroads, the Ninth Circuit stated that harm might be divisible if a reasonable basis for divisibility existed. Nevertheless, the Ninth Circuit cautioned that divisibility analysis in CERCLA cases must be "carefully limited." To do otherwise would undermine CERCLA's strict liability principles, "because defendants who can show the harm is divisible, and that they are not responsible for any of the harm' could whittle their liability to zero." A PRP status "premised on ownership of a facility does not require any involvement in the disposal of hazardous substances[;]" therefore a PRP cannot "cause" contamination on its property simply by owning land on which another party disposes of toxic waste. To allow landowner PRPs to use traditional causation analysis to prove that they were not wholly liable would "undermine the premise on which the statute designated them as PRPs to begin with."

106. See id. (holding evidence presented was insufficient to show reasonable basis for apportionment). For a critical analysis of the Ninth Circuit's reasoning on divisibility, see infra notes 154-65 and accompanying text.

107. See id. at 948-52 (imposing arranger liability on Shell). For a critical analysis of the Ninth Circuit's reasoning in imposing arranger liability, see infra notes 166-94 and accompanying text.

108. See id. (imposing arranger liability on Shell). The Ninth Circuit supported its finding that Shell was aware that chemical spills and leaks were occurring at the facility by pointing out that "Shell regularly would reduce the purchase price of the D-D, in an amount the district court concluded was linked to loss from leakage." Id. at 951.

109. See Burlington, 520 F.3d at 926 (holding reasonable basis test for apportionment) (citing United States v. Hercules, Inc., 247 F.3d 706, 717 (8th Cir. 2001)). For a further discussion of the facts of Burlington, see supra notes 24-49 and accompanying text.

110. See Burlington, 520 F.3d at 929 (stating limit needed on divisibility analysis).

111. Id. (citing United States v. Twp. of Brighton, 153 F.3d 307, 318 (6th Cir. 1998)) (stating divisibility analysis weakens strict liability principle of CERCLA).

112. See id. at 938 (noting inapplicability of causation in CERCLA analysis). For a further discussion of causation and its applicability to CERCLA cases, see supra notes 54-56 and accompanying text.

113. See Burlington, 520 F.3d at 998 (arguing traditional causation analysis would undermine purpose for PRP designation).
A landowner PRP can establish divisibility only by proving that no contaminants are traceable to his or her portion of land at the time of disposal.\textsuperscript{114} That a defendant cannot realistically keep precise records of all of his or her contaminants is understandable, but here it was fatal to the defendants' case.\textsuperscript{115} The Ninth Circuit in \textit{Burlington} held that the Railroads failed to establish that a reasonable basis for divisibility existed because the Railroads could not supply the court with very precise records proving the exact amount of contaminants traceable to only the activities on their parcel.\textsuperscript{116}

Divisibility of harm for an arranger, on the other hand, is more straightforward,\textsuperscript{117} since its focus is on the manner in which disposal takes place.\textsuperscript{118} In \textit{Bell} and \textit{Hercules}, the Ninth Circuit first looked to see if, theoretically, a basis for divisibility existed.\textsuperscript{119} The court then investigated whether the defendants' evidence sufficiently established a reasonable basis for divisibility.\textsuperscript{120} Finally, the court looked to see whether the district court erred in finding that a reasonable basis existed.\textsuperscript{121}

\hspace{1cm} \textsuperscript{114.} See \textit{id.} at 943 (describing how landowner can prove divisibility).

\hspace{1cm} \textsuperscript{115.} See \textit{id.} at 944-45 (holding precise records crucial to show divisibility). The court noted that had more precise records been kept, it would have been possible for the Railroads to show the exact amount of leakage attributable to the Railroads and amount of leaked chemicals that traveled onto the B&B parcel. \textit{id.} at 944. The court found that keeping such records, as it demanded, is difficult and impracticable and that it is understandable why the Railroads did not keep such records. \textit{id.} Nevertheless, failure to keep these records resulted in the Railroads not being able to provide enough evidence to the court to support apportioning liability. \textit{id.} at 945.

\hspace{1cm} \textsuperscript{116.} See \textit{id.} (noting lack of more precise records). The Ninth Circuit stated that if better and more precise records were presented, "it would be possible to estimate the amount of leakage attributable to activities on the Railroad parcel, how that leakage traveled to and contaminated the soil and groundwater under the Arvin parcel, and the cost of cleaning up that contamination." \textit{id.} at 944. The Ninth Circuit found that the precise records it demands companies to supply to prove divisibility are impracticable to keep and the result may be unfair. \textit{id.} Nevertheless, "these practical considerations cannot justify a 'meat-axe' approach to the divisibility issue, premised on percentages of land ownership, as a means of adjusting for the difficulties of proving divisibility with precision when PRP status is based on land ownership alone." \textit{id.} at 944-45.

\hspace{1cm} \textsuperscript{117.} See \textit{id.} at 938 (describing how categories of PRPs can establish divisibility).

\hspace{1cm} \textsuperscript{118.} See \textit{Burlington}, 520 F.3d at 938 (describing how categories of PRPs can establish divisibility). For a further discussion on establishing divisibility in CERCLA cases, see \textit{supra} notes 59-79 and accompanying text.

\hspace{1cm} \textsuperscript{119.} See \textit{Burlington}, 520 F.3d at 942 (citing \textit{United States v. Hercules, Inc.}, 247 F.3d 706, 719 (8th Cir. 2001)) (describing first part of test in reviewing existence of reasonable basis for divisibility).

\hspace{1cm} \textsuperscript{120.} See \textit{id.} at 942 (describing second part of test in reviewing existence of reasonable basis for divisibility).

\hspace{1cm} \textsuperscript{121.} See \textit{id.} at 943 (questioning district court's finding of divisibility).
The Ninth Circuit found that the harm at the Arvin site was theoretically divisible, because some contamination occurred before the Railroads' parcel became a part of the B&B facility, however, not all harmful substances were stored on the Railroads' property and Shell sold only some of the chemicals to B&B that spilled at the site. Nevertheless, the Ninth Circuit overturned the district court, ruling that although divisibility was theoretically possible, the defendants failed to prove divisibility was reasonable.

1. The Railroads' Apportionment

The Ninth Circuit held the Railroads could only establish divisibility by proving that no contaminants were traceable to the land owned by the Railroads during the disposal of any toxic substances. The district court's opinion included eighty pages of factual findings and relied on percentages of land, time of ownership and types of products in finding that a reasonable basis for divisibility existed. While the facts provided were not in dispute, the Ninth Circuit ruled that they failed to support a reasonable basis for divisibility.

Instead, the Ninth Circuit noted that mere percentage of land owned and used, by itself, cannot provide a reliable basis for tracing the proportion of toxic leaks, contamination or cleanup costs that are associated with the whole site. The court recognized that CERCLA does not premise liability for contamination on just parts of a facility but rather upon the whole. Moreover, the court found that the period of ownership of the land was not a reasona-

122. See id. (describing possibility of showing divisibility). For a further discussion of the details of the case, see supra notes 24-49 and accompanying text.

123. See Burlington, 520 F.3d at 943 (holding no reasonable basis for apportionment of harm existed).

124. See id. (describing criterion for Railroads to establish divisibility).

125. See id. (describing district court's findings).

126. See id. (rejecting district court's rationale for apportionment).

127. See id. (citing United States v. Rohm & Haas Co., 2 F.3d 1265, 1285 (3d Cir. 1993) (rejecting percentage of land as rational basis to apportion harm). For a critical analysis of the Ninth Circuit's rejection of land percentage as a basis to apportion harm, see infra notes 158-69 and accompanying text.

128. See Burlington, 520 F.3d at 944 (noting operations at Arvin site were dynamic with many processes regarding chemicals happening throughout facility). The court noted that some fertilizer rigs were stored on Railroads' parcel and filled on B&B's parcel, pesticide cans were stored on Railroads' parcel before disposal, and chemical storage tanks were placed all over the facility. Id. The court held that a "simple calculation of land ownership" is not capable of capturing "any data that reflects this dynamic, unitary operation of the single Arvin facility." Id.
The Ninth Circuit noted that the district court assumed a constant rate of contamination "traceable to the facility as a whole for each time period." The Ninth Circuit also found that the district court erred in relying on the proportion of the types of hazardous substances present on the Railroads' parcel. Although there was no evidence "as to which chemicals spilled on the parcel, where on the parcel they spilled, or when they spilled[,]" there was evidence of potential D-D leakage on the Railroads' parcel, which "the district court excluded from its calculations." The Ninth Circuit, therefore, concluded that the Railroads did not prove their case for divisibility.

2. Shell's Apportionment

Moreover, according to the Ninth Circuit, Shell also presented insufficient evidence to warrant divisibility. The court held that no reasonable basis for divisibility existed because Shell failed to supply "more precise estimates of the average volume of leaked chemicals during the transfer process."

129. See id. at 945 (holding period of ownership not reasonable basis for divisibility).
130. Id. (criticizing district court's reasoning in finding divisibility). See also United States v. Rohm & Haas Co., 2 F.3d 1265, 1280 (3d Cir. 1993) (holding ownership of portion of land is alone not enough to establish divisibility). In Rohm & Haas, the defendants, Rohm & Haas (R&H), owned a 120-acre landfill in Pennsylvania and leased part of the landfill to Chemical Properties, Inc. (CP). Id. at 1268. After discovering that R&H disposed hazardous wastes at the site, the EPA brought a CERCLA suit against R&H and CP. Id. CP tried to avoid joint and several liability by arguing that the court could apportion the harm according to the small percentage of land at the site that CP owned. Id. at 1279. The Third Circuit rejected evidence of land ownership alone as a reasonable basis for apportionment. Id. at 1280. The Third Circuit stated that "to warrant apportionment, a defendant cannot simply provide some basis on which damages may be divided . . . . CP must prove that there is a way to determine what portion of the 'harm' . . . is fairly attributable to CP." Id.
131. See Burlington, 520 F.3d at 945 (finding no evidence to support district court's holding).
132. See id.
133. Burlington, 520 F.3d at 945 (criticizing district court's divisibility analysis).
134. Id. (criticizing district court failure to include potential D-D leaks).
135. See id. at 946 (holding Railroads failed to provide reasonable basis for divisibility). For a critical analysis of the Ninth Circuit's reasoning, see infra notes 158-99 and accompanying text.
136. See Burlington, 520 F.3d at 946 (holding evidence insufficient to establish divisibility).
137. Id. (finding Shell failed to provide adequate evidence to support divisibility). Shell had only provided evidence as to leaking, but according to the court, this was inadequate. Id. The Ninth Circuit stated that, "contamination - as dis-
Furthermore, in assuming "equal contamination and cleanup costs from all the chemicals' leakage," the district court failed to account for the possibility that each leaked chemical contributed different levels of contamination. 138 Providing only evidence of leakage, Shell could not prove a reasonable basis for divisibility. 139

B. Arranger Liability

In interpreting "arranger liability," the Ninth Circuit adopted a broad view, citing Shell Oil. 140 The court defined arranger liability as a transaction that contemplates hazardous substance disposal "as a part of, but not the focus of the transaction." 141 Although no direct contract for disposal existed, the court noted that this was a distinct from leakage — is the necessary consideration.” Id. The court wanted to see proof of a relationship “between waste volume, the release of hazardous substances, and the harm at the site.” Id. (citing United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988)). Further, the court stated, “volumetric calculations of contaminating chemicals — those remaining in the environment and requiring cleanup — could be sufficiently specific for apportionment.” Id. (citing United States v. Hercules, Inc., 247 F.3d 706, 719 (8th Cir. 2001)).

138. See id. (faulting district court's assumption of equal contamination and cleanup costs from all leaked chemicals). The Ninth Circuit also noted that different chemicals present have different cleanup costs. Id.

139. See id. (holding leakage or disposal evidence alone insufficient to prove divisibility). The Ninth Circuit stated Shell could not provide enough evidence to show even "a rough approximation" of contamination that remained at the Arvin site "either directly or through the presumption that the pro rata cost of remediating contamination is likely to be equivalent to a PRP's pro rata share of contamination." Id. Additionally, even the approximation of leakage was too speculative to prove divisibility. Id. To support its proposition, the Ninth Circuit cited Chem-Nuclear Sys. v. Bush, 292 F.3d 254, 255 (D.C. Cir. 2002). Id. In Chem-Nuclear, the defendant disposed drums filled with hazardous waste. Id. Eighty drums were directly attributable to the defendant. Id. The defendant could not prove that "it was responsible for only those eighty drums, and therefore was not entitled to apportionment." Id. at 946-47. Additionally, though the defendant "provided evidence supporting inferences regarding where its drums went, the court refused to accept these inferences as sufficient proof." Id. at 947. The Ninth Circuit criticized the district court for estimating the "volume of Shell's chemicals that leaked from each transfer based on data samples that do not readily extrapolate to total leakage over the entire twenty-three-year period that Shell supplied B&B with D-D." Id. The Ninth Circuit found that each of the district court's estimates was too speculative to warrant apportionment. Id. The Ninth Circuit did state, however, that Shell's specific contribution to the contamination was easier to ascertain than that of the Railroads. Id. at 946.

140. See id. at 948 (discussing "broad arranger liability"). For a further discussion of broad arranger theory in Shell Oil, see supra notes 96-100 and accompanying text.

141. Burlington, 520 F.3d at 948 (defining broad arranger liability). See also United States v. Shell Oil Co., 294 F.3d 1045, 1058 (9th Cir. 2002) (finding United States not considered arranger under CERCLA). The pertinent part of Shell Oil that the Ninth Circuit cited in Burlington notes that arranger liability can be imposed on a party who, although not in literal physical ownership or possession of a hazardous substance, had the obligation to exercise control over the disposal and/
broad arranger case because it involved a situation where the parties "did contract for the sale or transfer of hazardous substances that were then disposed of." Additionally, citing CDMG, the Ninth Circuit found that because CERCLA's definition of "disposal" includes unintentional processes such as "leaking," Shell may be liable even if it had no intent to dispose of the chemicals. That Shell arranged for a transaction in which there would necessarily be some form of leaking or spilling was enough to impose liability.

Additionally, the Ninth Circuit rejected Shell's argument that the company was not liable as an arranger because it did not have ownership or control over the hazardous chemicals. The Ninth Circuit held that while control is a pertinent element in finding a party to be an arranger, it is not a crucial element. In Shell Oil, the absence of any control or ownership "was a clue concerning whether the sales transaction contemplated disposal as an inherent part of the transaction." Here, Shell was the owner of the chemicals at the time the sale was entered into with B&B, was aware that chemical spills occurred and tried to exercise authority over B&B's

or was the source of the harmful substances or "managed its disposal." See Shell Oil, 294 F.3d at 1058.

142. Burlington, 520 F.3d at 948-49 (noting situations where broad arranger liability arises). For a critical analysis of the Ninth Circuit's arranger analysis, see infra notes 158-99 and accompanying text.

143. See Burlington, 520 F.3d at 949 (citing United States v. CDMG Realty, Co., 96 F.3d 706, 714 (3d Cir. 1996)) (holding "leaking" does not require intent or active human conduct). The opinion in CDMG, which the Ninth Circuit in Burlington applied in support of its contention that disposal under CERCLA may not acquire an affirmative act, only stated that the court will avoid the question if disposal always requires "active human conduct." CDMG, 294 F.3d at 714. Nevertheless, the court in CDMG stated emphatically that under CERCLA, "leaking" and "spilling" should be read to require active human conduct. Id. at 714. For further discussion of CDMG, see supra notes 82-95 and accompanying text; for a critical analysis of the Ninth Circuit's interpretation of CDMG, see infra notes 177-81 and accompanying text.

144. See Burlington, 520 F.3d at 949 (holding Shell liable as arranger despite no intent to dispose chemicals). The Ninth Circuit bolstered its finding that Shell's lack of intent to dispose did not matter in this case, by noting that leaks were "inherent in the transfer process arranged by Shell and contemporaneous with that process." Id. at 950. Further, Shell delivered the chemicals knowing leaks were likely during the transfer process and Shell gave advice and supervision regarding transfer and storage of the chemicals. Id. Thus, disposal was a "necessary part of the whole process." Id. For a critical analysis of the Ninth Circuit's reasoning in applying arranger liability, see infra notes 166-94 and accompanying text.

145. See Burlington, 520 F.3d at 950 (noting Shell's argument that lack of control or ownership means no arranger liability).

146. See id. at 951 (holding CERCLA does not require party to own hazardous wastes when it arranged for transaction or at time of transfer of ownership).

147. Id. (distinguishing from Shell Oil). For discussion of the facts of Shell Oil, see supra notes 90-97 and accompanying text.
handling of the chemicals. \textsuperscript{148} As a result, the Ninth Circuit deemed this sufficient to classify Shell as an arranger. \textsuperscript{149}

C. Dissent

Judge Bea wrote a strongly worded dissent in response to the Ninth Circuit’s ruling. \textsuperscript{150} In it, Judge Bea noted that the majority had held that a court might find a reasonable basis for divisibility based on volumetric, chronological, geographic, and/or other types of evidence. \textsuperscript{151} Yet here, the majority ruled that evidence presented on these considerations were “legally insufficient” to establish divisibility. \textsuperscript{152} The dissent argued that the majority was demanding certainty to find divisibility of harm rather than the accepted reasonableness standard. \textsuperscript{153} It attacked the majority opinion claiming it establishes an “impossible-to-satisfy” burden on CERCLA.

\textsuperscript{148} See Burlington, 520 F.3d at 950-51 (holding Shell as arranger under CERCLA). The court supplied evidence to show that Shell had authority over the disposal of harmful chemicals noting that, (1) Shell chose the common carrier to deliver the chemicals; (2) Shell altered the delivery process so that B&B had to use large storage tanks, “thus necessitating the transfer of large quantities of chemicals and causing leakage from corrosion of the large steel tanks;” (3) Shell provided rebates to B&B for improvements in “bulk handling and safety facilities and required an inspection by a qualified engineer;” (4) Shell often reduced purchase price of chemicals in an amount the district court found “was linked to loss from leakage[;]” and (5) Shell gave B&B a manual and checklist of the manual’s requirements to make sure that “D-D tanks were being operated in accordance with Shell’s safety instructions.” \textit{Id.}

\textsuperscript{149} See \textit{id.} at 951 (finding evidence demonstrated Shell’s arranger liability under CERCLA). For a critical look at the Ninth Circuit’s arranger analysis, see \textit{infra} notes 171-99 and accompanying text.

\textsuperscript{150} See Burlington, 520 F.3d at 952 (Bea, J., dissenting) (criticizing harshness of majority’s ruling). Judge Bea’s dissent stated that the majority opinion applies “impossible-to-satisfy burdens on CERCLA defendants”, which Congress did not intend. \textit{Id.}

\textsuperscript{151} See \textit{id.} at 956 (noting majority’s standard to find divisibility); see also \textit{id.} at 936 n.18 (majority opinion) (finding volumetric, chronological, other types of evidence and geography appropriate to establish divisibility).

\textsuperscript{152} See \textit{id.} at 956-57 (Bea, J., dissenting) (discussing problems majority’s findings). The dissent noted that the majority found no error in the district court’s fact finding and offered no authoritative citations to support its claim that the district court’s use of periods of ownership, percentages of land and types of hazardous materials to support finding a reasonable basis for apportionment was “legally insufficient.” \textit{Id.} at 956. For background on evidence used to establish divisibility, see \textit{supra} notes 61-79 and accompanying text.

\textsuperscript{153} See Burlington, 520 F.3d at 958 (Bea, J., dissenting) (stating majority opinion replaced reasonableness for certainty standard). Judge Bea noted that the factors the district court used to establish a basis for apportionment found support in the Restatement and in other circuit courts. \textit{Id.}
CLA defendants and imposes "joint and several liability on CERCLA defendants where Congress did not so intend." 154

Moreover, the dissent asserted that Shell was not an arranger because it did not intentionally "arrange for disposal." 155 At most, Shell had influence over the disposal process, but exercised neither ownership nor control. 156 Furthermore, the dissent stated that the majority's imposition of arranger liability on a "mere seller" of chemicals, which transferred control of the chemicals to another company "upon delivery and before spillage occurred, goes far beyond the statutory language and creates inter and intra-circuit splits." 157

V. CRITICAL ANALYSIS

The Ninth Circuit criticized the district court for using the "simplest of considerations" in finding that the harm at the Arvin site was divisible. 158 Nevertheless, the district court's methods in establishing divisibility of harm find support in the Restatement and prior case law. 159 Additionally, the Ninth Circuit's broad interpretation of arranger liability conflicts with the decisions of other

154. Id. at 952 (stating majority ruling placed impossible-to-satisfy burdens on defendants).

155. See id. at 961 (discussing role of intent in arranger liability). Even if the word "disposal" may have some passive connotations, CERCLA demands a party arrange for disposal of hazardous substances and not only arrange for the sale of hazardous substances. Id. This implies "an intentional action toward achieving the purpose: disposal." Id.

156. See id. at 961-62 (stating control is crucial in arranger analysis). Judge Bea stated, "that leakage may occur during the transfer of D-D from the common carrier to B & B's storage tanks cannot mean that Shell, as a seller, arranged for such leakage." Id. Although Shell did offer B&B rebates for improvements in safety and handling of the chemicals and provided B&B with a safety manual and a checklist on how to handle the chemicals, "Shell did not own or operate the ... facility, nor did any Shell employees play a role in the D-D transfer. ... Shell relinquished control over the D-D once the common carrier arrived at the B & B site and before the transfer of D-D." Id. at 962.

157. Id. at 954 (discussing potential impact of Ninth Circuit ruling). For a further discussion on the potential impact of the Ninth Circuit's ruling, see infra notes 200-13 and accompanying text.

158. See Burlington, 520 F.3d at 943 (majority opinion) (ruling evidence inadequate to find divisibility).

159. Compare id. at 958 (Bea, J., dissenting) (stating land percentages reasonable basis for apportionment), with id. at 943 (majority opinion) (stating land percentages are reasonable basis for apportionment). The majority in Burlington found that percentage of land could not be a reasonable basis for apportionment because "it does not provide a minimally reliable basis for tracing the proportion of leakage, contamination, or cleanup costs associated with the entire parcel." Id.; see also United States v. Hercules, Inc., 247 F.3d 706, 718 (8th Cir. 2001) (holding geographic considerations appropriate in divisibility analysis).
circuits, and misinterprets the plain meaning of words found in CERCLA’s arranger provision. 160

A. Apportionment/Divisibility

Although the harm in environmental pollution cases may be impossible to sever “into distinct parts,” the Restatement provides an avenue for apportionment. 161 The Restatement gives an example where cattle owned by two or more farmers trespass on a plaintiff’s land and trample the plaintiff’s crops. 162 Although “the aggregate harm is a lost crop[,]” it may “be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number.” 163 Despite the difficulty of precisely determining the harm caused by each cow, joint and several liability is nonetheless improper when a reasonable basis for divisibility exists (e.g., number of cattle owned by each defendant). 164

The Ninth Circuit admits that percentage of land owned by each party, time of ownership and volumetric considerations are reasonable, albeit imprecise, bases for the apportionment of harm. 165 Thus, because CERCLA only requires evidence sufficient

160. For a critical analysis of the Ninth Circuit’s interpretation of arranger liability, see supra notes 158-59, see infra notes 161-99 and accompanying text.

161. See Restatement (Second) of Torts, § 433A(1) cmt. d (1965) (noting example of reasonable division); see also Hercules, 247 F.3d at 718 (discussing divisibility of harm). The court in Hercules noted that while environmental pollution cases involve commingling of contaminants, that does not automatically mean apportionment of harm is impossible or inappropriate. Id. For background on the Restatement as it applies to CERCLA, see supra notes 61-64 and accompanying text.

162. See Restatement (Second) of Torts, § 433A(1) cmt. d (1965) (noting apportionment possible despite aggregate harm).

163. Id. (discussing apportionment of harm); see also In re Bell Petroleum Servs., 3 F.3d 889, 895-96 (5th Cir. 1993) (noting examples of divisible harms).

164. See Bell, 3 F.3d at 903 (5th Cir. 1993) (discussing Restatement standard for divisibility); see also Burlington, 520 F.3d at 958 (Bea, J., dissenting) (discussing cattle example in Restatement). It is important to note that CERCLA does not have a causation requirement to find liability. See Oswald, supra note 7, at 319 (discussing causation in CERCLA). Nevertheless, principles of causation are used in deciding apportionment. See Aaron Gershonowitz, Joint and Several Liability in Superfund Actions: When is Environmental Harm Divisible? PRPs Who Want to Be Cows, 14 Fordham Envtl. L. Rev. 207, 226-37 (2003). The Ninth Circuit itself stated that the defendant could avoid joint and several liability by showing that it caused “only a divisible portion of the harm.” Burlington, 520 F.3d at 934 (majority opinion) (quoting Carson Harbor Vill. Ltd. v. Unocal Corp., 270 F.3d 863, 871 (9th Cir. 2001)). For background on the role of causation in CERCLA, see supra notes 54-56 and accompanying text.

165. See Burlington, 520 F.3d at 936 n.18 (holding volumetric, chronological and geographic considerations appropriate to prove divisibility); see also Hercules,
to show that the environmental harm is reasonably divisible, the
district court, whose factual findings are undisputed, was correct in
apportioning harm among the defendants instead of imposing joint
and several liability upon them.\textsuperscript{166} Additionally, the Ninth Circuit’s
emphasis on precise records, which it admits may be impractical for
companies to keep, requires proof beyond a preponderance of the
evidence.\textsuperscript{167} Under a near certainty standard, implicitly proposed
by the Ninth Circuit, the imposition of joint and several liability
becomes nearly automatic for CERCLA defendants.\textsuperscript{168} Yet, this was
not Congress’s intent.\textsuperscript{169} If Congress wanted a stricter standard, it
would have articulated one instead of merely expecting courts to
glean a reasonableness standard from the Restatement.\textsuperscript{170}

B. Shell’s Arranger Liability

Fundamental to the Ninth Circuit’s ruling was its broad inter-
pretation of arranger liability.\textsuperscript{171} In finding that a party may be an
arranger under CERCLA despite having no intent to dispose of haz-

\textsuperscript{166} See Burlington, 520 F.3d at 956 (Bea, J., dissenting) (discussing majority
rejection of district court divisibility analysis). Judge Bea in her dissent noted that
the majority agreed that evidence such as percentage of land owned by each party
is a reasonable basis for apportionment but ruled that here, such pieces of evi-
dence were “the simples of considerations” and legally insufficient. Id. The Ninth
Circuit specifically noted that it did not find fault with the district court’s factfind-
ing in regards to the various evidence used to support divisibility. Id. at 943 (ma-
jority opinion).

\textsuperscript{167} See Bell, 3 F.3d at 904 (rejecting greater proof to support divisibility). In
Bell, despite defendant Sequa’s records as to its hazardous waste activities being
incomplete, the majority still found a reasonable basis for apportionment, specifi-
cally rejecting the dissent’s reasoning because it would require near certainty. Id.
at 904 n.19. For a discussion of Ninth Circuit’s record-keeping requirements, see
\textit{supra} notes 114-16 and accompanying text.

\textsuperscript{168} See Bell, 3 F.3d at 904 n.19 (holding evidence allowing rough approxima-
tion of harm by each party sufficient). For a discussion of facts and reasoning in
Bell, see \textit{supra} notes 68-73 and accompanying text.

\textsuperscript{169} See Bell, 3 F.3d at 904 n.19 (discussing Congress’ intent for joint and sev-
eral liability in CERCLA).

\textsuperscript{170} See id. (discussing Congressional intent); see also United States v. Atchison,
Topeka & Santa Fe Ry., Co., 2003 U.S. Dist. LEXIS 23130, at *292 (E.D. Cal. July 14,
2003) (noting Restatement is starting point in CERCLA analysis). For a further
discussion of how Congress intended courts to analyze CERCLA cases, see \textit{supra}
notes 70-73 and accompanying text.

\textsuperscript{171} See Dupont, \textit{supra} note 14, at 16 (discussing broad arranger liability).
For further background on arranger liability, see \textit{supra} notes 80-103 and accompa-
nying text.
ardous substances, the Ninth Circuit improperly applied the holding in CDMG and other CERCLA precedents.\textsuperscript{172}

1. Defining “Arranger”

The United States Supreme Court and the federal circuit courts of appeals often cite to dictionaries to ascertain the meanings of “undefined statutory terms.”\textsuperscript{173} Webster’s Unabridged Dictionary defines “arrange” as to “plan,” “make preparations for” and “to put in correct. . . or desired order.”\textsuperscript{174} These definitions for “arrange” suggest an element of intent.\textsuperscript{175} Furthermore, and in contrast to the Ninth Circuit’s decision in Burlington, the Sixth and Seventh Circuits also view “arrange” as requiring intent.\textsuperscript{176} CERCLA imposes arranger liability when a party has “arranged for disposal. . . of a hazardous substance.”\textsuperscript{177} The Ninth Circuit misinterpreted CDMG’s view of CERCLA’s arranger provision as supporting the notion that unintentional processes such as leaking and spilling (which are included in CERCLA’s definition of “disposal”), “indicate that ‘disposal’ need not be purposeful.”\textsuperscript{178} CDMG however, held that “leaking” and “spilling” required “affirmative human conduct.”\textsuperscript{179} The Ninth Circuit’s application of broad arranger lia-

\textsuperscript{172} See United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 949 (9th Cir. 2008) (internal citations omitted) (holding “leaking” does not require intent or active human conduct). But see Gen. Elec. Co. v. Aamco Transmissions, Inc., 962 F.2d 281, 286 (2d Cir. 1992) (holding arranger must have some actual involvement in disposing waste).

\textsuperscript{173} See Dupont, supra note 14, at 19-20 (discussing dictionary definitions of words in CERCLA).

\textsuperscript{174} Id. at 19 (referencing dictionary to define “arrange”); see also Burlington, 520 F.3d at 961 (Bea, J., dissenting) (referencing dictionary to define “arrange”). Judge Bea relied on an ordinary dictionary to define “arrange” as “to make preparations for.” Id. at 961. Judge Bea noted, “it is an oxymoron for an entity unintentionally to make preparations for disposal.” Id.

\textsuperscript{175} See Burlington, 520 F.3d at 961. (Bea, J., dissenting) (noting dictionary definitions denote intent).

\textsuperscript{176} See Gershonowitz, supra note 9, at 157 (discussing circuit courts’ rulings on arranger liability); see also WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 121 (1986 ed.) (defining “arrange”).

\textsuperscript{177} 42 U.S.C. § 9607(a) (3) (2006) (emphasis added) (listing parties potentially liable under CERCLA).

\textsuperscript{178} Dupont, supra note 14, at 16-19 (discussing Ninth Circuit misconstruction of “disposal”); see also Burlington, 520 F.3d at 949 (ruling intent not needed for “disposal”); see also United States v. CDMG Realty Co., 96 F.3d 706, 715 (3d Cir. 1996) (avoiding whether disposal always requires affirmative act). In CDMG, the court stated that while it need not rule on the issue of whether “disposal” always requires an affirmative human act, words used in CERCLA strongly suggest that an affirmative act is needed to find that a party disposed of a hazardous substance. Id. at 713.

\textsuperscript{179} See CDMG, 96 F.3d at 714 (finding strong implication “leaking” and “spilling” requires intentional act). For background on CDMG, see supra notes 82-95 and accompanying text.
bility, whereby a party may be liable as a CERCLA arranger for inadvertent spills, is, therefore, untenable if “leaking” is an affirmative rather than a passive act. Moreover, it seems illogical to define “disposal” under CERCLA as including accidental spills, because no one would “arrange” for such an occurrence.

2. A Question of Ownership and Control

The Ninth Circuit suggested that a party is liable as an arranger if it sells hazardous substances to another party “Free on Board” Yet, the Ninth Circuit failed to consider that a product delivered F.O.B. results in stewardship over the product passing to the accepting party. Under CERCLA, a party must own or possess the substances “intended to be disposed of by a third party.”

The Ninth Circuit would likely, and correctly, retort that parties do not avoid arranger liability by simply “labeling the arrangement a sale.” Nevertheless, the record evidence indicates that Shell was free from responsibility for the hazardous chemicals and did not exercise control over the chemicals’ disposal; thus, imposing arranger liability was inappropriate.

180. See Meline MacCurdy, “Useful Product” Exception Rejected and CERCLA Claim Against Chemical Manufacturer Is Allowed to Proceed, Jan. 23, 2008, http://www.martenlaw.com/news/?20080123-cercla-exception-rejected (explaining concept of broad arranger liability). The author, citing Burlington, states that “drawing on the inclusion of the passive term ‘leaking’ in CERCLA’s definition of disposal, courts have held parties liable as arrangers under this theory even when they had no intent to dispose of the product.”

181. See Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993) (holding accidental spills not included in definition of disposal).

182. See id. (criticizing Ninth Circuit decision imposing arranger liability).

183. Id. at 18 (noting requirements for arranger liability); see also Gershonowitz, supra note 9, at 148 (listing arranger as potentially liable party); see also United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 955 (9th Cir. 2008) (Bea, J. dissenting) (noting district court finding of stewardship of D-D passing from Shell to B&B).

184. See Regulated Substances and Waste Management, supra note 54, § 31.01 (discussing arranger liability in context of sales); see also Burlington, 520 F.3d at 951 (finding no requirement of ownership at time of disposal). The Ninth Circuit stated that requiring ownership at the time of disposal would make it too easy for a party to avoid arranger liability through a sale of its responsibility over hazardous substances.

185. See Burlington, 520 F.3d at 962 (Bea, J., dissenting) (noting stewardship passed to B&B at delivery); see also Dupont, supra note 14, at 18-19 (criticizing imposition of arranger liability). Mr. Dupont stated that the Ninth Circuit decision threatens to turn any chemical manufacturer into a “CERCLA-liable guarantor for the operations of every purchaser.” Id. at 18. But see Burlington, 520 F.3d at 948 (majority opinion) (defining arranger liability expansively). The Ninth Circuit ruled that a party is an arranger where “disposal of hazardous wastes is a foreseeable by-product of, but not the purpose of, the transaction giving rise to PRP status.” Id.
Additionally, the Ninth Circuit treated control over hazardous substance disposal as a pertinent, but not crucial, factor in determining arranger liability, contradicting the decision in Shell Oil.\footnote{186. See Burlington, 520 F.3d at 951 (holding ownership and control helpful, not dispositive to find arranger liability). But see United States v. Shell Oil Co., 294 F.3d 1045, 1055 (9th Cir. 2002) (finding control crucial element to determine whether party is arranger).}

It came to this conclusion by stating that the court in Shell Oil viewed control as "crucial" because, "the government never owned the chemicals before disposal occurred."\footnote{187. See Burlington, 520 F.3d at 951 (distinguishing facts of case from Shell Oil). For discussion of the facts in Shell Oil, see supra notes 96-100 and accompanying text.} Control over the hazardous substances was therefore necessary to determine whether the government could have "arranged" for disposal.\footnote{188. See Shell Oil, 294 F.3d at 1055 (ruling control crucial element in determining arranger liability).} Yet, Shell Oil and other court decisions involving CERCLA are not as limited as the Ninth Circuit suggests.\footnote{189. Shell Oil is explicit in holding that control is a "crucial element in determining whether a party is an arranger."\footnote{190. Previous court rulings also establish that a party is not liable as an arranger when it did not participate in the disposal of hazardous substances and did not decide how, if, or when hazardous materials should be disposed.\footnote{191. Moreover, the Ninth Circuit stretched the definition of "control," even as a mere pertinent factor, in finding that Shell shared responsibility for disposal because it seemed aware that there were chemical spills at every delivery to B&B and because Shell provided suggestions to} 

\footnote{192. See Howard W. Ashcraft, CERCLA "Arranger" Liability: Emerging Risk for Environmental Consultants, 7 ARCHITECTS/ENGINEERS PROF. NETWORK (1994), http://www.aepronet.org/pn/vol7-no2.html#author, (noting court opinions regarding importance of control in establishing arranger liability); see also Gen. Elec. Co., 962 F.2d at 286-87 (ruling defendants not liable as arrangers because no evidence existed that they exercised authority over disposal decisions); see also Hassayampa Steering Comm. v. Arizona, 768 F. Supp. 697, 701-02 (D. Ariz. 1991) (holding alleged arranger must exercise control over waste disposal to support imposing liability).}
B&B for handling the chemicals.\textsuperscript{192} As the dissent pointed out, Shell's actions are insufficient to show actual control over the disposal process.\textsuperscript{193} Arranger liability ends with the party that "both owned the hazardous waste and made the crucial decision of how it would be disposed."\textsuperscript{194}

The undisputed facts establish that stewardship of the chemicals passed from Shell to B&B once the chemicals arrived F.O.B. at the B&B facility.\textsuperscript{195} Additionally, only B&B employees actually handled the chemicals upon delivery and at every point thereafter.\textsuperscript{196} Furthermore, by agreement between the parties, once the chemicals arrived at the facility, it was B&B's responsibility to handle them safely and according to government regulations.\textsuperscript{197} Shell ceased to own the chemicals once the carrier trucks arrived F.O.B. at the Arvin site, and Shell was not the party responsible for their disposal; therefore, it is not an arranger.\textsuperscript{198}

\section*{VI. IMPACT}

Shell might have known that B&B was inept at handling the chemicals and that B&B was not complying with either Shell's or the government's safety recommendations and regulations.\textsuperscript{199} The Ninth Circuit decision, however, threatens to make every chemical manufacturer a "CERCLA-liable guarantor for the operations of every purchaser with a less than stellar environmental record."\textsuperscript{200} In the words of the dissent, the majority's broad application of arranger liability "is tantamount to saying that a bartender 'arranges\textsuperscript{192} See Burlington, 520 F.3d at 951 (holding Shell's knowledge of and response to continuing chemical spills sufficient exercise of control over disposal). For a further discussion of Shell's knowledge of and response to the chemical spills, see supra notes 48-49 and accompanying text.

\textsuperscript{193} See Burlington, 520 F.3d at 963 (Bea, J., dissenting) (criticizing majority's reasoning as overly broad). For a further discussion of the dissent's analysis, see supra notes 150-57 and accompanying text.

\textsuperscript{194} Ashcraft, supra note 192 (discussing limits of arranger liability).

\textsuperscript{195} See United States v. Atchison, Topeka & Santa Fe Ry., Co., 2003 U.S. Dist. LEXIS 23130, at *65 (E.D. Cal., July 14, 2003) (finding intent of contract transferred stewardship from Shell to B&B); see also Burlington, 520 F.3d at 962 (Bea, J., dissenting) (noting district court's factual findings not disputed).

\textsuperscript{196} See Atchison, 2003 U.S. Dist. LEXIS 23130, at **68-72 (discussing process of chemical transfer between Shell and B&B).

\textsuperscript{197} See id. at **198-94 (discussing agreement between Shell and B&B on handling transfer of chemicals).

\textsuperscript{198} For further background and discussion on arranger liability, see supra notes 80-103, 140-49, 155-57, 171-98 and accompanying text.

\textsuperscript{199} See Dupont, supra note 14, at 18 (noting Shell was aware or should have been aware of B&B's careless handling of chemicals).

\textsuperscript{200} See id. (discussing implications of broad form of arranger liability).
for the disposal' of bourbon onto the bar when he sells a glass of bourbon F.O.B. patron, who, while carelessly lifting the glass, spills the bourbon.”

This decision could also create inter-circuit splits in an area where uniformity of interpretation is tantamount. For example, there may be new disagreements as to what is a “reasonable” basis for divisibility. Should the Ninth Circuit’s divisibility analysis gain both widespread acceptance and U.S. Supreme Court approval, imposition of joint and several liability will become nearly automatic on CERCLA defendants. As a result, future CERCLA defendants, would be more likely to seek early settlement with the EPA.

Nevertheless, an eight-judge dissent from the petition to rehear the case en banc and the conflict created with other circuits may call into question the viability of the Ninth Circuit’s ruling. Moreover, the Ninth Circuit’s refusal to consult common dictionary definitions of terms like “arrange” and “disposal” stands in contrast to recent U.S. Supreme Court and circuit court opinions. Some

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201. United States v. Burlington N. & Santa Fe. Ry. Co., 520 F.3d 918, 961 n.20 (9th Cir. 2008) (Bea, J., dissenting) (commenting on majority application of arranger liability). The dissent found the majority application of arranger liability far too broad, noting that prior case law suggests that without finding more evidence that a transaction included “an ‘arrangement’ for the ultimate disposal of a hazardous substance, CERCLA liability [can] not be imposed.” Id. at 961 (citation omitted).

202. See id. at 963 (noting importance of avoiding circuit-splits in interpreting CERCLA); see also Oswald, supra note 7, at 325-26 (discussing Congressional intent for courts to develop uniform interpretations for CERCLA). For a background on Congress’s purpose in enacting CERCLA, see supra notes 1-3, 70-72 and accompanying text.

203. See In re Bell Petroleum Servs., 3 F.3d 889, 904 n.19 (8th Cir. 1993) (holding reasonable basis for divisibility does not require more than preponderance of evidence).

204. See id. (rejecting automatic imposition of joint and several liability as contrary to Congressional intent). The Ninth Circuit’s decision in Burlington seems to concur with the dissent in Bell, requiring a higher evidentiary burden for CERCLA defendants to avoid joint and several liability. Id. (rejecting dissent’s reasoning). For a further discussion of the Ninth Circuit’s reasons for imposing joint and several liability, see supra notes 104-49 and accompanying text.

205. See Feldman & Crane, supra note 6 (noting heavy burden in proving divisibility). For a critical analysis of the Ninth Circuit’s divisibility analysis, see supra notes 158-70 and accompanying text.

206. See Dupont, supra note 14, at 19-20 (discussing potential impact of Burlington). For background on the Ninth Circuit’s reasoning in Burlington, see supra notes 104-49 and accompanying text.

207. See id. (noting decisions of other courts).
scholars view the decision as "legally still-born," which raises doubt about whether Burlington will survive Supreme Court scrutiny.\textsuperscript{208}

For CERCLA defendants within the Ninth Circuit's jurisdiction however, avoiding liability will become increasingly difficult.\textsuperscript{209} Recently, the Federal District Court for the Eastern District of California followed the reasoning in Burlington and imposed CERCLA liability on a chemical manufacturer.\textsuperscript{210} The court ruled that, "neither ownership nor control of the hazardous substance at the time of disposal is necessary. . . . an arranger need only own the chemical when entering into the sales transaction."\textsuperscript{211} If the Supreme Court upholds Burlington, chemical manufacturers throughout the United States will likely face the unenviable task of defending themselves under a greatly expanded concept of arranger liability.\textsuperscript{212}

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\textsuperscript{208} See id. at 20 (discussing repercussions of Ninth Circuit decision). For background information on how other courts have analyzed arranger liability in the CERCLA context, see supra notes 80-103 and accompanying text.

\textsuperscript{209} See MacCurdy, supra note 180 (discussing recent court ruling following Burlington). The author noted that the Ninth Circuit's expansive interpretation of arranger liability threatens to ensnare a broader category of parties and makes it very difficult for CERCLA defendants to avoid being held an arranger. \textit{Id.}

\textsuperscript{210} See id. (noting court's holding in case).

\textsuperscript{211} United States v. Lyon, 2007 U.S. Dist. LEXIS 94329, at *19 (E.D. Cal. Dec. 14, 2007). In this case, Lyon, which owned land upon which a dry cleaning business was operated, was sued by the EPA pursuant to CERCLA for environmental contamination caused by chemical disposal from the dry cleaning business. See \textit{id.} at *4. Lyon subsequently filed a third-party complaint against Vulcan, a manufacturer of a chemical, PCE, commonly used in dry cleaning. See \textit{id.} at *4-5. Lyon claimed that Vulcan was liable as a CERCLA arranger because Vulcan manufactured a chemical which was then sold to distributors and then resold to the dry cleaning businesses, which thereafter disposed of it. See \textit{id.} at *4-6. Vulcan argued the claims against it should be dismissed because Lyon failed to show that Vulcan owned, possessed, or had either the authority or the duty to dispose of the chemical. See \textit{id.} at *17. The court rejected Vulcan's argument, holding that ownership or control at the time of disposal is not necessary to find a manufacturer liable as an arranger under CERCLA. See \textit{id.} at *19. (citing Burlington, 520 F.3d at 809-10. As long as a manufacturer owned the chemical when entering into a sales transaction, it could be found to be an arranger. See \textit{id.} That Lyon's complaint alleged Vulcan sold PCE to distributors "reveals sufficient ownership under Burlington Northern" and therefore Lyon's complaint can go forward. See \textit{id.}

\textsuperscript{212} See MacCurdy, supra note 180 (discussing impact of Burlington and Lyon). For a critical analysis of Burlington, see supra notes 158-99 and accompanying text.

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