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Jones-Hamilton Co. v. Beazer Materials & (and) Services, Inc.: The Bottomless Pit of CERCLA Generator Liability

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JONES-HAMILTON CO. v. BEAZER MATERIALS & SERVICES, INC.: THE BOTTOMLESS PIT OF CERCLA GENERATOR LIABILITY

I. INTRODUCTION

In Jones-Hamilton Co. v. Beazer Materials & Services, Inc., the Ninth Circuit imposed "generator" liability on a chemical provider in an action for contribution for cleanup costs by a chemical formulator. Toxic waste was released into containment ponds during the formulation process, in which the formulator utilized the provider's raw materials. The materials were furnished under a contract in which the provider retained ownership of the original materials and which specified a tolerance for a small percent of spillage by the formulator. The Beazer court held that the provider qualified as having "arranged for disposal" under section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

CERCLA provides a remedial measure to permit the recovery of costs for the removal of hazardous wastes. The Act was enacted in order to counteract the rapid increase of hazardous waste sites and the damaging effects to the environment caused

1. 959 F.2d 126 (9th Cir. 1992).
2. Id. at 131. For a further discussion of the facts and holding of Beazer, see infra notes 125-50 and accompanying text.
3. Beazer, 959 F.2d at 128.
4. Id.
5. Id. at 130-31.
7. CERCLA § 101(24), 42 U.S.C. § 9601(24). CERCLA defines the terms "remedy" or "remedial action" to mean:

those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

Id.
8. For the purposes of this Note, the terms "hazardous waste," "hazardous substance," "toxic waste," and "toxic material" are used synonymously.

(417)
by the release of hazardous substances. CERCLA authorizes the creation of a resource of funds, known as "Superfund," to enable the Environmental Protection Agency (EPA) to clean up hazardous waste sites as the toxic conditions are discovered.

Despite the availability of Superfund resources to enable EPA to quickly commence cleanup of a contaminated site, CERCLA places the ultimate responsibility for cleanup costs on "those responsible for problems caused by the disposal of chemical poisons." Thus, CERCLA authorizes a federal cause of action to recover costs expended under Superfund. CERCLA empowers EPA to bring suit against four classes of persons for response costs and compensation for damages caused by the release of hazardous wastes. CERCLA allows cleanup costs to be imposed "rapid responses to the nationwide threats posed by 30-50,000 improperly managed hazardous waste sites in this country as well as to induce voluntary responses to those sites." Id. at 805.

10. United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989) (CERCLA was "enacted... in an effort to eliminate unsafe hazardous waste sites.").


14. Aceto, 872 F.2d at 1377 ("CERCLA authorizes the EPA to clean up hazardous waste sites itself and creates a 'Superfund' with which to fund the EPA's activities."). See 26 U.S.C. § 9507; CERCLA §§ 104-105, 42 U.S.C. §§ 9604-9605. For an explanation of Superfund, see supra note 11.

15. CERCLA § 101(21), 42 U.S.C. § 9601(21). "Person" is defined as an "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." Id.

16. CERCLA § 101(25), 42 U.S.C. § 9601(25). CERCLA defines the terms "respond" or "response" to mean "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." Id.

17. CERCLA § 107(a), 42 U.S.C. § 9607(a). This section imposes liability and states: Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -
1) the owner and operator of a vessel or a facility,
2) 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,
3) any person who by contract, agreement, or otherwise arranged for
on owners or operators, transporters, and "generators" of hazardous waste. However, a "generator" of toxic waste is not limited to those who actually discharge the contaminants into the environment. For purposes of imposing CERCLA liability, the criteria for imposing "generator" liability are considered by many to be more complicated than those imposing liability on other potentially responsible persons (PRPs). Section 107(a)(3) itself is laden with terms which are unclear or simply undefined, and the legislative intent is nearly impossible to determine. CERCLA's nebulous legislative history has frequently left courts to "fill in the gaps," and has resulted in generator liability being imposed in an increasingly wide range of circumstances.

This Note will examine the legislative history of section 107(a)(3), and trace the judicial development of generator liability. This Note will then analyze the Ninth Circuit's decision in

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\text{disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and}
\]

4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.

18. For the purposes of this Note, the terms "generator" and "arranger" are used interchangeably.

19. For the statutory section imposing liability on potentially responsible persons (PRPs), see CERCLA § 107(a), 42 U.S.C. § 9607(a). See supra notes 15, 17, and accompanying text.


21. Id. at 34.

22. For a discussion of legislative intent, see infra notes 29-30 and accompanying text.

23. Howard & Benfeild, supra note 20, at 34-36.
**Beazer,**

with an emphasis on its implications for determining the current standards and the potential upper limits of generator liability.

**II. HISTORICAL BACKGROUND OF GENERATOR LIABILITY**

**A. Legislative History of Section 107(a)(3)**

CERCLA was enacted in 1980 in response to the alarming increase in the number of hazardous waste sites and the damage derived from the release of contaminants into the environment. The purpose of the Act was twofold: first and foremost, to ensure swift cleanup of toxic waste sites; and second, to impose the costs of cleanup on the parties responsible for the release of the hazardous substances. The statute was enacted by

24. 959 F.2d 126 (9th Cir. 1992). See infra notes 151-78 and accompanying text for an analysis of the Beazer decision.

25. CERCLA § 101(22), 42 U.S.C. § 9601(22). “Release” is defined by CERCLA as any “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment” any pollutant or contaminant or hazardous substance. Id.

26. CERCLA § 101(8), 42 U.S.C. § 9601(8). Environment is defined by CERCLA as:

(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act (16 U.S.C. § 1801-1882 (1992)), and

(B) any other surface water, ground water, drinking water supply, land surface or other subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

Id. For a discussion of the impetus behind CERCLA’s enactment, see supra notes 9-10 and accompanying text.

27. Cleanup of the contaminated sites is achieved by the removal of the toxic materials. See CERCLA § 101(23), 42 U.S.C. § 9601(23). CERCLA defines the terms “remove” or “removal” as:

the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release . . . .

Id.

28. CERCLA § 101(14), 42 U.S.C. § 9601(14). “Hazardous substance” is defined as any substance designated under § 1321(b)(2)(A) of Title 33; any element, compound, mixture, solution, or substance designated pursuant to § 9602 of this title; any hazardous waste having the characteristics identified under § 3001 of the Solid Waste Disposal Act (42 U.S.C. § 6921), except any waste for which Congress has suspended regulation; any toxic pollutant listed under § 1317(a) of Title 33; any hazardous air pollutant listed under § 112 of the Clean Air Act (42 U.S.C. § 7412); and any imminently hazardous chemical sub-
Congress "as compromise legislation after very limited debate under a suspension of the rules." As a result of the rapid and somewhat chaotic process of enacting CERCLA, the Act "has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history." The ensuing years have seen numerous interpretations of the statutory language due to the indistinct nature of many of CERCLA's provisions.

Section 107(a) of CERCLA is the vehicle for imposing liability on persons responsible for the release of toxic wastes into the environment. Response costs may be sought from persons responsible for generating toxic waste into the environment. The criteria as to who qualifies as a "generator" of toxic waste, however, is both complex and indeterminate. "Generator" or

stance or mixture with respect to which the Administrator has taken action pursuant to § 2606 of Title 15. The term excludes petroleum, including crude oil or any fraction thereof which is not specifically listed in one of the foregoing provisions, natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel. See CERCLA § 101(14), 42 U.S.C. § 9601(14).


The bill which actually became CERCLA had "virtually no legislative history at all," despite Congress' work on toxic waste cleanup bill for over three years. Grad, supra note 6, at 1. The bill was "hurriedly put together by a bipartisan leadership group of senators," and passed by the Senate in lieu of all other pending similar measures. Id. It was placed before the House and considered "in the closing days of a lame duck session of an outgoing Congress." Id. As a result, it was considered and passed after very limited debate and under a suspension of the rules which did not allow for amendments. Id.


32. Howard & Benfield, supra note 20, at 34-36.

33. See supra note 25 for the definition of "release" under CERCLA; see also CERCLA § 101(22), 42 U.S.C. § 9601(22).

34. See CERCLA § 107(a), 42 U.S.C. § 9607(a).

35. CERCLA § 107(a), 42 U.S.C. § 9607(a).

“arranger” liability is imposed by section 107(a)(3) on persons who arrange for the disposal of hazardous substances under a contract or agreement, regardless of ownership or possession of the hazardous substances.\(^{37}\)

The most problematic component of this provision, and that which is most subject to interpretation by courts, is the phrase “by contract or agreement, or otherwise arranged for disposal.”\(^{38}\) “Disposal”\(^{39}\) is given the same meaning as that provided for in the Solid Waste Disposal Act,\(^{40}\) and refers to any means by which any solid or hazardous waste is permitted to enter the environment or is released into the air or waterways.\(^{41}\) The term “arranged,” which is at the crux of the issue of generator liability, is not defined anywhere in the statute.\(^{42}\) Similarly, the meaning of the phrase “otherwise arranged” is unclear. As a result, courts have been obliged to construe the meaning of the provision with meager aid from the legislative history, by supplementing the history with principles of common law and other fields.

B. Statutory Construction of CERCLA

The basic rule of statutory construction is to look first to the language of the statute, and then to the legislative history if the CERCLA itself “presents a relatively complex solution to a complex problem. It leaves much to be desired from a syntactical standpoint, perhaps a reflection of the hasty compromises which were reached as the bill was pushed through Congress just before the close of its 96th Session.”\(^{43}\)

37. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). CERCLA specifically imposes generator liability on “any person who by contract, agreement, or otherwise arranged for disposal or treatment,... of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances.”\(^{44}\)


39. See CERCLA § 101(29), 42 U.S.C. § 9601(29) (“’The terms ‘disposal,’ ‘hazardous waste,’ and ‘treatment’ shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. § 6903].’”). See infra note 41 and accompanying text for a description of the meaning of “disposal.”


41. CERCLA § 103(3), 42 U.S.C. § 6903(3). The term “disposal” means: the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42. See Gaba, supra note 38; Howard & Benfeild, supra note 20; see also CERCLA § 101, 42 U.S.C. § 9601; CERCLA § 107, 42 U.S.C. § 9607.
language is unclear. As the language of section 107(a)(3) is not well defined, and the legislative history is unclear at best, courts are left to interpret the provisions which lack clarity in order to facilitate the goals of CERCLA.

It has generally been considered that the remedial nature of CERCLA requires a liberal statutory construction in order to avoid frustrating the essential purpose of the Act. The essential purpose of CERCLA is to provide the federal government with the necessary tools for prompt and effective response to the threat posed by hazardous waste in the environment, and to impose accountability for remedial actions on the persons responsible for the threat. Given this remedial intent, its provisions "should be afforded a broad and liberal construction so as to avoid frustration of prompt response efforts." In addition, liberal construction avoids placing limitations on those responsible for response costs "beyond the limits expressly provided."

It is evident that Congress intended the scope of liability under CERCLA to "be determined from traditional and evolving principles of common law." The statute contemplates that Federal common law be developed and implemented in order to interpret CERCLA where the statutory language is incomplete or indeterminative. The enactment of CERCLA itself was spurred

45. Gaba, supra note 38, at 1316.
46. Mottolo, 605 F. Supp. at 902.
47. Wade, 577 F. Supp. at 1331. Despite the lack of clarity in the legislative history of CERCLA, "[w]hat is clear, however, is that the Act is intended to facilitate the prompt clean-up of hazardous waste dump sites and when possible to place the ultimate financial burden upon those responsible for the danger created by such sites." Id.
49. Id.
50. Id.
51. Chem-Dyne, 572 F. Supp. at 808; see also Wade, 577 F. Supp. at 1326 (Congress' intent was to empower federal courts to establish federal law of liability under CERCLA); Colorado v. ASARCO, Inc., 608 F. Supp. 1484 (D. Colo. 1985) (federal interest in remedy of toxic waste sites and need for uniform law justifies development of common law on the scope of generator liability).
52. Chem-Dyne, 572 F. Supp. at 808. The legislative history of CERCLA itself is inconclusive in determining the common law issue, and refers both to "common law" and to "federal common law." Id. (citing 126 Cong. Rec. S14,964, H11,787, H11,799). However, in circumstances where there is a lack of an express statutory provision declaring whether state or federal common law
by the recognition that pervasive dumping of hazardous waste was inadequately dealt with at the state level. For that reason, as well as the federal financial interest in the Superfund resources, the scope of liability under CERCLA is not dependent on the laws of any state. Accordingly, the rights, responsibilities and liabilities under section 107 are governed by a federal rule of decision. The courts may then properly develop a body of Federal specialized law in order to aid in the interpretation of the unclear provisions of CERCLA.

In developing a body of federal common law, the starting point should be federal statutes dealing with a similar subject matter in order to determine the underlying federal policy. In


The Chem-Dyne court examined the question of whether CERCLA's scope of liability should be interpreted by a federally created uniform law or according to the incorporated state law of the forum state and maintained that CERCLA falls into that category of Federal programs which must be uniform in character throughout the country and which necessitate the formulation of federal rules of decision. Chem-Dyne, 572 F. Supp. at 809 (citing Kimbell Foods, 440 U.S. at 728; Standard Oil, 332 U.S. at 311). As Representative Florio explained, "To insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law in this area." Chem-Dyne, 572 F. Supp. at 809 (quoting 126 Cong. Rec. H11,787 (Dec. 3, 1980)).


56. Chem-Dyne, 572 F. Supp. at 809. "[T]he delineation of a uniform federal rule of decision is consistent with the legislative history and policies of CERCLA." Id.

making such a determination, however, neither the statutes or decisions of a particular state are conclusive when delineating federal law.\textsuperscript{58}

In \textit{United States v. Chem-Dyne Corp.},\textsuperscript{59} a federal district court confronted the issue of whether liability under section 107 could be held joint and several.\textsuperscript{60} While CERCLA itself does not expressly provide for joint and several liability, and Congress itself considered and rejected such language,\textsuperscript{61} the court determined that CERCLA clearly provided for the development of federal common law and held that under such a body of law, liability could be joint and several.\textsuperscript{62}

In \textit{United States v. Wade},\textsuperscript{63} the district court acknowledged the federal interest in remedying toxic waste dangers.\textsuperscript{64} The court further discussed the need for uniform law as justification for the development of federal common law regarding the scope of generator liability under CERCLA.\textsuperscript{65} The \textit{Wade} court declared that Congress intended for the courts to apply federal common

\textsuperscript{58} Id.
\textsuperscript{59} 572 F. Supp. 802 (S.D. Ohio 1983).
\textsuperscript{60} Id. at 804.
\textsuperscript{61} Both the original Senate and House bills expressly provided for joint, several, and strict liability. \textit{ASARCO}, 608 F. Supp. at 1486. The express provision in the Senate bill (S. 1480), however, was deleted in the compromise version which was finally presented and passed by the Senate on November 24, 1980. S. 1480, 96th Cong., 2d Sess \S 4a, 126 CONG. REC. 30,908 (1980). The original House bill (H.R. 7020) was entirely discarded, and the bill finally passed by the House on December 3, 1980 was the compromise Senate bill which had already been passed in the Senate. H.R. 7020, 96th Cong., 2d Sess. \S 3071, 126 CONG. REC. 26,779 (1980).
\textsuperscript{62} \textit{Chem-Dyne}, 572 F. Supp. at 808. \textit{Accord ASARCO}, 608 F. Supp. at 1484. The district court in \textit{ASARCO} stated that "[i]t is clear . . . that the deletion of all references to joint and several liability from the Act did not signify that Congress rejected those standards of liability." \textit{Id.} at 1486.

\textsuperscript{64} \textit{Id.} at 1336-37.
\textsuperscript{65} \textit{Id.}
law principles in determining the scope of generator liability. In rejecting the application of state law principles in questions of joint and several liability, the court emphasized that common law treatment of the issue varied from state to state, and that such unequal application would “undermine the policy of the statute by encouraging illegal dumping in states with lenient liability laws.”

Despite the prevailing view that a uniform body of federal common law concerning the scope of generator liability may be legitimately formulated, courts have continued to struggle with the scope of section 107(a)(3). Thus, the resulting decisions have contributed little toward the goal of predictability in determining under what circumstances parties may be liable as generators.

C. Evolution of Generator Liability Under CERCLA

1. Elements of Prima Facie Liability

Before response costs for the cleanup of a contaminated site may be awarded, a prima facie case under CERCLA must be established. The elements required to establish such prima facie liability are: 1) the site is a “facility”; 2) there is a “release” or

66. Wade, 577 F. Supp. at 1337. The Wade court contended that a reading of the entire legislative history of CERCLA reveals that the deletion of the express provision for joint and several liability was intended to “avoid mandatory application of that standard to a situation where it would produce inequitable results.” Id. The court referred to the statement by Senator Randolph, who introduced the amendment to delete the provision, specifically indicating that in deleting the reference to joint and several liability, they were “relying on common law principles to determine when parties should be severally liable.” Id. (quoting 126 CONG. REC. S14,964 (Nov. 24, 1980)).

The chief sponsor of the House bill, Representative Florio, stated that: [i]ssues of joint and several liability not resolved by this shall be governed by traditional and evolving principles of common law. The terms joint and several have been deleted with the intent that the liability of joint tortfeasors be determined under common or previous statutory law. . . . To insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area.

Id. at 1337 (quoting 126 CONG. REC. H11,787 (Dec. 3, 1980)).

67. Id. at 1338.

68. Id. See supra note 47 and accompanying text.


70. CERCLA § 101(9), 42 U.S.C. § 9601(9). CERCLA defines a “facility” as:

(A) any building, structure, installation, equipment, pipe or pipeline
"threatened release" of a "hazardous substance" from the site; 3) the release or threatened release has caused the party seeking recovery to incur response costs; and 4) the defendants must fall within one of the four categories of potentially responsible persons (PRPs).\textsuperscript{71} Under the fourth element, it remains difficult to establish the precise circumstances under which a person is a "potentially responsible person" within the meaning of section 107(a).\textsuperscript{72} Arguably the greatest difficulty a party seeking recovery for response costs may have in satisfying the fourth element is in establishing that a person "arranged for disposal" within the meaning of section 107(a)(3).\textsuperscript{73} Courts have continued to find themselves in a quandary due to the conflict created by the desire to avoid frustrating the purpose of the Act by limiting the situations in which the fourth element may be established, and the unclear boundaries of the statutory standard.\textsuperscript{74} Thus, courts continue to grapple with the permissible scope of generator liability.\textsuperscript{75}

2. Judicial Development of Generator Liability

It has been necessary for courts to interpret the murky provisions of section 107(a)(3) and to develop a body of specialized federal common law concerning the implementation of CERCLA's overall scheme.\textsuperscript{76} The development of such a body of law, however, has done little to achieve the desired uniformity.\textsuperscript{77} Most troublesome in this evolution is the indistinct limit to the scope of persons who may be held liable for arranger or generator


72. For a discussion of who may be a potentially responsible person under CERCLA, see supra notes 15, 17, and accompanying text.

73. Howard & Benfeild, supra note 20, at 34-36.

74. Gaba, supra note 38, at 1316.

75. \textit{Id.}

76. For a discussion of the development of federal and state law in implementing CERCLA's provisions, see supra notes 51-56 and accompanying text.

77. Howard & Benfeild, supra note 20, at 42-47.
liability.\textsuperscript{78}

Liability under section 107(a)(3) has been clearly established in the instance where a person creates hazardous wastes and arranges for its disposal at another facility.\textsuperscript{79} The outer limits of generator liability, however, appear to be in a state of transition.\textsuperscript{80} The question remains concerning the minimum connections a person may have within a contract or agreement in order to find the person liable as a generator or arranger of toxic waste.\textsuperscript{81}

Courts have generally concluded that sales of products containing toxic materials do not warrant the imposition of liability on sellers under section 107(a)(3) as generators of toxic wastes.\textsuperscript{82}

Given the magnitude of possible transactions between parties, however, courts have been constrained to assess the transactions on a case-by-case basis. This piecemeal evaluation has, for the most part, led to further confusion and dubious progress toward realizing uniformity or predictability.

3: Scope of Persons Liable as "Generators"

In \textit{United States v. Aceto Agricultural Chemical Corp.},\textsuperscript{83} a federal court of appeals held that a pesticide manufacturer who hired a formulator to convert technical grade pesticides into commercial grade pesticides was liable under section 107(a)(3) for arranging for the disposal of hazardous wastes.\textsuperscript{84} The court concluded that the pesticide manufacturer "arranged for" the disposal of hazardous substances under section 107(a)(3) and denied its motion to dismiss, based on three allegations in the formulator's complaint: 1) the pesticide manufacturer had contracted with him for the formulation of "their hazardous substances," 2) the pesticide manufacturer had retained ownership of the chemicals throughout the process, and 3) the process inherently involved the generation and disposal of hazardous wastes.\textsuperscript{85} The \textit{Aceto} decision has been considered by some commentators to be the most expansive ap-

\textsuperscript{78} Gaba, \textit{supra} note 38, at 1313. "The scope of persons liable because they 'arranged for disposal' remains an uncertain and evolving issue." \textit{Id.}

\textsuperscript{79} See \textit{Id.} "At a minimum, liability extends to generators who create a hazardous waste and arrange for its disposal at another facility." \textit{Id.}

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} See \textit{Id.}

\textsuperscript{83} 872 F.2d 1373 (8th Cir. 1989).

\textsuperscript{84} \textit{Id.} at 1384.

\textsuperscript{85} \textit{Id.} The specific issue before the court was whether the district court had properly dismissed the pesticide manufacturer's motion to dismiss for failure to state a claim. \textit{Id.} at 1376.
plication of generator liability.86

In reaching its conclusion, the Aceto court examined the meanings behind the terms used in section 107(a)(3).87 After examining the meaning of "disposal" as provided by the statute,88 the court discussed the possible interpretations of "arrange for."89 Since the term is not defined in the statute, the court addressed the common meaning of the word.90 The term "arrange" is commonly defined in the English language as "to put in proper order," "to adjust," "to settle," or "to prepare."91 The pesticide manufacturer argued that the common meaning of "arrange" required that it could only be held liable under section 107(a)(3) if it intended to dispose of a waste,92 and that since the complaint alleged only an intent to arrange for formulation of a product, no intent to dispose of waste could be inferred.93 The court, however, rejected this formulation of the term.94

The Aceto court examined the broad remedial purpose of CERCLA, as well as the statute's legislative history,95 and con-


87. Aceto, 872 F.2d at 1379.

88. Id. For a discussion of the meaning of "disposal" under CERCLA, see supra notes 39-41 and accompanying text.

89. Aceto, 872 F.2d at 1380.

90. Id. The court examined the pesticide manufacturer's dictionary definition of "arrange." Id. The court noted that "[d]efendants contend the word 'arrange' means 'to come to an agreement' or 'to make plans, prepare.'" Id. at 1380 n.7 (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY 120 (1961)).


92. Aceto, 872 F.2d at 1380.

93. Id.

94. Id.

95. Id. The court examined the pertinent legislative history, and noted that the original Senate and House bills contained more explicit language. Id.

H.R. 7020, the original House bill, contained language extending liability to "any person who caused or contributed to" a release or threatened release of toxic substances. Id. at 1380 n.8 (citing H.R. 7020, 96th Cong., 2d Sess. (1980)); see also New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985). See generally Grad, supra note 6.

Similarly, the Senate bill, S. 1480, as originally introduced, stated that liability would attach to "any person who caused or contributed to a release of hazardous substances." Aceto, 872 F.2d at 1380 n.8 (citing S. 1480, 96th Cong., 2d Sess. (1980)). This language was changed by the Senate Committee on Environmental and Public Works to the statement, "any person who by contract, agreement or otherwise arranged for" and incorporated into the final Act. Id. (citing S. 1480, 96th Cong., 2d Sess. (1980); STAFF OF SENATE COMM. ON ENVTL. AND PUB. WORKS, WORKING PAPER NO. 2, 96th Cong., 2d Sess. (1980)).
cluded that any interpretation of “arrange for” that would permit the pesticide manufacturers to “close their eyes” to the method of toxic substance disposal was contrary to CERCLA’s policies.96

Several courts have imposed the requirement of a nexus between a party to be held liable under section 107(a)(1) and the disposal in order to find that the party had “arranged for disposal.”97 However, in *CPC International, Inc. v. Aerojet-General Corp.*,98 a district court in Michigan held that the determining factor for finding such a nexus was whether the party had assumed responsibility for determining the fate of the hazardous substances.99 This court reasoned that the assumption of responsibility was more determinative of liability than looking to the creation of the substances, title to them, or active involvement in their disposal.100

Ownership of the hazardous chemicals is a factor that has been weighed differently by various courts. For some courts, ownership of the hazardous chemicals is a heavily weighed factor in imposing section 107(a)(3) liability, and often tips the scales in favor of liability.101 The *Aceto* court specifically distinguished the facts before it from a case where liability was not imposed, on the basis that the hazardous substances were no longer owned by the defendants.102

The reasons for the change to “arrange for” are “not easy to divine,” however, “elimination of the concept of ‘cause’ is consistent with the imposition of strict liability.” *Aceto*, 872 F.2d at 1380 n.8; see also *Shore Realty Corp.*, 759 F.2d at 1039-40; *Wade*, 577 F. Supp. at 1333-34.

96. *Aceto*, 872 F.2d at 1380-82.

97. *CPC Int’l, Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269 (W.D. Mich. 1991) (some nexus must exist between potentially responsible party and disposal of hazardous substance); see also *NEPACCO*, 810 F.2d at 743. Accord *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992) (nexus required for generator liability); *General Elec. Co. v. Aamco Transmissions, Inc.*, 967 F.2d 587 (2d Cir. 1992) (nexus required to impose liability not found in lease arrangement between oil companies and service station tenants to impose liability on oil companies for tenants’ waste). Compare *Wade*, 577 F. Supp. at 1326 (rejecting argument that there must be causal nexus between cleanup costs and specific generator’s waste as eviscerating CERCLA’s remedial intent).


99. *Id.* at 1278 (“[Generator liability] requires the assumption of responsibility for or control over the disposition of hazardous waste.”).

100. *Id.* (“The nexus issue is not a test of whether a party created or left hazardous substances or had title to them, but rather whether the party assumed responsibility for determining their fate.”).

101. *Aceto*, 872 F.2d at 1383-84.

102. *Id.* at 1384. In imposing liability the court distinguished its findings from the holding in United States v. Westinghouse Elec. Corp., 22 Env’t Rep. Cas. (BNA) 1230 (S.D. Ind. 1983), in that “defendants in [Aceto] did not sell their technical grade pesticide to [the formulator]; they retained ownership through-
On the other hand, where ownership is not demonstrated, retention of control is a factor strongly considered by other courts. In *United States v. Northeastern Pharmaceutical and Chemical Co.*, the Eighth Circuit held that despite the defendant's lack of ownership of the hazardous substances, generator liability was properly imposed due to the defendant's authority to control the handling and disposal of the waste. Similarly, a district court in *United States v. A & F Materials Co., Inc.* stated that the crucial inquiry for establishing generator liability is in determining "who decided" the location and method of treatment or disposal of the toxic substance. In following this guideline, the court proceeded to impose generator liability on a party who sold a caustic solution to another defendant, after finding that disposal of the solution was the motivation for the sale.

4. Characterization of the Arrangement: Sale or Incorporation

Defendants in an action for recovery for response costs have at times argued successfully that the particular circumstances of their arrangement amounted to a true "sale" of the hazardous substances in order to avoid generator liability. Some courts, however, have imposed generator liability in order to prevent the circumvention of section 107(a)(3) by merely characterizing the

out the formulation process. Moreover, [the formulator] was not manufacturing a product for its own use; it was formulating defendants' pesticide products for them." *Aceto*, 872 F.2d at 1384 (citing *Westinghouse*, 22 Env't Rep. Cas. (BNA) at 1233).

103. See *NEPACCO*, 810 F.2d at 743-44.
104. 810 F.2d 726 (8th Cir. 1986).
105. *Id.* at 743-44. The court stated its belief that "requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for liability under CERCLA [§ 107(a)(3)] would be inconsistent with the broad remedial purposes of CERCLA." *Id.* at 743; see also *Mottolo*, 629 F. Supp. at 56 (person who arranges for disposal or transportation not required to own or possess hazardous waste).
107. *Id.*; see also *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651 (N.D. Ill.), aff'd on other grounds, 861 F.2d 155 (7th Cir. 1988).
Incorporation of a "useful" product is another characterization which has proven to have varying results for precluding liability for some defendants. In *Florida Power & Light Co. v. Allis Chalmers Corp.*, the Eleventh Circuit refrained from imposing liability on one party who sold a "useful" product to another party, who in turn incorporated the substance into another product which was ultimately discarded. In *Florida Power & Light*, the manufacturers of PCB-contaminated transformers sold transformers to a company which utilized them for several years before selling them to a salvage company which released the contaminants into the environment during their reclamation process. The manufacturer was not held liable for "arranging for disposal" of the hazardous wastes based on the evidence. In explicitly refusing to apply a per se rule in determining the liability of a manufacturer under CERCLA, however, the court stated that "even though a manufacturer does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed, the manufacturer may be liable." To impose generator liability on the manufacturer, evidence must indicate that the manufacturer is the party "otherwise arranging" the disposal of the toxic substance.

The use of characterization, however, has done little to further delineate the standards for imposing liability. In determining liability, the *Aceto* court maintained that "courts have not hesitated to look beyond defendant's characterizations to determine whether a transaction in fact involves an arrangement for disposal of a hazardous substance."

5. Intent to Dispose or Knowledge of Disposal

Most courts considering the issue have held that intent is not a requirement for imposing generator liability under CERCLA.

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111. 893 F.2d at 1313 (11th Cir. 1990).
112. Id. at 1318.
113. Id.
114. Id. at 1315.
115. *Florida Power & Light*, 893 F.2d at 1318.
116. Id.
117. *Aceto*, 872 F.2d at 1381.
118. United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987); see *Aceto*,
The majority of courts have rejected the argument that lack of intent to dispose precludes generator liability, and have maintained that liability under CERCLA is strict, without regard to the party’s fault, state of mind, or intent. Liability has been imposed even in circumstances where a party was unaware that hazardous substances would be deposited at a particular site, and believed they would be deposited elsewhere.

Furthermore, court decisions have imposed liability on a party where the generation of toxic wastes is inherent in the process of formulation. In *Aceto*, the court determined that the inherent knowledge of the party owning the technical grade pesticide that hazardous wastes would be generated in the process, despite having hired a formulator to actually make the commercial grade pesticide, was an important factor in imposing section 107(a)(3) liability on the technical grade pesticide owner. In addition, some courts have held that summary judgment will be precluded by allegations of such inherent knowledge.

Despite the avowed need for a uniform body of federal law in implementing the remedial purposes of CERCLA, it is evident that several factors are used by courts in determining when generator liability exists. Due to the wide range of specific relationships and agreements between parties, the determination can often be made only after an evaluation of the factors present in a particular case. Furthermore, through the use of characterization, and the relative weights given by courts to different factors in assessing liability, uniformity and predictability continue to be elusive goals.


119. See *Bliss*, 667 F. Supp. at 1304. For a discussion of strict liability under CERCLA, see supra notes 95-96 and accompanying text.


121. See *Aceto*, 872 F.2d at 1378, 1384.

122. *Id.* at 1378.

123. *United States v. Velsicol Chem. Corp.*, 701 F. Supp. 140 (W.D. Tenn. 1987). In *Velsicol*, summary judgment was held to have been properly denied due to the government’s allegations that a pesticide chemicals supplier had knowledge of industry-wide pesticide formulation practices and that hazardous waste generation was an incident of the formulation process. *Id.* at 142-43.

124. Where the action is one for contribution among parties for recovery costs, some courts have begun to express the relative weights given by various standards for imposing liability as utilizing equitable factors in determining the level of contribution to be allocated among the parties. See *United States v. Shaner*, Civ. No. 85-1372, 1990 WL 115085 (E.D. Pa. June 25, 1990). See generally *Amoco Oil v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989) (action involving one

In *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*, the United States Court of Appeals for the Ninth Circuit, in an action for contribution for cleanup costs, confronted the issue of whether CERCLA imposed "generator" or "arranger" liability on Beazer for generating toxic wastes within the meaning of section 107(a)(3). The court held that Beazer was liable for generating hazardous wastes as an "arranger."  

Jones-Hamilton (J-H), was a contracting chemical formulator which formulated raw materials provided by Beazer into wood preservation compounds. Beazer retained ownership of the materials it provided under the agreement, including substances classified as "hazardous substances" under CERCLA. The agreement provided for a "tolerance" of two percent party suing another for recovery of cleanup costs under CERCLA is contribution action). A full discussion of contribution under CERCLA is beyond the scope of this Note; the issue being addressed here is a possible explanation of the wide range of criteria used in imposing generator liability.  

Considering possibly the most recent step on the evolutionary ladder of CERCLA liability, the court in Environmental Transp. Sys., Inc. v. Ensco, Inc., 969 F.2d 503 (7th Cir. 1992), discussed judicial flexibility in determining the factors to be used in assessing the allocation of cleanup costs among multiple responsible parties. The *Ensco* court maintained that courts may legitimately examine the equities, and in any given case may consider several factors, a few factors, or only one factor in assessing liability depending on the totality of circumstances presented to the court. *Id.* This approach may not facilitate the development of a uniform body of law, however, it may more accurately portray the methods courts must utilize in order to deal with the breadth of circumstances under which generator liability may be established.

125. 959 F.2d 126 (9th Cir.), *reh'd denied*, 1992 WL 201121 (9th Cir. 1992). Upon denial of rehearing, the decision appearing at 959 F.2d 126 was amended and superseded; however, the amendments discuss the issue of the appealability of summary judgment motions, and do not affect the substantive issues of generator liability and indemnity.

126. *Beazer*, 959 F.2d at 131-32.

127. *Id.* at 131. The court additionally held that while the clause for indemnification of Beazer did not violate public policy, it nonetheless did not protect Beazer from costs arising from its own wrongful acts. *Id.* at 130.

A full discussion of the issue of indemnification under CERCLA is beyond the scope of this Note. However, indemnification will be discussed as to its impact on the court's decision to hold "generator liability" against Beazer.

128. *Id.* at 128. The original agreement was entered into by Jones-Hamilton and the Wood Treating Chemical Co. (WTCC) in 1970. *Id.* at 127. WTCC was then purchased by Kop-Coat, Inc., and Beazer subsequently assumed the duties, liabilities and rights of Kop-Coat. *Id.* The agreement between Jones-Hamilton and WTCC was to continue until terminated by written notice, which occurred in 1984. *Id.*

129. *Id.* at 128.

130. *Id.* The raw materials provided by Beazer included pentachlorophenol and tetrachlorophenol, both of which are classified under CERCLA as "hazardous substances." *Id.; see CERCLA § 101(14), 42 U.S.C. § 2601(14).* For a dis-
shrinkage per month in the materials Beazer provided.\textsuperscript{131} Additionally, the agreement provided for indemnification of Beazer\textsuperscript{132} for any costs incurred due to J-H's failure to comply with all applicable laws.\textsuperscript{133}

J-H performed its formulation activities with a consultant employed by Beazer on site during the formulation process.\textsuperscript{134} During the formulation process, substances prohibited from discharge\textsuperscript{135} were released into J-H's waste water containment ponds.\textsuperscript{136} After the contamination was discovered, cleanup and abatement orders were issued\textsuperscript{137} to J-H resulting in substantial compliance costs.\textsuperscript{138}

J-H brought a contribution action for cleanup costs\textsuperscript{139} against Beazer and sought a declaratory judgment regarding Beazer's "potential liability" under CERCLA.\textsuperscript{140} Beazer's counter-claim sought indemnity under the formulation agree-

\begin{itemize}
  \item \textsuperscript{131} Beazer, 959 F.2d at 128 ("A tolerance of up to two percent by volume shall be allowed for spillage or shrinkage in any calendar month. . . .")
  \item \textsuperscript{132} Id. The agreement originally provided for indemnification of WTCC. For the discussion of J-H's agreement to indemnify WTCC, see infra note 135 and accompanying text. For a discussion of Beazer's assumption of the rights and liabilities of the original contract, see supra note 128 and accompanying text.
  \item \textsuperscript{133} Beazer, 959 F.2d at 128 ("J-H agrees to comply with all applicable Federal, State and Local laws, ordinances, codes, rules and regulations and to indemnify WTCC against all losses, damages and costs resulting from any failure of J-H or any of its employees, agents or contractors to do so.").
  \item \textsuperscript{134} Id. The full extent of the role of Beazer's consultant, Dr. Stutz, in the formulation process while on site at J-H's Newark, California facility, is disputed. Id. The district court noted, however, that "[a]lthough the agent's full role in the formulation process is disputed, it is clear that his duties included, at a minimum, insuring that plaintiff maintained quality control standards that were acceptable to defendants." Jones-Hamilton Co. v. Kop-Coat, Inc., 750 F. Supp. 1022, 1023 (N.D. Ca. 1990), aff'd in part, reversed in part, Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 959 F.2d 126 (9th Cir. 1992).
  \item \textsuperscript{135} Beazer, 959 F.2d at 128. Despite the prohibition under J-H's permit, prohibited substances, "apparently including pentachlorophenol, were nonetheless discharged into the ponds." Id. For a discussion of J-H's permit limitations and the raw materials provided by Beazer, see supra note 130 & infra note 136 and accompanying text.
  \item \textsuperscript{136} Beazer, 959 F.2d at 128. J-H's permit received in 1970 from the California Regional Water Quality Control Board prohibited the discharge of chemicals other than certain listed substances into its waste water containment ponds. Id.
  \item \textsuperscript{137} Id. The cleanup and abatement orders were issued by the California Regional Water Quality Control Board. Id.
  \item \textsuperscript{138} Id. ("J-H has spent over $2,000,000 to comply with the orders.").
  \item \textsuperscript{139} Id.; see CERCLA § 113(f), 42 U.S.C. § 9613(f).
  \item \textsuperscript{140} Beazer, 959 F.2d at 128.
\end{itemize}
ment. Each party subsequently moved for summary judgment. The district court denied J-H’s motion for partial summary judgment on the issue of whether Beazer had “arranged for the disposal” of toxic wastes.

J-H appealed the denial of partial summary judgment on generator liability. The issue before the Ninth Circuit was whether J-H’s summary judgment motion was properly granted as to Beazer’s liability under section 107(a)(3). The court of appeals held that the district court erred in denying J-H’s motion for partial summary judgment on the issue of Beazer’s generator liability, and reversed the lower court’s decision. The court mana-

141. Id.
142. Id.
143. Id. (citing Jones-Hamilton Co. v. Kop-Coat, Inc. 750 F. Supp. 1022 (N.D. Cal. 1990)).
144. Id. Beazer’s summary judgment motion as to J-H’s duty to indemnify Beazer was granted, and the court held that the indemnification clause barred J-H’s claim for contribution. Id. The district court additionally awarded attorney’s fees to Beazer as an indemnitor prosecuting its indemnity claim. Id. at 132.

145. On appeal, the Ninth Circuit reiterated the standard of review for denial of a motion for summary judgment. Beazer, 959 F.2d at 130. The court noted that denial of summary judgment is generally not appealable since it is not a final order. Id. (citing Abend v. MCA, Inc., 863 F.2d 1465, 1482 n.20 (9th Cir. 1988), aff’d, 495 U.S. 207 (1990)). However, in this instance the district court’s grant of summary judgment “was a final decision giving [the court] jurisdiction to review its denial of plaintiff’s motion for summary judgment.” Beazer, 959 F.2d at 130 (citing Abend, 863 F.2d at 1482 n.20).

146. Id. at 127.
147. Id. The court of appeals also confronted the issue of whether the indemnification clause was against public policy under CERCLA in the Ninth Circuit. Id. at 129-30. CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1) states that: No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

Id.

As the Ninth Circuit noted, “courts around the country have reached different interpretations of this language.” Beazer, 959 F.2d at 129. The Ninth Circuit previously held that enforcement of an indemnification clause does not violate public policy under CERCLA. Id. (citing Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1459 (9th Cir. 1986)).

148. Beazer, 959 F.2d at 131. In addition, the court held that the district court erred in granting summary judgment in favor of Beazer on the issue of indemnification. Id. at 130. See supra note 127 and accompanying text.

The court further vacated the lower court’s decision to award attorney’s fees to Beazer, and held that the lower court could revisit the issue of awarding attorneys fees to an indemnitor after determining to what extent each party was liable for cleanup costs. Beazer, 959 F.2d at 132.
dated that the district court grant summary judgment in favor of J-H and hold that Beazer “arranged for disposal” of the hazardous substances. After stating that Beazer was liable for the generating of wastes, the court remanded the action for a determination of the extent of Beazer’s liability for contribution for cleanup costs, both for its “arranger” liability and any direct participation in waste disposal at J-H’s facility.

IV. Analysis

The Beazer court held that Beazer was liable under the formulation agreement for generating hazardous waste within the meaning of section 107(a)(3), and that J-H was entitled to contribution to the extent of that liability. However, as material issues of fact remained regarding Beazer’s involvement in the disposal of the wastes, the appellate court ruled that summary judgment was precluded on the issue of Beazer’s generator liability, and that the the motion for partial summary judgment was properly denied by the district court.

The issue of the scope of generator liability was one of first impression in the Ninth Circuit. However, in reaching its decision, the Beazer court avoided an examination of the legislative history of CERCLA. The court’s statutory analysis entailed citing the language of section 107(a)(3) and noting that “arranged for” was not defined. The court cited the decisions of other jurisdictions which followed varied approaches.

149. Beazer, 959 F.2d at 132 (“The district court should grant summary judgment in favor of J-H, holding that Beazer ‘arranged for disposal’ of hazardous materials.”).

150. Id. at 131-32. The Ninth Circuit affirmed the district court’s holding that J-H was obligated to indemnify Beazer for any liability Beazer incurred as a result of J-H’s wrongdoing, and contribution from Beazer could not be sought to the extent of J-H’s infraction. Id. at 132.

151. Id.

152. Id.

153. Id. at 131 (“We have not yet addressed the issue of when liability for ‘arranging for disposal’ will attach.”).

154. Beazer, 959 F.2d at 131. The Ninth Circuit briefly examined the legislative history of CERCLA in its decision in Mardan, 804 F.2d at 1454, concerning the issue of indemnification; that process, however, was far from the in-depth examination which has been performed by other courts in interpreting CERCLA provisions.

155. Beazer, 959 F.2d at 131. The court further quoted the definition of “disposal.” Id.; see CERCLA § 101(29), 42 U.S.C. § 9601(29). For an explanation of the meaning of disposal, see supra notes 39, 41, and accompanying text.

156. Beazer, 959 F.2d at 131 (citing Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313 (11th Cir. 1990); United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373 (8th Cir. 1989); CPC Int’l, Inc. v. Aerojet-General
compared and contrasted the *Beazer* facts to the facts of *Aceto* and *Florida Power & Light*.\(^{157}\) The *Beazer* court based its decision primarily on analogy to the facts and on the holding in *Aceto*, and attempted to distinguish the case from *Florida Power & Light*.\(^{158}\)

The *Beazer* court discussed the factual circumstances of *Aceto*, and reasoned that since the issue was one of first impression in its jurisdiction,\(^{159}\) and the facts presented to the court were similar to those in *Aceto*, the Ninth Circuit would apply the *Aceto* court’s holding.\(^{160}\) In following the *Aceto* holding, however, the *Beazer* court did not endeavor to determine if the reasoning behind the *Aceto* decision was sound, but merely applied its holding after viewing the facts.\(^{161}\) In consideration of the fact that the *Aceto* decision has been considered by many to be the most expansive application of generator liability,\(^{162}\) the *Beazer* court should have more closely scrutinized the *Aceto* court’s reasoning. Furthermore, the *Beazer* court acknowledged the lack of definition of the term “arrange,” but did not apply the rule of statutory construction that requires an exploration of the legislative history.\(^{163}\)

In *Beazer*, the court observed the fact that in *Aceto* the pesticide company which hired the formulator had retained ownership of the chemicals it provided.\(^ {164}\) The *Beazer* court then found a similar element of ownership in the contract before it.\(^ {165}\) Similarly, the *Aceto* court was heavily influenced by the retention of ownership of the hazardous substances,\(^ {166}\) and rejected the argument that although the defendants retained ownership, liability

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\(^{157}\) *Beazer*, 959 F.2d at 131. For a discussion of the facts and holding in *Aceto*, see supra notes 83-96 and accompanying text. For a discussion of the holding in *Florida Power & Light*, see supra notes 111-16 and accompanying text.

\(^{158}\) *See Beazer*, 959 F.2d at 131 n.2. For a discussion of the facts of *Beazer* as contrasted to those in *Florida Power & Light*, see infra notes 169-71 and accompanying text.

\(^{159}\) *Beazer*, 959 F.2d at 131.

\(^{160}\) *Id.*

\(^{161}\) *Id.*

\(^ {162}\) *See generally* Ruckdaschel-Haley, *supra* note 69, at 251.

\(^{163}\) *Beazer* 959 F.2d at 131. For a discussion of basic rules of statutory construction, see *supra* note 43 and accompanying text.

\(^ {164}\) *Id.* (citing *Aceto*, 872 F.2d 1373 (8th Cir. 1989)). For a discussion of the effect of retention of ownership on generator liability, see *supra* notes 101-02 and accompanying text.

\(^{165}\) *Beazer*, 959 F.2d at 128.

\(^{166}\) *Aceto*, 872 F.2d at 1373.
should not be imposed as they had no authority to control the materials or the decision as to the manner of their disposal. 167

Other courts have indicated their preference for the authority to control as having greater weight than the retention of ownership. 168 While in both Beazer and Aceto the retention of ownership was a deciding factor, it is clear that generator liability has been imposed in numerous situations where there was no such provision in the agreement. The Beazer court, however, failed to discuss why it did not find such reasoning persuasive and why it preferred ownership to be the controlling factor.

The Beazer court distinguished the facts of Florida Power & Light on the grounds that the defendants in that case had purchased a product which had contained toxic materials, and had used the product for forty years before “disposing” of it. 169 The Beazer court remarked that while the Florida Power & Light court declined to impose generator liability in that instance, it had also declared that it was not fashioning a per se rule. 170 However, the Beazer court again failed to state how the Florida Power & Light court’s reasoning impacted on the facts before it, notably since retention of ownership was not a factor in that case. 171

The Beazer court only briefly discussed the spillage clause in the agreement between J-H and Beazer. 172 The court designed the following syllogistic argument for imposing generator liability on Beazer: 1) Beazer retained ownership of the chemicals it provided; 2) the materials it provided included substances classified as hazardous under CERCLA; and 3) the agreement contemplated a level of spillage. 173 The court then declared it was “clear” that Beazer had arranged for disposal under section 107(a)(3). 174

However, the Beazer court did not scrutinize the meaning of the provision which tolerated a small percent of spillage of the materials owned by Beazer nor the intent of the parties in fashioning the provision retaining Beazer’s ownership of the materi-

167. Id.
168. For a discussion of the effect of the authority to control on liability, see supra notes 103-08 and accompanying text.
169. Beazer, 959 F.2d at 131 n.2.
170. Id. (citing Florida Power & Light, 893 F.2d at 1318).
171. See Florida Power & Light, 893 F.2d 1313 (11th Cir. 1990).
172. Beazer, 959 F.2d at 131.
173. Id.
174. Id. (“Thus, it is clear that under the agreement Beazer ‘arranged for disposal’ of toxic substances within the meaning of section 9607.”) (footnote omitted).
als. The court noted the Aceto court’s rejection of the intent argument as a basis for withholding liability, but then proceeded to infer that Beazer was liable for “arranging of disposal” of the toxic substances under section 107(a)(3) on the basis that Beazer had “contemplated” spillage due to the tolerance provision, despite J-H’s agreement to comply with all applicable laws. The court, in effect, surmised that the intent to arrange for disposal could be inferred from the agreement for imposing liability for noncompliance with the law.

Furthermore, in following the Aceto holding, the Beazer court referred to the Aceto court’s assertion that it would go beyond the parties’ characterizations of a transaction in determining whether generator liability is met. For this reason, the limits of the scope of generator liability to be imposed in the Ninth Circuit remain unclear. The weight of retention of ownership as a controlling factor, and whether it is a required element in the Ninth Circuit, remains uncertain. In adopting such an expansive standard, the Beazer court should have made at least a minimal attempt to discern Congress’ intent in enacting CERCLA, delineate the circumstances under which generator liability may be imposed, and set forth its own reasoning for its findings.

V. IMPACT

The Beazer decision has done little to define the standard of generator liability in the Ninth Circuit, and may indicate a trend in courts’ unwillingness to engage in the arduous process of discerning the meaning of CERCLA’s provisions. At first glance the decision may appear to facilitate the process of achieving greater uniformity as one jurisdiction follows the decision of another. However, in merely following an expansive standard of looking beyond the parties’ characterizations, without delineating the requirements of the standard beyond the factor of ownership, the Beazer decision lends little toward predictability in the scope of generator liability. Uniformity, even limited uniformity, will not result from a jurisdiction’s wholesale adoption of an expansive standard in imposing liability without further delineation.

175. Id.
176. Id. For a discussion of the Aceto court’s reasoning that intent is not required for imposing generator liability, see supra notes 88-96 and accompanying text.
177. Beazer, 959 F.2d at 131.
178. Id. (citing Aceto, 872 F.2d at 1380).
The outer limits of liability under section 107(a)(3) are not yet in sight. The goal of developing a more uniform body of federal common law to be utilized in interpreting CERCLA’s more obscure provisions while implementing its overall policies has not been met. It is evident that the last of the possible variations on circumstances and agreements between parties, as well as the emphasis each court places on various factors to determine liability, is not yet within reach. This state of flux makes it difficult for parties to have any reasonable reassurance that agreements they become involved in concerning the use of hazardous materials will afford them any protection from generator liability. The sweep of what may fairly be considered “arranging for disposal” is perhaps overly broad and affords parties few guidelines in avoiding, or even limiting, liability.

The uncertainty created by section 107(a)(3) as it was adopted is likely an inherent result of the manner in which CERCLA was enacted. However, given the broad remedial nature of CERCLA, and the strong interest in avoiding the frustration of any of its policies, the courts have been left to resolve the details of the application of generator liability in a piecemeal manner. The Beazer decision demonstrates the need for Congress to amend the language of section 107(a)(3) to more clearly delineate the ultimate scope of generator liability. The application of the Aceto holding, without careful reasoning or adherence to general rules of statutory construction, indicates the Beazer court’s strong unwillingness to discern Congressional intent or to wrestle with the scope of generator liability. The breadth of interactions which could result in liability if this trend continues, suggests that the best solution is for Congress to amend section 107(a) in order to alleviate the inherent ambiguities in the determination of generator liability.

Meigan Flood Cooper