Businesses that sell hazardous substances or products containing hazardous substances, particularly used products, face the risk of a variety of legal claims if the substances are released and harm the environment—even if the seller itself did not directly leak or spill the substances. From common law torts like negligence, nuisance, trespass and strict products liability to causes of action under federal and state statutes prohibiting spills and pollution, there is no shortage of causes of action that can be asserted. But few claims keep general counsel up at night more than a claim for cost recovery or contribution based on “arranger liability” under § 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(3). A party found liable as an arranger under CERCLA may be required to pay millions of dollars in response costs and natural resources damages, which could be devastating to a business’s bottom line and crippling to its future.

Mitigating the Risk of Arranger Liability Under CERCLA

BY JOHN J. DIChELLO

Section 107(a) of CERCLA imposes liability for the response and cost of cleaning up environmental contamination by hazardous substances on four classes of potentially responsible parties, including those who “arranged for disposal” of hazardous substances. The purpose of arranger liability is to close a loophole that otherwise would allow an entity to circumvent liability by simply contracting with another party for the disposal of the entity’s waste.

This begs the question of what it means to “arrange.” The U.S. Supreme Court provided some clarification in the landmark decision in Burlington Northern & Santa Fe Railway Co. v. United States, 556 U.S. 599, 2009 BL 95907 (2009). In short, the Court held that a party must intend to dispose of a hazardous substance to qualify as
an arranger. The decision in Burlington Northern is widely viewed as significantly narrowing the scope of arranger liability.

In Burlington Northern, an oil company and other entities sold pesticides and chemicals to Brown & Bryant Inc., which operated a facility for the storage and distribution of agricultural chemicals. Leaks and spills often occurred at the facility when common carriers delivered chemicals and during the process of transferring the chemicals between trucks and tanks onsite for storage and when distributed to B&B’s customers. The oil company had actual knowledge of leaks and spills. Notably, the oil company attempted, albeit unsuccessfully, to reduce the number of releases by providing its distributors with safety manuals, requiring the distributors to maintain adequate storage facilities, and offering discounts to distributors that implemented improvements at their facilities. Based on the oil company’s knowledge of releases, the government argued that the company was an “arranger” under CERCLA and should be responsible for a portion of the costs to remediate contamination at the site.

The court held that the oil company did not constitute an arranger because, despite the company’s knowledge of releases, it did not enter into the sale of chemicals to B&B “with the intention that at least a portion of the product be disposed of during the transfer process.” The court reasoned that “an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance.” The court added that “[w]hile it is true that in some instances an entity’s knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity’s intent to dispose of its hazardous wastes, knowledge alone is insufficient to prove that an entity ‘planned for’ the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.” Because the oil company took steps to reduce the occurrence of leaks and spills, the oil company’s mere knowledge that releases continued, without more, was insufficient to show that the company specifically intended to dispose of chemicals.

The court provided additional guidance on the type of evidence that could satisfy the intent element for purposes of arranger liability. Specifically, the Court stated that “CERCLA liability would attach under § 9607(a)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance,” but “an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination.” The court acknowledged the existence of a gray area between these two extremes where “the seller has some knowledge of the buyers’ planned disposal or whose motives for the ‘sale’ of a hazardous substance are less than clear.” Those instances require a fact-intensive inquiry on the nature of the transaction that “looks beyond the parties’ characterization of the transaction as a ‘disposal’ or a ‘sale.’”

Several federal appeals courts have applied the dictates of Burlington Northern in addressing transactions falling in the “gray area” in cases of putative arranger liability under CERCLA. Those cases confirm that the requisite intent for arranger liability is difficult to define precisely and requires a case-specific, highly factual analysis, thereby leaving businesses uncertain about their potential exposure and risk of liability as arrangers. The good news, however, is that these cases also show that the intent element is quite difficult to prove.

To assist businesses with the evaluation of their potential exposure as arrangers under CERCLA, this article outlines relevant considerations for determining the existence of intent identified by federal appellate courts since Burlington Northern. This article also provides suggestions to help businesses minimize their potential arranger liability.

**Post-Burlington Northern Appeals Court Cases**


General Electric manufactured electric capacitors containing Pyranol, an insulating material made with polychlorinated biphenyls (PCBs). To be useful to GE, the processed Pyranol had to meet certain purity specifications; any Pyranol falling short of the standards was considered “scrap Pyranol” and stored in 55-gallon drums in designated scrap areas. After accumulating “a glut of scrap Pyranol,” GE entered into an informal arrangement with Frederic H. Fletcher, a paint manufacturer, in which Fletcher purchased scrap Pyranol from GE at bargain prices to use as a plasticizer additive for his paint. Approximately 10 years later, after Fletcher had purchased 3,600 drums of scrap Pyranol, Fletcher began missing payments. GE nonetheless de-

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2 670 F.3d at 379-80.

3 Id. at 380.

4 Id.

5 Id.
livered three more shipments of scrap Pyranol to Fletcher. Fletcher subsequently informed GE that the quality of its scrap Pyranol had declined in recent years, and proposed that GE retrieve from his property drums of Pyranol that he could not use and he would pay for the usable drums. GE ignored Fletcher’s proposal. Roughly 20 years later, the Environmental Protection Agency discovered hundreds of drums of scrap Pyranol on Fletcher’s property and sought to recover costs associated with the cleanup from GE, alleging that GE “arranged for disposal” of a hazardous substance under § 107(a)(3) of CERCLA.

The U.S. Court of Appeals for the First Circuit affirmed the district court’s judgment holding GE liable as an arranger, because GE “purposefully entered into the arrangement with Fletcher with the desire to be rid of scrap Pyranol.” The First Circuit reasoned that GE viewed the scrap Pyranol not as a legitimate, useful product, but as waste. For example, GE stored the scrap Pyranol in second-hand 55-gallon drums labeled as “scrap” and “waste” in salvage areas; pursued arrangements to reduce its stockpile of scrap Pyranol, including transferring it to landfills; subjected the scrap Pyranol to minimal quality control; and did not market the scrap Pyranol as a viable product to anyone other than Fletcher. Indeed, there was no evidence that any market for scrap Pyranol even existed. This evidence showed that “any profit derived from selling scrap Pyranol to Fletcher was subordinate and incidental to the immediate benefit of being rid of an overstock of unusable chemicals.”

In addition, the court in General Electric concluded that GE’s actions and inaction in dealing with Fletcher further evinced GE’s intent to dispose of hazardous substances. In particular, GE knew that some of the scrap Pyranol was unusable; during the final years of the GE-Fletcher arrangement, GE controlled the amount and quality of the scrap Pyranol delivered to Fletcher and the number of transfers increased drastically, even after Fletcher missed payments; despite Fletcher’s complaint that GE provided contaminated and unusable scrap Pyranol, which claim GE verified through its own testing, and Fletcher’s request that GE pick up the unusable drums from his property, GE simply wrote off Fletcher’s debt and left Fletcher with the burden of disposing of the scrap Pyranol. This conduct, the court stated, shows that “[t]hough the initial arrangement . . . may not have, in express terms, directed Fletcher to dispose of GE’s scrap Pyranol, GE certainly understood this would be the result of its actions and took the conscious and intentional step of leaving Fletcher to dispose of the materials.” In other words, GE attempted to dispose of waste through the guise of a legitimate, arms-length transaction. Therefore, the First Circuit concluded that GE was liable for arranging for disposal of a hazardous substance under CERCLA.


In DVL, the U.S. Court of Appeals for the Second Circuit affirmed the district court’s denial of plaintiff DVL Inc.’s motion for partial summary judgment on its arranger liability claim and grant of summary judgment on that claim in favor of defendants Niagara Mohawk Power Corp. (and its related entities) and General Electric Co. In that case, DVL acquired property on which a scrap or salvage yard known as the Caputo Garage was once located. That property contained PCB contamination. GE owned and operated a plant near the DVL site that manufactured capacitors and electrical components that used PCBs, but GE did not store PCBs on or deliver PCBs to the DVL site. For its part, Niagara Mohawk provided electrical service in the area and employed distribution line transformers containing PCBs. The evidence showed that a vendor obtained retired transformers from Niagara Mohawk, and after stripping them shipped transformer shells to certain sites, but not to the DVL site/Caputo Garage. DVL argued that GE and Niagara qualified as arrangers under § 107(a)(3) of CERCLA because historically those parties discarded and conveyed for disposal waste containing PCBs and therefore “intentionally disposed of PCB waste on the DVL site.”

The Second Circuit affirmed the district court’s summary judgment rulings that DVL failed to offer sufficient evidence that GE and Niagara Mohawk disposed or arranged for the disposal of PCBs at the DVL site. As to GE, DVL offered no evidence of activities with any connection whatsoever to the DVL site, instead citing only evidence of GE’s conduct at its manufacturing plant, the presence of PCBs at that site, and GE’s historical practices and disposal of PCBs at sites separate from and unrelated to the DVL property. This evidence did not show that GE disposed or intended to dispose of waste at the DVL site. DVL’s evidence that Niagara arranged for the disposal of PCB at the DVL site was similarly lacking. While Niagara provided electrical service in proximity to the DVL site using transformers containing PCBs, and unmarked transformers were observed at the DVL site, DVL presented no evidence that Niagara transformers were sent to or disposed of on the DVL site or that the transformers found at the DVL site originated from Niagara. Absent any evidence that GE or Niagara took intentional steps to discard PCBs at the site at issue, those parties could not be liable as arrangers under § 107(a)(3) of CERCLA.

6 Id. at 380-81. 7 Id. at 381. 8 Id. at 391. 9 Id. at 384, 386. 10 Id. at 385-86. 11 Id. at 386. 12 Id. at 385. 13 Id. at 390-91. 14 Id. at 391.
C. Third Circuit. Litgo New Jersey Inc. v. Comm'r N.J. Dep't of Envtl. Prot., 725 F.3d 369 (3d Cir. 2013)

The U.S. Court of Appeals for the Third Circuit in Litgo briefly addressed arranger liability under § 107(a)(3) of CERCLA. In that case, soil and groundwater beneath property owned by Litgo New Jersey Inc. was contaminated with, among other things, volatile organic compounds such as trichloroethylene and perchloroethylene (PCE or perc). From the early 1900s through the 1980s, the Litgo property housed at various times a facility for manufacturing pipes and fittings; the Columbia Aircraft plant, which manufactured machine precision parts for the military using equipment owned by the U.S.; and warehouses leased to commercial and industrial tenants, including JANR Transport. Each of these activities contributed to contamination at the Litgo property. Of equal significance, a nearby site owned by Signo Trading International stored hazardous wastes generated by the U.S., which had contracted with Resource Technologies Services, a reputable hazardous waste transporter, for its disposal at Signo's property. Following a fire at the Signo site in the 1980s, state regulators required licensed haulers to remove hazardous wastes offsite to licensed facilities, and RTS shipped thousands of containers of materials, including hazardous waste, to the JANR warehouse on behalf of the U.S. Those materials were stored improperly and eventually spilled and leaked from their containers. Litgo initiated an action against the U.S. and other parties alleging that they were liable for the costs of remediation at the Litgo property under CERCLA.

In a fairly clear-cut case of arranger liability under CERCLA, the district court determined following trial that the U.S. was liable for a portion of the cleanup costs at the Litgo site because it “arranged for the disposal of some of the hazardous waste that was ultimately stored at the JANR warehouse.” The district court rejected the U.S. argument that the government should not be liable because it arranged for storage, rather than disposal, of the waste. The district court reasoned that the “key difference between storage and disposal appears to be that storage is intended to be temporary,” while “the evidence suggests that when the United States . . . contracted with . . . RTS they intended to permanently get rid of what they believed to be waste products.” The percentage of costs allocated to the U.S., however, was minimal (2 percent) because the U.S. was not directly involved in the transportation of substances to the Litgo property, in storing the substances at the property, or in treating or disposing of the substances, and exercised reasonable care regarding transportation of the substances by entrusting them to a reputable hazardous waste disposal contractor. Furthermore, the U.S. had no knowledge that RTS or Signo would fail to properly dispose of the wastes.

Litgo challenged a number of the district’s court rulings on appeal, including its allocation of CERCLA costs among the defendants. In doing so, the Third Circuit in Litgo reaffirmed that the U.S. was liable solely because it arranged for disposal of hazardous substances to the JANR warehouse. The court also upheld the allocation of costs to the U.S., noting that Litgo and other parties played a larger role in the contamination-producing events by concealing the contamination and resisting remediation, but the U.S. simply “arranged for hazardous waste to be disposed of by what was then considered to be a reputable contractor, and the waste reached the JANR warehouse only because of third-party actors.”


In the coming months, the U.S. Court of Appeals for the Fourth Circuit is expected to weigh in on arranger liability under § 107(a)(3) of CERCLA in Georgia Power. The district court in that case granted summary judgment in favor of Georgia Power Co. because it did not intend to dispose of hazardous substances when it sold used transformers to Ward Transformer Co. that contained oil and PCBs. Georgia Power, an electric utility, used electrical transformers to generate electricity. When those transformers fell into disrepair, Georgia Power disposed of any unusable transformers and sold transformers with value after draining and removing the oil. During the 1980s, Ward purchased transformers from Georgia Power at auctions and, after repairing/remanufacturing them, resold the transformers to third parties for a profit. Some of those transformers contained residual oil and PCBs, which was discharged at the Ward site when the transformers were rebuilt for resale resulting in PCB contamination. Consolidation Coal Co. and Carolina Power & Light Co. initiated cleanup of the Ward site pursuant to an administrative settlement with the U.S. EPA, and PCS Phosphate Co. subsequently joined the remediation efforts. These parties sought to recover the cleanup costs from Georgia Power and others that sold transformers to Ward, sent transformers to Ward for repairs, or consigned transformers to Ward, alleging that they “arranged for disposal” of PCBs under § 107(a)(3) of CERCLA.

In concluding that Georgia Power did not constitute an arranger under CERCLA, the district court “look[ed] first to the value of the materials sold” and concluded that the transformers sold to Ward had marketable value, a viable market for used transformers existed, and Ward was able to resell the repaired transformers and make “thousands of dollars more than what Ward
paid Georgia Power . . . on resale.”50 Moreover, the court concluded that the used transformers sold by Georgia Power were useful despite the need to be remanufactured, and most continued to be used as transformers after resale rather than serve as scrap.51

As to the state of the product at the time of sale, the court found that the transformers filled with oil were not leaking and were capped when Georgia Power sold them to Ward.52 Although some transformers contained a film or sheen of residual oil despite being drained by Georgia Power, and certain transformers were not capped, “the fact that Georgia Power drained and disposed of PCB-laden oil before sale of those transformers shows that Georgia Power’s purpose for these transactions was to sell transformers to Ward and not dispose of the oil containing hazardous waste.”53 Lastly, the court stated that Georgia Power had no knowledge of spills of oil at the Ward site.54 For these reasons, the district court concluded Georgia Power lacked the requisite intent for arranger liability under § 107(a)(3) of CERCLA.55


Martin K. Eby Construction Co. was contracted to install an underground water pipeline that crossed several other underground pipelines, including Celanese’s methanol pipeline.56 While excavating the area containing Celanese’s pipeline, an Eby employee accidentally struck and damaged the pipeline with a backhoe.57 The employee “did not know what he had struck,” nor did he prepare a report of the incident.58 The Celanese pipeline subsequently leaked, which required Celanese to repair the pipeline and perform remediation.59 Celanese sought to recover its cleanup costs from Eby under CERCLA, arguing that Eby was an arranger under § 107(a)(3) because it “consciously disregarded” the “obligation to investigate what it hit” while excavating.60

Affirming the district court’s judgment, the U.S. Court of Appeals for the Fifth Circuit in Celanese held that Eby could not be liable as an arranger because it did not take intentional steps or plan for the release of methanol from Celanese’s pipeline.61 The court reasoned that Eby did not know it had struck the pipeline, much less intend to damage it.62 The court also noted that the Court in Burlington Northern “declined to impose arranger liability for a defendant with more culpable mens rea,” namely, the defendant oil company that arranged for the shipment of chemicals despite knowing that leaks and spills would occur.63 In these circumstances, Eby could not qualify as an arranger under CERCLA.

Vine Street LLC v. Borg Warner Corp., 776 F.3d 312, 2015 BL 8885, 79 ERC 1977, 5th Cir., No. 07-40440, (5th Cir. 2015)

Five years after Celanese, the Fifth Circuit revisited the scope of arranger liability in Vine Street. In that case, Norge, a former subsidiary of Borg Warner, designed, installed, and sold dry cleaning equipment to College Cleaners, including dry cleaning machines and a drainage system that included water separators that released wastewater into the sewer and recycled perchloroethylene for future use.64 Norge also sold perc to College Cleaners.65 From time to time, perc was released into the sewer through the water separators.66 Norge modified the design of the water separators to minimize the loss of perc, which was expensive, but perc continued to escape from the sewer system and eventually impacted soil and groundwater beneath College Cleaners and a neighboring property.67 Vine Street LLC, the purchaser of both properties, initiated remediation, and sought to recover a portion of the cleanup costs from Borg Warner under § 107(a)(3) of CERCLA on an arranger liability theory.68

Relying on Burlington Northern, the Fifth Circuit in Vine Street reversed the district court’s judgment and concluded that Norge did not constitute an “arranger” because it did not intend to discharge perc.69 The court reasoned that while Norge knew that perc would escape the water separators and enter the sewer system and that a discharge was inevitable, Norge intended for the water separators to recycle perc for future use, not to dispose of it.70 Norge also designed its dry cleaning equipment such that College Cleaners could reuse perc.71 Indeed, Norge developed additional measures to reduce discharge after learning that the water separators were not completely effective, which “cut[s] against a finding of intent.”72

Furthermore, in evaluating evidence of Norge’s intent to dispose of perc, the Fifth Circuit in Vine Street concluded that the business relationship and transaction between Norge and College Cleaners “centered around the successful operation of a dry cleaning business—not around the disposal of waste.”73 Stated differently, no evidence suggested that “Norge engaged in a subterfuge to disguise the disposal of perc as a legitimate transaction surrounding the operation of a dry cleaning business.”74 The “purpose of the transaction” between Norge and College Cleaners was to sell perc and dry cleaning equipment, both unused, useful products that were necessary to operate College Cleaners’ dry cleaning business.75 Therefore, Norge lacked the necessary intent to qualify as an arranger under CERCLA.

D. Seventh Circuit. NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682, 2014 BL 266977 (7th Cir. 2014)
From 1954 to 1971, NCR Corp. was the exclusive manufacturer and seller of emulsion for carbonless copy paper.\textsuperscript{76} That emulsion used Aroclor 1242, a PCB, as a solvent.\textsuperscript{77} PCBs were released with wastewater into the Lower Fox River in Wisconsin by NCR when producing carbonless paper, as well as by paper mills involved in the paper recycling business.\textsuperscript{78} Recyclers purchased NCR’s leftover scraps of carbonless copy paper, which is known as “broke,” washed off the PCBs and chemicals, and recycled the pulp to make paper.\textsuperscript{79} The primary reason for the transaction is that production of paper from recycled broke is less expensive than producing paper from scratch.\textsuperscript{80} Decades later, in 2007, NCR performed remediation of PCB contamination at the Lower Fox River site and sought contribution for the response costs from the recyclers.\textsuperscript{81}

Although the district court in NCR allocated all response costs to NCR and concluded that NCR was not entitled to contribution from the recyclers for cleanup at operable units 2 through 5,\textsuperscript{82} P.H. Glatfelter Co. and WTM Co. argued on appeal that NCR should have been liable as an arranger under § 107(a)(3) of CERCLA based on the sale of broke to recycling mills by NCR’s corporate predecessor, Appleton Coated Paper.\textsuperscript{83} Glatfelter argued that Appleton arranged for the disposal of PCBs when it sold broke to the recycling mills for processing.\textsuperscript{84} The significance of this argument is that a finding adverse to NCR on the arranger liability theory would make NCR liable for response costs at operable unit 1 and increase NCR’s exposure for contribution.\textsuperscript{85}

The Seventh Circuit in NCR affirmed the district court’s ruling following trial and held that Appleton did not constitute an arranger under CERCLA.\textsuperscript{86} The court found that Appleton’s “main purpose in selling broke was not to get rid of it, but instead to place it on a competitive market and recoup some of its costs of production.”\textsuperscript{87} Importantly, Appleton invested significant resources in recapturing broke, recorded the broke as an asset on its balance sheet, and would have disposed of broke differently if no market for it existed.\textsuperscript{88} In addition, Appleton did not sell containers of PCBs in an effort to get rid of them, but instead sold a product that is not inherently dangerous and often does not contain any PCBs.\textsuperscript{89} In addition, the broke had value to the recyclers given the higher cost to produce paper from scratch.\textsuperscript{90}

The Seventh Circuit rejected Glatfelter’s argument that Appleton should be subject to arranger liability simply because it intended to discard of the broke with knowledge that recyclers would separate the paper from the broke in the first place.\textsuperscript{91} Such a rule, the court stated, would “sweep almost any entity that ever touches the product under arranger liability,” including the original producer of the Aroclor who intentionally sold it to NCR knowing that some portion would be discarded down the line.\textsuperscript{92} That would expand arranger liability far beyond the bounds set in Burlington Northern.\textsuperscript{93}

The Seventh Circuit also noted that “[e]ven selling with perfect knowledge that the buyer will dispose of the materials at some point in the future cannot on its own qualify as arranging for disposal,” adding that “it is also important to look at the party’s intent.”\textsuperscript{94} In that case, Appleton had no control, by contract or otherwise, over the PCBs in the broke once the recyclers obtained the broke; the recyclers were free to sell the broke to another entity, contract with a disposal company to get rid of it, bring it to a landfill, or dump into the river.\textsuperscript{95}

Lastly, the Seventh Circuit in NCR stated that while broke is not a “new and useful product,” the product was “a useful input that also contained hazardous material.”\textsuperscript{96} The court emphasized that sales of a new, useful product represent only one end of the continuum and that sales of products “for more than token amounts and that take place on a competitive market that are useful, like broke, could remove the products from the realm of arranger liability.”\textsuperscript{97} Therefore, NCR was not liable as an arranger under § 107(a)(3) of CERCLA.

\section*{E. Ninth Circuit. Team Enterprises LLC v. Western Inv. Real Estate Trust, 647 F.3d 901, 2011 BL 193483 (9th Cir. 2011)}

Team Enterprises operated a dry cleaning store that used perchloroethylene as part of the cleaning process and in turn generated wastewater containing the chemical.\textsuperscript{98} To filter and recycle wastewater for reuse, Team Enterprises used a machine produced by R.R. Street & Co. called the Puritan Rescue 800.\textsuperscript{99} That machine returned distilled perc to Team Enterprises’ dry cleaning machines and deposited the wastewater into an open bucket.\textsuperscript{100} Team Enterprises disposed of the wastewater containing perc by pouring it down a sewer drain, thereby contaminating soil on the property.\textsuperscript{101} After the state regulator directed Team Enterprises to perform remedial action, Team Enterprises sought to recoup the costs of that remediation from R.R. Street under § 107(a)(3) of CERCLA.\textsuperscript{102} Team Enterprises argued that R.R. Street was liable as an arranger because it designed the perc-distilling machine “in such a way as to render disposal inevitable; failed to warn Team about the risk of contamination that would result from improper disposal; and exercised control over the disposal process.”\textsuperscript{103}
The U.S. Court of Appeals for the Ninth Circuit Court in *Team Enterprises* affirmed the district court’s order granting summary judgment to R.R. Street and held that R.R. Street was not subject to arranger liability because it did not sell the Rescue 800—a useful product—with the specific intent of disposing of perc. According to the court, “to satisfy the intent requirement, a company selling a product that uses and/or generates a hazardous substance as part of its operation may not be held liable as an arranger under CERCLA unless . . . the company entered into the relevant transaction with the specific purpose of disposing of a hazardous substance.”105 The court stated that the design of the Rescue 800 did not suggest that R.R. Street intended for the disposal of perc; at most, the design showed that “Street was indifferent to the possibility that Team would pour perc down the drain,” which is insufficient to establish arranger liability. Moreover, the court refused to infer intent from R.R. Street’s failure to warn because doing so would expand the scope of arranger liability beyond its intended parameters. Finally, according to the court, evidence that R.R. Street provided an instruction manual to Team Enterprises directing users to pour wastewater into a bucket was merely a recommendation and was not enough to establish that it exercised actual control over Team Enterprises’ disposal of perc such that R.R. Street qualified as an arranger. R.R. Street, therefore, was not subject to CERCLA arranger liability.


Around the time that the Ninth Circuit decided *Team Enterprises*, the court also issued a short, unpublished decision in *Hinds Investments* affirming the district court’s dismissal of the arranger liability claim of defendant/third-party plaintiff Team Enterprises, LLC against third-party defendant Cooper Industries Ltd. In that case, Team Enterprises leased property from the plaintiffs to operate a dry cleaning business. Cooper was the successor-in-interest to a former manufacturer of dry cleaning equipment whose Martin Sales American Laundry Machinery division franchised “One Hour Martinizing” dry cleaners with Team Enterprises. Team Enterprises used a Martin 30.0 Dry Cleaning Machine on plaintiffs’ property that was installed pursuant to Martin’s specifications and allegedly “was manufactured and/or designed by Martin to use PCE and to dispose of PCE into the environment.” The plaintiffs brought claims against Team Enterprises to recover costs to clean up PCE contamination at their property, and Team Enterprises sought contribution from Cooper, arguing that it “arranged for the disposal of hazardous substances.”

The district court in *Hinds Investments* concluded that Team Enterprises failed to sufficiently allege a claim for arranger liability because it made “no attempt to allege control of [the] discharge in that it merely concludes disposal of PCE and equipment installation pursuant to Martin specifications,” which allegations are “too far removed to attempt to impose arranger liability on Cooper.” The court also found that Team Enterprises offered no evidence that equipment design involving disposal of hazardous substances invokes CERCLA liability; alleged only that the Martin 30.0 machine used a hazardous substance that was later disposed of; and alleges nothing more than Cooper’s “effective design/manufacturer of dry cleaning equipment and installation specifications to invoke the useful product defense for Cooper.” In addition, the court noted arranger liability cannot be imposed on a party such as Cooper that did not own or possess the hazardous substances or have authority to control or duty to dispose of them, adding that “control over” the design of dry cleaning machines and provision of instructions on their use is insufficient ‘by themselves’ to hold a manufacturer/seller liable as an arranger. The court further reasoned that Team Enterprises’ allegations regarding provisions of the franchise agreement that gave Martin control of the quality of the services, required Team Enterprises to adhere to Martin’s practices, and gave Martin the ability to inspect dry cleaners, did not establish arranger liability because Team Enterprises “fail[ed] to tie such franchise agreement provisions to PCE disposal.”

The Ninth Circuit in *Hinds Investments* agreed with the district’s court’s findings, noting that (1) “Team’s allegations, taken as true, are too far removed to attempt to impose arranger liability on Cooper,” and (2) “Team failed to allege facts showing that Cooper entered into a dry cleaning franchise agreement for the purpose of disposing of [perchloroethylene] or that Cooper exercised actual control over the disposal process.” Therefore, Cooper could not be liable as an arranger.

**Considerations for Determining Intent for Arranger Liability**

The circuit court decisions regarding arranger liability under CERCLA demonstrate that the boundaries of intent for purposes of establishing liability are imprecise. Divining a party’s intent must be done on a case-by-case basis and will be a fact-intensive endeavor. Several factors identified in the case law will inform that inquiry and should be considered by businesses evaluating their potential liability from transactions involving hazardous substances or products containing such substances or acquisitions of companies involving in handling such materials.

**A. Does the product have a useful purpose?** The seller of a finished, useful product containing a hazardous substance—whether the product is brand new or refurbished—may be shielded from arranger liability for contamination resulting from the transport or use of...
that product. The following is a list of factors that are relevant to evaluating the usefulness of a product:

(a) the product serves a productive purpose;
(b) the existence of a viable, competitive market for the product;
(c) the value of the product to the purchaser (e.g., it can be resold for profit);
(d) the value of the product to the seller (e.g., it is sold for more than token amounts);
(e) the product is not obsolete;
(f) the product has not reached the end of its useful life (it is not merely scrap and can be reused);
(g) the product has resale value (and more than nominal resale value); and
(h) the product was in good condition when it was sold (i.e., not leaking or spilling).

In contrast, the seller of non-useful products or hazardous substances is more likely to be liable as an arranger because it is effectively getting rid of waste and delegating the responsibility for disposing of it to another party. This is so even if that party is willing to pay for the item.

**B. Is the sale transaction legitimate?** The circumstances surrounding the sale of a product containing hazardous substances may evince the intent to dispose of waste through an otherwise bona fide, legitimate transaction in which a purchaser is willing to buy the product. In other words, what was the purpose of the transaction? The underlying motive of a seller in a transaction is critical to answering that question. If a seller’s primary goal is to get rid of something useless, even if it had value to the purchaser, then a court is more likely to find arranger liability. But if the seller’s motive is to sell a useful product with a productive purpose and a well-established market, even if that product contains a hazardous substance that could be discarded by the purchaser, then arranger liability is less likely.

**C. What is the seller’s knowledge of the disposal?** A seller’s knowledge that a hazardous substance is or may be released at the purchaser’s property, alone, does not establish the required intent for arranger liability. Knowledge of spills, however, can provide some evidence of intent and must be weighed along with other relevant considerations.

**D. Who owns, possesses, or controls the product?** Ownership or possession of a product containing hazardous substances at the time of disposal is relevant to the determination of arranger liability. Similarly, the extent of a party’s control over the product when it is disposed is instructive. A party who does not own, possess, or have authority to control the product during disposal is less likely to be liable as an arranger.

**Tips to Mitigate the Risk of Arranger Liability**

Businesses should take precautions to reduce the likelihood of arranger liability under CERCLA. Many of these measures can be carried out by inserting certain terms in contracts with purchasers and distributors of products containing hazardous substances. Below is a non-exhaustive list of ways that a business can prevent arranger liability:

1. Perform a careful, thorough due diligence review before acquiring another company. Make sure you are aware of all historical practices and properties that may have involved the storage, use or disposal of hazardous substances.
2. Select only reputable distributors and contractors to transport hazardous substances. Know your vendors. Do not use the same vendors for sales as disposals.
3. Provide customers and distributors with detailed product safety manuals and instructions regarding the safe handling, storage and use of the product.
4. Require distributors to maintain safe and adequate storage facilities.
5. Request periodic access to distributors’ storage facilities to conduct inspections.
6. Require distributors and contractors to acknowledge and agree that they are aware of the risks of handling, storage and using the product.
7. Require distributors and contractors to agree to fully comply with all applicable laws regarding storage, handling and use of hazardous substances.
8. Specify in agreements with customers that the purpose of the transaction is the sale of a product and not disposal. Likewise, if you are not engaging in a transaction intending for the disposal of hazard substances, do not include language that could be interpreted as supporting such intent.
9. Treat sales and disposals differently within your business. Create different internal procedures and processes for each.
10. Require customers and distributors to indemnify, defend, and hold you harmless from claims relating to disposal of hazardous substances.
11. If you are aware of leaks or spills of hazardous substances by distributors or customers, take steps to minimize the possibility of future releases by those entities. Affirmatively prevent spills.
12. Do not accept or assume authority to control hazardous substances after you sell them to customers.
13. If you are selling a used product, adequately prepare the item for sale by removing any hazardous substances and ensure hazardous substances cannot be released from the product during transport or storage.
14. Treat used but useful products containing hazardous substances as assets on your balance sheet.
15. If you hire a contractor to dispose of hazardous substances, avoid involvement in transporting or storing the substances.

**Conclusion**

Following Burlington Northern, courts are now required to engage in a more fact-intensive inquiry to determine arranger liability under CERCLA. That inquiry focuses on the intent of the party alleged to have arranged for disposal of hazardous substances, without regard to any unpremeditated events and incidents that are beyond the control of the party. While there is no bright-line rule for determining the existence of intent, the key factors identified by courts and the suggestions enumerated here should serve as useful guideposts to businesses seeking to reduce their exposure to arranger liability.