

**RESTATEMENT FOR ARRANGER LIABILITY UNDER
CERCLA: IMPLICATIONS OF *BURLINGTON NORTHERN*
FOR SUPERFUND JURISPRUDENCE**

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INTRODUCTION

This past May, the United States Supreme Court for the first time addressed two issues that Congress left open in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA” or “Superfund”).¹ These issues are: (1) the scope of arranger or “generator” liability under the language of CERCLA section 107(a)(3)²; and (2) the circumstances in which a party under section 107³ may be held jointly and severally liable. The Court rejected the position of the United States Government on both issues. The Court found that the Government had attempted to extend CERCLA generator liability “beyond the limits of the statute itself.”⁴ It also found that despite the Government’s “refusal to acknowledge the potential divisibility of the harm,”⁵ the District Court’s rough formula limiting the generator liability of the defendants to nine percent of the Government’s total response costs “was supported by the evidence and comports with the apportionment principles”⁶ to which members of Congress had made reference in 1980.⁷

Because the Court first addressed these two issues more than twenty-eight years after CERCLA’s enactment and because of the fact that the Court rejected the Government’s litigation position, which it had asserted regularly in the lower courts, *Burlington Northern* has precedential implications for hundreds of lower court opinions relating to arranger liability and to the application of joint and several liability. Below, I survey decisions prior to *Burlington Northern* on the first of these issues, arranger liability, and assess their precedential effect in light of that decision. This

1. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006).

2. *Id.* § 9607(a)(3).

3. § 9607.

4. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1879 (2009).

5. *Id.* at 1881.

6. *Id.* at 1883.

7. *See id.* at 1881 (stating Congress’s desire that CERCLA follow “traditional and evolving principle of common law”).

article will adopt the artifice of a hypothetical “Restatement” for this area of Superfund jurisprudence. It will follow a structure consisting of three subdivisions: (1) the black-letter law, reflecting an assessment of the current applicable legal rules in summary form after *Burlington Northern*; (2) Comments and Illustrations reflecting an elaboration and application of these rules with reference to prior cases; and (3) Reporter’s Notes, reflecting commentary about these rules, applications, and likely areas of ambiguity or dispute that courts may need to visit or revisit in light of *Burlington Northern*.

I. RESTATEMENT OF THE LAW: CERCLA ARRANGER OR “GENERATOR” LIABILITY

Notwithstanding any other provision or rule of law, and subject only to the defenses expressly set forth in CERCLA, any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . from which there is a release, or a threatened release which causes the incurrence of responses costs, of a hazardous substance . . . shall be liable for: 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; any other necessary costs of response incurred by any other person consistent with the national contingency plan; 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 release; and the costs of any health assessment or health effects study carried out under subsection i [of CERCLA section 104].⁸

II. COMMENTS AND ILLUSTRATIONS

A. Scope

This Restatement addresses issues of arranger or “generator” liability arising under CERCLA section 107(a)(3), 42 U.S.C. § 9607(a)(3), as they

8. § 9607(a).

stand after the Supreme Court's decision in *Burlington Northern*.⁹ It explores how the decision likely impacts prior holdings of the lower courts on many arranger liability issues not directly addressed in the Supreme Court's holding. The Restatement is limited to a discussion of arranger liability and does not generally address principles regarding other classes of potentially responsible parties (PRPs), except insofar as they relate to arranger liability.¹⁰

Arranger liability under section 107(a)(3) significantly expanded hazardous waste cleanup liability from the federal law that existed prior to its enactment in 1980, especially considering its intended retroactive application.¹¹

For the sake of simplicity, except where the context indicates otherwise, this Restatement uses the word "damages" to encompass response costs, natural resource damages, and the costs of health effects studies recoverable under section 107(a).¹² Similarly, the word "harm" is interchangeable with "release, and threatened release" within the CERCLA context.¹³

B. History

Generally, CERCLA is "not a model of legislative draftsmanship"¹⁴: the courts have described it as "hastily-drawn,"¹⁵ "fragmented,"¹⁶ with a "well-deserved notoriety for vaguely-drafted revisions and an indefinite, if not contradictory, legislative history."¹⁷ More specifically, Congress deliberately left many liability issues open, indicating, "[i]t is intended that issues of liability not resolved by this act, if any, shall be governed by

9. *Burlington Northern*, 129 S. Ct. at 1870.

10. See *infra* Parts II.G–H. Note that the *Burlington Northern* decision of the Supreme Court did not directly address the apportionment of CERCLA liability to generators in its holding since it found Shell Oil Company, the "generator" appellant, not liable at all under section 107(a)(3). *Burlington Northern*, 129 S. Ct. at 1880 ("Having concluded that Shell is not liable as an arranger, we need not decide whether the Court of Appeals erred in reversing the District Court's apportionment of Shell's liability for the cost of remediation.").

11. See *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997) (upholding constitutionality of CERCLA's retroactive effect). But see Alfred R. Light, "Taking CERCLA Seriously: The Constitution Really Does Limit Retroactive Liability," 13 *Toxics L. Rep.* (BNA) 238, 238–44 (July 15, 1998).

12. See 42 U.S.C. § 9601(6), (16), (22), (23), (24) (2006) (defining "damages", "natural resources", "remove or removal", and "remedy or remedial action").

13. See § 9601(22) (definition of "release").

14. *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986).

15. *Violet v. Picillo*, 648 F. Supp. 1283, 1288 (D.R.I. 1986), *aff'd*, *O'Neil v. Picillo* 883 F.2d 176 (1st Cir. 1989).

16. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 204 (W.D. Mo. 1985).

17. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (5th Cir. 1989) (quoting *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985)).

traditional and evolving principles of common law.”¹⁸ The language of section 107(a)(3) is a modification of language in Senate Bill S.1480 as reported from the Senate Environment and Public Works Committee in 1980.¹⁹

C. “Person”

The “person” potentially liable as an arranger may be “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.”²⁰ Parent corporations are not derivatively liable absent a traditional basis for piercing the corporate veil.²¹ Individuals are not derivatively liable absent personal involvement in disposal practices.²²

D. “By Contract, Agreement, or Otherwise Arranged For”

To qualify as an arranger, a person must have entered into a transaction “with the intention that at least a portion of the product [which is the subject of the transaction] be disposed of” or treated.²³ The word “arrange” implies action directed to a specific purpose.²⁴ “[K]nowledge alone is insufficient to prove that an entity ‘planned for’ the disposal, particularly when the

18. 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, at 686 (1983) [hereinafter LEGIS. HIST.].

19. *Id.* at 485–86.

20. 42 U.S.C. § 9601(21) (2006).

21. *United States v. Bestfoods*, 524 U.S. 51, 62–64 (1998).

22. *See Riverside Mkt. Dev. Corp. v. Int’l Building Prods., Inc.*, 931 F.2d 327 (5th Cir. 1991) (finding corporate officer not liable because he did not personally participate in company’s disposal of asbestos); *Rockwell Int’l Corp. v. IU Int’l Corp.*, 702 F. Supp. 1384, 1390 (N.D. Ill. 1988) (“Mere ability to exercise control as a result of the financial relationship of the parties is insufficient for liability to attach. The entity must actually exercise control.”). *But cf.* *United States v. New Castle County*, 727 F. Supp. 854, 868–69 (D. Del. 1989), *aff’d on other grounds sub nom.*, *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997) (declining to find liable a state closely involved in planning and regulation of disposal site). An “operator” of the polluted facility requiring cleanup, however, is directly liable. *Bestfoods*, 524 U.S. at 65. Operate means to “manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” *Id.* at 66–67. The Supreme Court’s holding in *Bestfoods* concerning the operator liability of a parent corporation “also logically applies to cases involving arranger liability.” *Raytheon Constructors, Inc. v. Asarco, Inc.*, 368 F.3d 1214, 1220 (10th Cir. 2003) (citing *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 846 (6th Cir. 1999)).

23. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1879–80 (2009).

24. *Id.* at 1879.

disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.”²⁵

Illustrations

1. *A* enters “into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance.”²⁶ *A* is liable as an arranger.²⁷

2. *A*, the original owner of Facility 1 and the generator of contaminated mud there, sold the property to *B*. *B* subsequently arranged for disposal of the waste mud at Facility 2, owned and operated by *C*. *C* sued *A*, alleging that by selling Facility 1, *A* had “arranged for” disposing of the site’s leftover contaminated waste mud. Even though in selling the entire property to *B*, *A* also sold whatever waste existed on Facility 1, *A* did not arrange for the disposal of the waste mud from Facility 1 to Facility 2. *A* is not liable as an arranger.²⁸

3. *A* sells used transformers containing the hazardous substance PCB to *B*. *B* subsequently, unbeknownst to *A*, disposes of the transformers in a way that leads to contamination. *A* is not liable as an arranger.²⁹

4. *A* is aware that minor, accidental spills occurred during the transfer of a product containing a hazardous substance from a common carrier to *B*’s bulk storage tanks after the product had arrived at the facility and had come under *B*’s stewardship. This knowledge does not support an inference that *A* intended such spills to occur. *A* is not liable as an arranger for the contamination that occurred at *B*’s facility.³⁰

E. “Disposal or Treatment”

The statute requires that the subject of the arrangement triggering liability be “disposal or treatment” of hazardous substances. The statute broadly defines “disposal” as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water”³¹ However, to qualify as an arranger, a person

25. *Id.* at 1880.

26. *Id.* at 1878.

27. *Id.*

28. *Jersey City Redevelopment Auth. v. PPG Indus.*, 655 F. Supp. 1257, 1260–61 (D.N.J. 1987), *aff’d*, 1988 U.S. Dist LEXIS 16848 (3d Cir. 1987).

29. *Fla. Power & Light v. Allis Chalmers Corp.*, 893 F.2d 1313, 1319 (11th Cir. 1990).

30. *Burlington Northern*, 129 S. Ct. at 1880.

31. 42 U.S.C. § 9603(3) (2006) (RCRA definition adopted for CERCLA at 42 U.S.C. § 9601(29)).

must have entered into a transaction “with the intention that at least a portion of the product [which is the subject of the transaction] be disposed of . . . by one or more of the methods described” in this definition.³² Simply knowing that “spilling” and “leaking” may occur as a collateral consequence of the transaction is not sufficient to justify liability.³³

Illustrations

1. *A* supplies creosote and other hazardous chemicals to *B* for wood treatment. *A* had also been involved in the design, construction, and continuation of *B*'s facility, where the wastes were generated and deposited. *A*'s transaction was not for the purpose of disposing or treating *the substance* at *B*'s site. *A* is not liable as an arranger to remedy *B*'s site.³⁴

2. *A* shipped used bearings to a Foundry for processing into new bearings. In exchange for the used bearings, *A* received credit for the weight of the bearings against a purchase of new wheel bearings (after a deduction for the weight of dirt and grease). The used wheel bearings transported to the Foundry were dirty and broken when they arrived. Moreover, the bearings were melted down in a process that produced dirt and slag (both of which were dumped in a back lot with sand, which was found to be contaminated). However, slag and dust would be produced even if virgin materials were used to make new bearings. Removal of contaminants was not the purpose of the transaction; rather, the intent of

32. *Burlington Northern*, 129 S. Ct. at 1880.

33. *Id.*; *Fla. Power & Light*, 893 F.2d at 1317–18, cited in *Burlington Northern*, 129 S. Ct. at 1878–79; see *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999) (finding sale of unused chemicals not a disposal arrangement); see also *Dayton Indep. School Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1066 (5th Cir. 1990) (finding that “CERCLA does not provide a remedy for asbestos removal” under disposal arrangement).

34. *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988) (“The statute does not fix liability on slipshod architects, clumsy engineers, poor construction contractors, or negligent suppliers of on-the-job training—and the fact that [the defendant] might have been all four rolled into one does not change matters.”); see *Kelley ex rel. Mich. Natural Res. Co. v. ARCO Indus. Corp.*, 739 F. Supp. 354, 359 (W.D. Mich. 1990) (holding that a sale was not an arrangement even where hazardous substance was not necessary to functioning of product); *Prudential Ins. Co. v. U.S. Gypsum Co.*, 711 F. Supp. 1244, 1253 (D.N.J. 1989) (“In the absence of the disposal of or an arrangement for the disposal of a hazardous substance, liability under § 9607(a)(3) cannot attach.”); *United States v. Westinghouse Elec. Corp.*, 22 ENV'T REP. CAS. (BNA) 1230, 1233 (S.D. Ind. 1983) (finding no liability for third-party defendant who did not contract for disposal of waste). *Contra United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1379–80 (8th Cir. 1989) (holding a chemical manufacturer liable for cleanup for sending chemical waste to independent contractor to formulate pesticides, even though manufacturer had no control or knowledge over the formulator's waste-disposal practices, because generation of waste by the formulator was inherent in the process for which the manufacturers had contracted).

both parties was to create new wheel bearings. *A* is not liable as an arranger.³⁵

F. "Of Hazardous Substances Owned or Possessed by Such Person"

The statute requires "proof of ownership, or at least possession" of the hazardous substance that is the subject of the disposal arrangement as a required factor for liability.³⁶ Constructive rather than actual possession of the waste may be sufficient, however, and liability may be established by demonstrating a defendant's control over the waste.³⁷

Illustrations

1. *A* arranged for the disposal of wastes generated by *B*, due to a fire at *B*'s chemical plant, which are transported and disposed of by *C*, an independent contractor paid by *B*. *A* may or may not be liable as an arranger, depending upon whether *A* assumed the obligation to control or the duty to dispose of the hazardous materials at issue.³⁸

2. *A* and *B* entered into an agreement to build a manufacturing plant that would convert TDA (which *B* would produce) into TDI (which *A* would purchase and use for its own production of urethane foam). The generation of toxic waste was a natural byproduct of this manufacturing process. *A* approved the plant design specifications and capital expenditure requests. The construction plans specifically provided that the hazardous waste generated by the TDI Plant would be placed in drums and buried at

35. *Pnemo Abex Corp. v. High Point, Thomasville & Denton R. Co.*, 142 F.3d 769, 775 (4th Cir. 1998), cited in *Burlington Northern*, 129 S. Ct. at 1879.

36. *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 678 (3d Cir. 2003).

37. *See id.* at 677 (holding *inter alia* that one of the most important factors of arranger liability is control over the production process); *see also* *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 24 (1st Cir. 2004) (finding that "a waste broker may be liable as an arranger if the broker controls the disposal of the waste"); *United States v. Shell Oil Co.*, 294 F.3d 1045, 1057 (9th Cir. 2002) (finding the United States not liable as arranger, because it never owned any of the waste products, did not exercise any control over waste disposal, and did not have an obligation to control the manner of waste disposal); *Gen. Elec. Co. v. Aamco Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (finding that obligation to control wastes sufficient to impose liability); *Transp. Leasing Co. v. California*, 861 F. Supp. 931, 949 (C.D. Cal. 1993) (finding that ownership or possession can be actual or constructive). *But cf.* *United States v. Bliss*, 667 F. Supp. 1298, 1306 (E.D. Mo. 1987) (holding broker liable if it has authority to control the place and manner of the disposal).

38. *Bliss*, 667 F. Supp. at 1306-07 (holding that a party need not have actual ownership or possession of the waste to be liable). *But see* *Shell Oil Co.*, 294 F.3d at 1056 (distinguishing 8th Circuit decisions in *Aceto* and *Continental Ins. Cos. v. Northern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988), where the liable parties were either the source of the pollution or managed its disposal by the arranger because the obligation to exercise control, rather than the mere ability or opportunity to exercise control, is necessary for arranger liability).

an offsite location. A joint committee of the two companies included plans and preparations for waste disposal, research and recommendations on waste disposal locations, and approved methods for reducing the volume of waste sent offsite. Considered together, these facts demonstrate that the parties arranged for disposal of hazardous substances. *A*'s control of the hazardous substances suffices to establish constructive ownership and possession of the hazardous substances disposed of.³⁹

G. "By Any Other Party or Entity"

Arranger liability applies only where the arrangement is for disposal by a different party or entity. Because a disposer is liable as an "operator," there is no need to resort to the arranger provision to establish liability over such a person. If a party actually disposes of the hazardous substance itself, it is liable as "[a] person who at the time of disposal . . . operated any facility at which such hazardous substances were disposed of."⁴⁰

H. "At Any Facility or Incineration Vessel Owned or Operated by Another Party or Entity and Containing Such Hazardous Substances"

Arranger liability applies only where the arrangement is at a facility or vessel owned or operated by another party or entity containing the hazardous substances that were the subject of the arrangement. Where the same person who arranged for disposal of hazardous substances also owns or operates the facility where those substances are disposed, the person is liable as an "owner or operator" and arranger liability is not needed. Unlike arranger liability, "owner or operator" liability may exist whether or not the defendant planned the disposal.⁴¹ A present "owner or operator" may be liable regardless of his involvement (or lack thereof) in the disposal of the hazardous substances.⁴² To establish liability under the arranger provision, the plaintiff must show that the hazardous substances that were the subject of the defendant's arrangement for disposal are *contained* at the facility

39. GenCorp, Inc. v. Olin Corp., 390 F.3d 433, 449 (6th Cir. 2004).

40. 42 U.S.C. § 9607(a)(2) (2006).

41. *E.g.*, Nurad, Inc. v. William E. Hooper & Sons, 966 F.2d 837, 840 (4th Cir. 1992) (holding that CERCLA section 107(a)(2) imposes liability on the party that owns the facility at the time hazardous waste leaks from an underground storage tank on the premises, reversing a decision holding that proof of an affirmative participation in hazardous waste disposal was a prerequisite to liability).

42. § 9607(a)(1); *e.g.*, United States v. Twp. of Brighton, 153 F.3d 307, 330 (6th Cir. 1998), *cited in* Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1882 (2009).

from which there is a release or threat of release.⁴³ Absent direct proof regarding the removal of defendant's particular waste from a facility to which it was sent, a showing that waste chemically similar to waste of the defendant is sufficient.⁴⁴ A showing that the defendant intended that his waste go to the particular facility at issue is unnecessary.⁴⁵

I. "From Which There Is a Release, or a Threatened Release Which Causes the Incurrence of Response Costs, of a Hazardous Substance"

In his prima facie case, the plaintiff need not show that a specific defendant's waste caused the incurrence of cleanup-costs.⁴⁶ Plaintiff need only prove that the defendant's hazardous substances were deposited and contained at the site from which there was a release and that the release caused the incurrence of response costs.⁴⁷ This is the only required "nexus" in the prima facie case.⁴⁸ Where the plaintiff seeks recovery of natural resource damages rather than response costs, it must show that the defendant's substances are a "contributing factor" to the damages.⁴⁹

Illustrations

1. *B* disposed of hazardous substances on its property near the facility requiring cleanup. *B*'s disposal, however, was not connected to the different contamination on plaintiff's property and no investigation or remediation had been undertaken in response to the wastes disposed of by defendant. Plaintiff has not established the required "nexus" between defendant's disposal and the incurrence of response costs.⁵⁰

43. § 9607(a)(3).

44. *United States v. Hercules, Inc.*, 247 F.3d 706, 716 n.8 (8th Cir. 2001).

45. *E.g.*, *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 234 (W.D. Mo. 1985) ("[T]he statute does not require that the generator select the site in order to be liable [T]he statute imposes liability upon any person who 'arranged for disposal or treatment . . . at any facility owned or operated by another party or entity.'").

46. *Hercules, Inc.*, 247 F.3d at 716 n.8, cited in *Burlington Northern*, 129 S. Ct. at 1881; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1151-54 (1st Cir. 1989); *Durham Mfg. Co. v. Merriam Mfg. Co.*, 294 F. Supp.2d 251, 268 (D. Conn. 2003).

47. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3d Cir. 1992), cited in *Burlington Northern*, 129 S. Ct. at 1881; *United States v. Union Corp.*, 259 F. Supp.2d 356, 384 (E.D. Pa. 2003).

48. *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp.2d 105, 135-37 (N.D. N.Y. 2003).

49. *Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F. Supp.2d 1094, 1124 (D. Idaho 2003); *United States v. Montrose Chem. Corp. of Cal.*, 33 Env't Rep. Cas. (BNA) 1207 (C.D. Cal. 1991).

50. *Niagara Mohawk Power Corp.*, 291 F. Supp.2d at 136.

2. Hazardous substances originating at site A, owned by plaintiff, and site B, owned by defendant, commingled. Site A requires remediation. The plaintiff, on summary judgment, (a) identifies a contaminant at site A, (b) identifies the same contaminant (or perhaps a chemically similar) contaminant at the defendant's site B, and (c) provides evidence of a plausible migration pathway by which the contaminant could have traveled from the defendant's facility to the plaintiff's site. The plaintiff has met its burden of production. To avoid summary judgment, defendant must proffer evidence sufficient to create a genuine issue of material fact as to its ability to disprove causation.

3. A operated a portion of the Water Street Site, the Wynantskill Creek, into which A spilled a number of hazardous substances. B brought an action seeking to recover costs in response to releases of such hazardous substances at Area 2 of the Water Street site. B fails to prove that hazardous substances migrated from the Wynantskill Creek onto Area 2, which B remediates. No investigations or remedial actions by B relate to Wynantskill Creek. B has not shown the required nexus between any purported release on A's property and remediation at Area 2. Thus, A is not liable.⁵¹

Even where a person falls within the scope of arranger liability, he may escape partial or total responsibility for response costs or damages if those costs or damages can be divided by causation.⁵² For example, no liability accrues where spills of substances that were the subject of the arrangement do not require remediation.⁵³ The Restatement (Third) of Torts explains that “[d]amages can be divided by causation when” any person or group of persons “to whom the factfinder assigns a percentage of responsibility [or any tortious act of such a person] was a legal cause of less than the entire damages.”⁵⁴ Divisibility is entirely a technical, scientific inquiry having nothing to do with culpability, cooperation, or any other conduct factors that may bear on the allocation of costs in a CERCLA contribution action.⁵⁵ Any basis upon which contributions of a defendant can be measured or

51. *Id.* at 135–36.

52. The topic of joint and several liability after *Burlington Northern* is the subject of another article by this author, Alfred R. Light, *Restatement for Joint and Several Liability Under CERCLA After Burlington Northern*, 39 ENVTL. L. REP. 11058 (2009).

53. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1882–83 (2009) (discounting the railroad's liability because chemical contamination at the railroad parcel did not require remediation).

54. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26(b)(1) (1999).

55. Gerald W. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 U. DAYTON L. REV. 267, 359 (1996).

compared to contributions of others may provide a basis for divisibility.⁵⁶ For a person held liable as an arranger, the basis for comparison may be volume⁵⁷ or comparative toxicity.⁵⁸ Some bases which a court may use to divide damages by causation also may be equitable factors, which the same court may use to allocate costs among jointly and severally liable persons where damages are not divisible.⁵⁹

4. *A* manufactured aluminum sheet and plate products, which produced as a byproduct an emulsion consisting of ninety-five percent deionized water and five percent mineral oil. Trace quantities of hazardous substances were also contained in the emulsion. *A* arranged for the disposal of used emulsion with *B*, who disposed of it through a borehole into the site. The release of hazardous substances at the site caused the government to incur response costs. After assessing the relative toxicity, migratory potential, and synergistic capacity of substances in the release causing the incurrence of response costs at the site, *A* showed that the emulsion did not and could not, when mixed with other hazardous substances, contribute to the release and the resultant response costs. Though nominally a liable

56. *Id.* at 360; see *United States v. Hercules, Inc.*, 247 F.3d 706, 719 (8th Cir. 2001) (explaining that it is possible to prove divisibility of single harms based on volumetric, chronological, and other types of evidence or establishment of “non-contiguous areas of contamination”).

57. *In re Bell Petroleum Servs. Inc.*, 3 F.3d 889, 901–02 (5th Cir. 1993), cited in *Burlington Northern*, 129 S. Ct. at 1881; *Kamb v. U.S. Coast Guard*, 869 F. Supp. 793, 799 (N.D. Cal. 1994) (apportioning liability based on the volume of lead each defendant contributed to the site and based on the divisibility of the site into two discreet sections—one section used by defendants and one unused by defendants).

58. *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 937–38 (8th Cir. 1995) (allocating by toxicity in a contribution action).

59. Courts frequently make reference to the Gore factors, named for Rep. Al Gore in an amendment that did not become part of CERCLA, as equitable allocation factors. These include some factors potentially relevant to divisibility, such as the distinguishability of a defendant’s discharge from other discharges, amount of hazardous waste involved, degree of toxicity of the hazardous waste involved, and the degree of involvement by the parties in generation, transportation, treatment, storage, or disposal of the wastes. Other Gore factors appear unrelated to causation, such as the degree of care exercised with respect to the hazardous waste concerned and the degree of cooperation with Federal, State, or local officials to prevent any harm to the public health or environment. *United States v. Twp. of Brighton*, 153 F.3d 307, 318 n.16 (6th Cir. 1998) (“Some of the Gore factors (1, 2, and 3) are compatible with causation analysis; others (5 and 6) reflect fairness concerns; at least one (4) does both.”), cited in *Burlington Northern*, 129 S. Ct. at 1881; *Allied Signal, Inc. v. Amcast Int’l Corp.*, 177 F. Supp. 713 (S.D. Ohio 2001) (listing and analyzing the Gore factors and describing their legislative background); *United States v. Cantrell*, 92 F. Supp. 2d 704, 711 (S.D. Ohio 2000) (“Divisibility determinations are to be based on legal considerations of causation, not of equitable considerations of fairness. Considerations of fairness which are not relevant to divisibility determinations include the degree of care taken by the PRPs and the degree of cooperation by the PRPs with the government to prevent harm to the environment or public.”) (internal citation omitted).

party under CERCLA as an arranger, *A* has divided the damages by causation and is not liable for *any* response costs.⁶⁰

5. *A* owned the real property at the site, a twenty-four-block area north of the Brazo Street facility, a chrome-plating shop operated successively from 1971 through 1977 by *A*, *B*, and *C*. *A* owned the property from 1967 through 1981 and conducted chrome-plating activities there in 1971 and 1972. In 1972, *B* purchased the shop and leased the property from *A*. *B* continued to conduct similar, but more extensive, chrome-plating activities there until mid-1976. In August 1976, *C* purchased the assets from *B*, leased the property from *A*, and conducted similar chrome-plating activities there until late 1977. The release of hazardous substances at the site caused the government to incur response costs and to sue *A*, *B*, and *C* for reimbursement. Various witnesses testify regarding the rinsing and wastewater disposal practices of each defendant and the amount of chrome-plating activity conducted by each. *C* introduces expert testimony regarding a volumetric approach to apportionment, calculating the total amount of chromium that had been introduced into the environment by *A*, *B*, and *C*, collectively and individually. A second expert estimated the amount of chromium on the basis of electrical usage records. *C* has established a reasonable basis for division of the damages by causation.⁶¹

“Whether damages are divisible is a question of fact.”⁶² “A party alleging that damages are divisible [ordinarily] has the burden to prove they are divisible.”⁶³ “The magnitude of each divisible part is also a question of fact. The burden to prove the magnitude of each part is on the party who

60. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268–69, 271 (3d Cir. 1992), cited in *Burlington Northern*, 129 S. Ct. at 1881. In this illustration—unlike in *Alcan* on remand—*A* proffered sufficient evidence showing that the emulsion could not have contributed to the release and is therefore able to avoid liability. Cf. *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648, 657 (M.D. Pa. 1995) (granting summary judgment in favor of the Government and full reimbursement of its response costs upon *Alcan*’s failure to present evidence on apportionment of the harm).

61. *In re Bell Petroleum Servs., Inc.*, 3 F.3d at 902–04, cited in *Burlington Northern*, 129 S. Ct. at 1881. Professor Boston characterizes this decision and the two circuit decisions involving *Alcan Aluminum Corporation* as “agreeing that divisibility of the harm could be established even if wastes were commingled.” Boston, *supra* note 55, at 357.

62. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. h (1999); see generally *Price v. U.S. Navy*, 39 F.3d 1011, 1018 (9th Cir. 1994) (affirming assignment of percentages of liability to two defendants [95% to Navy, 1% to home builder] and declining to second guess discretion of court in apportioning liability). But cf. *In re: Dana Corp.*, 379 B.R. 449, 457–58 (S.D. N.Y. 2007) (divisibility analysis is “intensely factual” but the preliminary matter of whether harm is capable of apportionment is a question of law).

63. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. h (1999); see *Raytheon Aircraft Co. v. United States*, 532 F. Supp. 2d 1306, 1310 (D. Kan. 2007) (placing divisibility burden on Government as defendant in private cost recovery action); *In re: Dana Corp.*, 379 B.R. at 457.

seeks division.”⁶⁴ Notwithstanding this ordinary burden, both the Restatement (Second) and the Restatement (Third) of Torts have noted the potential unfairness of this general rule because it can impose full liability on a defendant who only caused part of the damages.⁶⁵ The Third Restatement recommends that the “more attractive solution is to place the burden of proof on the party seeking to avoid responsibility for the entire injury, along with relaxing the burden of production.”⁶⁶ Under *Burlington Northern* where an apportionment analysis is demanded by the circumstances of a case, a court may apportion liability *sua sponte*, even if not advanced by a defendant.⁶⁷

J. Defenses

Affirmative defenses expressly set forth in CERCLA are found in sections 107, 113, and 122.⁶⁸ They are not addressed in this Restatement.⁶⁹

64. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. h (1999).

65. *Id.*; RESTATEMENT (SECOND) OF TORTS § 433B (1964).

66. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. h (1999); *see* *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) (“Alcan as the polluter bears the ultimate burden of establishing a reasonable basis for apportioning liability.”); *United States v. Alcan Aluminum Corp.*, 2006 U.S. Dist. LEXIS 24309, *34–36 (N.D. N.Y. Apr. 26, 2006) (denying motion for summary judgment in favor of jury trial on divisibility, indicating potential divisibility of Alcan wastes “chronologically, physically, and geographically,” apportionment by volume, and an analysis of issues of relative toxicity, migratory potential, and synergy); *United States v. Agway, Inc.*, 193 F. Supp. 2d 545, 548 (N.D. N.Y. 2002) (“To defeat a motion for summary judgment on the issue of divisibility, a defendant ‘need only show that there are genuine issues of material fact regarding a reasonable basis for apportionment of liability.’” (quoting *Alcan Aluminum Corp.*, 990 F.2d at 722)); *United States v. Chrysler Corp.*, 29 Chem. Waste Litig. Rep. 566, 576 (D. Del. Dec. 9, 1994) (“[A]n evidentiary hearing should be conducted and summary judgment should not be granted when there is a genuine issue of material fact as to whether there is a reasonable basis for apportioning liability.”).

67. In *Burlington Northern*, the parties “left the court to independently perform the equitable apportionment analysis demanded by the circumstances of the case.” *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1881 (2009). The Supreme Court’s upholding implicitly found the District Court’s *sua sponte* apportionment analysis permissible. *Id.* It did this despite the United States’s argument that this mode of procedure deprived it of a fair opportunity to respond to the court’s theories of apportionment and to rebut their factual underpinnings. *Id.* at 1886 (Ginsburg, J., dissenting).

68. 42 U.S.C. §§ 9607, 9613, 9622 (2006).

69. That only express defenses are recognized does not mean that certain other universally applicable legal principles, sometimes denominated as affirmative defenses but not explicitly endorsed in CERCLA’s language (e.g., collateral estoppel, accord and satisfaction, and *res judicata*), are unavailable. *See* *Town of Munster v. Sherwin-Williams Co.*, 27 F.3d 1268, 1272 (7th Cir. 1994) (explaining that a CERCLA defendant should be able to raise *res judicata* as a matter of public policy); *Cal. Dep’t. of Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1038 (C.D. Cal. 2002) (noting that *res judicata*, collateral estoppel, and accord and satisfaction are available to CERCLA defendants).

III. REPORTER'S NOTES

A. Scope

The parameters of the arranger or “generator” liability provision set forth in section 107(a)(3) have been among the most fiercely litigated issues under CERCLA. As the Supreme Court put it in *Burlington Northern*, the primary reason for fierce litigation has been the government’s push for CERCLA liability to “extend beyond the limits of the statute itself.”⁷⁰ Without clear statutory language or legislative history supporting its position, the government resorted to policy arguments. For example, they argued that CERCLA intends to place responsibility for cleanup on “those responsible for problems caused by the disposal of chemical poisons.”⁷¹ They also counseled for a “liberal judicial interpretation . . . consistent with CERCLA’s ‘overwhelmingly remedial’ statutory scheme”⁷² and broad, conclusory principles not to interpret the statute “in any way that apparently frustrates the statute’s goals, in the absence of a specific congressional intent otherwise.”⁷³ A broad goal is simply to provide the government with the “tools” it desires for a “prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal.”⁷⁴ It buttressed the approach by resorting to common law liability principles, without reference to CERCLA’s statutory language.⁷⁵ The government has used this approach in other areas of CERCLA liability.⁷⁶

Starting in the late 1990s, however, circuit courts began to put an end to this policy approach, which amounts to the notion that the government should win simply because it is the government. *Burlington Northern*, which uses the traditional approach to statutory interpretation found in the opinions of Justice Thomas in *Atlantic Research*⁷⁷ and *Cooper Industries*,⁷⁸

70. *Burlington Northern*, 129 S. Ct. at 1879.

71. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989) (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)).

72. *Aceto*, 872 F.2d at 1380 (quoting *United States v. Ne. Pharmaceutical & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986)).

73. *Id.* (quoting *Dedham Water Co.*, 805 F.2d at 1081).

74. *Id.*

75. *Id.* at 1379 (dealing with the liability of the employer of an independent contractor) (citing RESTATEMENT (SECOND) OF TORTS § 427A (1964)).

76. See Alfred R. Light, *CERCLA’s Cost Recovery Statute of Limitations: Closing the Books or Waiting for Godot?* 16 SE. ENVTL. L.J. 248, 281–84 (2008) (arguing that the earliest courts interpreting CERCLA improperly deferred to the government’s litigation positions in interpreting CERCLA’s statute of limitations using “conclusory policy reasoning”).

77. *United States v. Atl. Research Corp.*, 551 U.S. 128, 135–37 (2007) (interpreting CERCLA section 107(a)(4)(B)).

indicates that the United States Supreme Court also squarely rejects this jurisprudential approach.⁷⁹

B. History

Despite the well-deserved notoriety of CERCLA's legislative process in 1980, the arranger liability provision in section 107(a)(3) bears hallmarks of careful legislative attention to the language delimiting the parameters of the provision. In 1980, the Senate Committee on Environment and Public Works narrowed CERCLA's language, holding liable any "person who caused or contributed to or is causing or contributing to . . . such release, including . . . generators."⁸⁰ The description of "generator" in the bill tracks the current language, except that it requires the hazardous substances be "at facilities or sites owned or operated by *such* other party or entity," seeming to imply a requirement that the "generator" arrange for disposition of waste at the other contracting party's facility.⁸¹ If so, the final language negotiated in the lame-duck session clarified or broadened the "generator" category to include a broader class of disposal arrangements through deletion of the word "such." That Senators on this Committee (or committee staff) focused on "such" is of some interest in light of the problematic judicial construction of the word as it appears in the final language.⁸² The final language, however, is narrower than the language in the bill that had passed the House, which was very similar to the language in the original Senate bill described above.⁸³

C. "Person"

The Supreme Court's 1998 decision in *Bestfoods*⁸⁴ superseded a number of lower court opinions that had held derivatively liable a person who exercised pervasive control over a liable entity even in the absence of

78. See *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 165–66 (2004) (interpreting CERCLA section 113(f)).

79. Light, *supra* note 76, at 284.

80. LEGIS. HIST., *supra* note 18, at 169.

81. *Id.* at 486 (emphasis added).

82. See *infra* notes 99–103 and accompanying text (discussing the literal interpretation of "such" versus traditional canons of statutory construction).

83. H.R. REP. NO. 96-510, § 107(a)(4) (1980) (adding section 3071(a)(1)(D)(b), LEGIS. HIST., *supra* note 18, at 438) (imposing liability on "any person who caused or contributed to the release or threatened release").

84. *United States v. Bestfoods*, 524 U.S. 51 (1998).

specific evidence about control over waste-disposal practices.⁸⁵ An opinion holding a secured creditor liable on such a theory has been superseded by statutory amendment.⁸⁶

D. “By Contract, Agreement, or Otherwise Arranged For”

At the time *Burlington Northern* was decided, several circuits had adopted standards similar to the Ninth Circuit’s, which the Supreme Court disapproved. One district court categorized arranger case law prior to *Burlington Northern* as dividing into three distinct approaches: (1) a strict liability approach; (2) a specific intent approach; and (3) a “totality of the circumstances” or case-by-case approach.⁸⁷ Plainly, *Burlington Northern* limits liability to situations where there is an intent to purposefully dispose or treat, opting for the specific intent approach.⁸⁸

85. *E.g.*, *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27–28 (1st Cir. 1990) (finding the parent corporation was an “operator” because of its pervasive control over subsidiary empowering it to control release or threat of release of hazardous substance); *see United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1202 (E.D. Pa. 1989) (“Where a subsidiary is or was at the relevant time a member of one of the classes of persons potentially liable under CERCLA; and the parent had a substantial financial or ownership interest in the subsidiary; and the parent corporation controls or at the relevant time controlled the management and operations of the subsidiary, the parent’s separate corporate existence may be disregarded.”); *see also Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 671–72 (D. Idaho 1986) (holding parent liable because familiar with subsidiary’s waste disposal practices, and having capacity to control, placed limits on subsidiary’s pollution control expenditures, and other factors). The Eleventh Circuit in *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990) said in dictum that a security creditor “may incur liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation’s treatment of hazardous wastes.”

86. 42 U.S.C. § 9601(20)(F)(i)(II) (2006) (stating that the term “participation in management” “does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations”).

87. *United States v. Gordon Stafford, Inc.*, 952 F. Supp. 337, 339–40 (N.D. W. Va. 1997); *Fleet Factors*, 901 F.2d at 1550; Randy Boyer, Note, *Morton Int’l, Inc. v. A.E. Staley Mfg. Co.: The Third Circuit Establishes a Standard for Arranger Liability*, 17 TULANE ENVTL. L.J. 201, 204–05 (2003).

88. *E.g.*, *Morton Int’l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 678 (3d Cir. 2003) (rejecting a strict liability approach to arranger liability); *see S. Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 407 (11th Cir. 1996) (recognizing that intent is one relevant factor to determine arranger liability); *see also United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996) (“[I]n the absence of a contract or agreement, a court must look to the totality of the circumstances, including any ‘affirmative acts to dispose,’ to determine whether the Defendants intended . . . an arrangement for disposal. . . . [A] party can be responsible for ‘arranging for’ disposal, even when it has no control over the process leading to the release of substances.”); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993), *cited in Burlington Northern*, 129 S. Ct. at 1879 (explaining that the “words ‘arranged for’ imply intentional action”); *FMC Corp. v. U.S. Dep’t of Commerce*, No. 92-1945, 1993 WL 489133 (3d Cir. 1993) (finding Congress’s intent when drafting CERCLA was not to impose strict liability on the government for hazardous WWII facilities), *rev’d*, *FMC Corp. v. U.S. Dep’t of Commerce*, 29 F.3d 833 (3d Cir. 1994); *Fla. Power & Light v. Allis Chalmers Corp.*, 893 F.2d 1319 (11th Cir. 1990) (granting motion for summary judgment where party could not support the contention that manufacturers intended

E. "Disposal or Treatment"

Read in the context of the phrase, "arranged for disposal or treatment," the phrase "disposal or treatment" requires that there be an intentional human act by the "person" potentially liable under section 107(a)(3).⁸⁹ Similarly, the phrase "arranged with a transporter for transport for disposal or treatment" does not reach a shipper who arranged for transport of a useful product containing hazardous substances that are spilled en route, since the arrangement for shipment of the product does not imply an intent to "dispose" of the product through such accidental spillage.⁹⁰ This does not necessarily mean that "disposal" in other CERCLA contexts implies intentional action. "In the context of the operator of a hazardous-waste dump, 'disposal' includes accidental spillage."⁹¹ Thus, *Burlington Northern* does not necessarily carry implications for cases that have imposed liability under section 107(a)(2) on a "person who at the time of disposal owned or operated any facility at which such hazardous substances are disposed of."⁹² Whether the terms "disposal" and "disposed of" in that paragraph imply affirmative human conduct is beyond the scope of this arranger Restatement.⁹³

to dispose of the waste); *United States v. Aceto Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989); *New York v. Gen. Elec. Co.*, 592 F. Supp. 291 (W.D. N.Y. 1984); see generally Benjamin J. Rodkin, Note, *Deciphering CERCLA's Vocabulary: United States v. Burlington—"Reasonable" Division and "Arranger" Liability*, 20 VILL. ENVTL. L.J. 275 (2009) (evaluating a Ninth Circuit decision to impose joint and several liability on defendants in *Burlington Northern*); Boyer, *supra* note 87, at 206 (discussing a Seventh Circuit decision establishing a specific intent approach).

89. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993).

90. *Id.*

91. *Id.*

92. 42 U.S.C. § 9607(a)(2) (2006).

93. Several circuit courts have held that passive migration does not constitute a "disposal" within the meaning of CERCLA. *Bob's Beverage, Inc. v. Acme, Inc.*, 264 F.3d 692, 697 (6th Cir. 2001); *United States v. 150 Acres of Land*, 204 F.3d 698, 705 (6th Cir. 2000); *ABB Indus. Sys., Inc. v. Prime Tech, Inc.*, 120 F.3d 351, 357–58 (7th Cir. 1997); *United States v. CDMG Realty Co.*, 96 F.3d 706, 713 (3d Cir. 1996); see *Tanglewood E. Homeowners v. Charles Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1998) (finding "disposals" may occur when a party releases previously existing hazardous substances into the environment through landfill excavations and fillings); *Nurad, Inc. v. William E. Hooper & Sons, Co.*, 966 F.2d 837, 844–46 (4th Cir. 1992) (finding CERCLA's definition of "disposal" includes passive migration); *United States v. 175 Inwood Assocs.*, 330 F. Supp. 2d 213, 225–26 (E.D. N.Y. 2004) (finding defendants liable as owners of the site at the time drums of hazardous waste were releasing chemicals into the ground); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989) (allowing civil action only against prior owners or operators who owned the land at the time the hazardous substances were introduced); Michael S. Caplan, *Escaping CERCLA Liability: The Interim Owner Passive Migration Defense Gains Circuit Recognition*, 28 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,121 (1998) (analyzing "CERCLA's language and structure as it pertains to liability for passive migration of hazardous substances"); Robert L. Bronston, Note, *The Case Against Intermediate Owner Liability for Passive Migration of Hazardous Waste*, 93 *MICH. L. REV.* 609 (1994) (arguing that "Congress intended

F. “Of Hazardous Substances Owned or Possessed by Such Person”

Prior to *Burlington Northern*, the broad interpretation of “arranged for” advocated by the Environmental Enforcement Section of the Department of Justice (the “A Team”) presented serious challenges for the Environmental Defense Section (the “B Team”) in its defense of federal agencies seeking to avoid liability under section 107(a)(3). For example, Shell Oil argued in a counterclaim against the United States that if a party has “substantial control over a manufacturing process wherein a hazardous waste stream is generated and disposed of, then that party assumes the obligation to control the disposal of that waste stream.”⁹⁴ The Ninth Circuit ruled in favor of the United States, holding that it was not liable on the counterclaim because it never actually “owned or possessed [the waste] and never had an authority to control or duty to dispose of, the hazardous materials.”⁹⁵ In effect, by winning this case the Government undermined its earlier precedents as plaintiff, holding waste brokers and other such intermediaries liable. The *Shell Oil* precedent narrowed the circumstances in which such persons might be said to have “owned or possessed” the substances disposed of.⁹⁶ As pointed out in law review commentary in early 2009, the Ninth Circuit’s distinguishing of its earlier opinion in *Shell* in its *Burlington Northern* decision (ironically involving the same corporation on the “other side” of the same issue) is unpersuasive because it diluted the level of control over substances that trigger liability to mere awareness of spills.⁹⁷ Because the *Burlington Northern* decision focuses on the absence of the intent required to show that Shell “arranged for” the disposal or treatment of hazardous substances, the law regarding the separate element that the substances be “owned or possessed” by that person remains confused. The matter is likely to be litigated in cases where the government sues as arranger persons who brokered arrangements between generators and disposers but who never actually owned or possessed the generator’s substances. In short, it is unclear whether the “A Team” or the “B Team” now holds the upper hand.

disposal to have an active meaning and therefore that courts should not hold prior intermediate owners liable for the passive migration of hazardous waste”).

94. *United States v. Shell Oil Co.*, 294 F.3d 1045, 1055 (9th Cir. 2002).

95. *Id.* at 1058.

96. *See, e.g., United States v. Bliss*, 667 F. Supp. 1298, 1306–07 (E.D. Mo. 1987) (representing the previous precedent that a party does not need to have actual ownership of the waste to be held liable, just the ability to exercise control of the disposal, as shown in Part II.F.Illustration.1).

97. Rodkin, *supra* note 88, at 275, 302–04.

G. “By Any Other Party or Entity”

There is no reason to think that the requirement that only “off-site” arrangers are liable would generate any controversy in light of the broad scope of liability of past and present owners and operators under section 107(a)(1) and section 107(a)(2).⁹⁸

H. “At Any Facility or Incineration Vessel Owned or Operated by Another Party or Entity and Containing Such Hazardous Substances”

In the context of arranger liability, the Court has emphasized the “ordinary meaning” of statutory language when interpreting “arranged.”⁹⁹ This has led to the consequent view that a defendant’s knowledge of spills is only relevant if it is indicative of the ultimate issue of whether the defendant intended spills to occur.¹⁰⁰ This view hints that the Court would approach the significance of the phrase “containing such hazardous substances” differently from the position that the Government has argued, often successfully, in the lower courts. Beginning with *United States v. South Carolina Recycling & Disposal, Inc.*,¹⁰¹ some lower courts adopted the Government’s view that Congress intended to omit any causation requirement in CERCLA and read section 107(a)(3) only to require that the plaintiff show that hazardous substances “alike, similar, or of a like kind” are contained at the facility rather than to require a showing that the defendant’s substances, which were the subject of his disposal arrangement, are contained at the site.¹⁰² This construction, however, presents logical difficulties. Read literally with this interpretation of “such,” any person who arranges for disposal of a substance at a facility is liable for cleanup of the facility, whether their waste ever went to the facility at all. The Fourth Circuit solved this difficulty by inferring a requirement that the generator’s waste must be “sent” to the site needing cleanup.¹⁰³ But this inference offends traditional canons of statutory construction because there is no textual basis for this judicial gloss. *Burlington Northern* suggests that the Supreme Court might well reach the same practical result as the Fourth Circuit in *Monsanto*, but that it would use a different jurisprudential

98. 42 U.S.C. § 9607(a)(2) (2006).

99. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1879 (2009).

100. *Id.* at 1880.

101. *United States v. S.C. Recycling & Disposal, Inc.*, 653 F. Supp. 984, 992 (D.S.C. 1984), *aff’d*, *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir.1988).

102. *Monsanto*, 858 F.2d at 169.

103. *Id.* at 169 n.15.

approach. The Court might rule that the plaintiff could meet its burden of production on the issue of whether the defendant's waste is contained at the facility by showing (1) the arrangement for disposal at the facility and (2) that waste similar to that of the defendant was at the site at the time of remediation. In other words, absent direct proof that a defendant's waste had been removed from the site, an inference that the defendant's waste is "contained at the site" would arise from this showing. This would avoid the strained construction of the word "such," which the Government initially wrote into the *South Carolina Recycling* district court opinion it drafted.¹⁰⁴

I. "From Which There Is a Release, or a Threatened Release Which Causes the Incurrence of Responses Costs, of a Hazardous Substance"

As several circuit courts candidly have admitted, even if the plaintiff does not have to prove a precise nexus between the defendant and the release requiring cleanup, the potential that damages may be apportioned, and liability limited under Restatement principles, means that a defendant "may escape any liability for response costs if it either succeeds in proving that [its hazardous substance] did not contribute to the release and the cleanup that followed, or contributed at most only to a divisible portion of the harm."¹⁰⁵ Though *Burlington Northern* does not address causation as a separate element of proof under CERCLA, its approval of the district court's reduction of Railroad responsibility based in part on the absence of a substantial contribution of a particular chemical, D-D, to the contamination remediated implicitly acknowledges this method of escaping CERCLA liability.¹⁰⁶

Under the Restatement standard applicable under CERCLA, explained in *Burlington Northern*, a single harm is divisible when it is possible to discern the degree to which different parties contributed to the damage.¹⁰⁷

104. See Alfred R. Light, *The Importance of "Being Taken": To Clarify and Confirm the Litigative Reconstruction of CERCLA's Text*, 18 B.C. ENVTL. AFF. L. REV. 1, 31-32 (1990) (describing the district court's crafting of the word "such" in *South Carolina Recycling*).

105. *United States v. Hercules, Inc.*, 247 F.3d 706, 716 (8th Cir. 2001), cited in *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. at 1881; *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993), cited in *Burlington Northern*, 129 S. Ct. at 1881 (2009); see *Textron, Inc. v. Barber-Coleman Co.*, 903 F. Supp. 1570, 1583 (W.D.N.C. 1995) ("It seems the point is to shift the burden of proving causation to defendants.").

106. *Burlington Northern*, 129 S. Ct. at 1882-84.

107. See *Burlington Northern*, 129 S. Ct. at 1881 ("[T]he District Court ultimately concluded that this was 'a classic divisible in terms of degree case'"); see also *Hercules*, 247 F.3d at 718, cited in *Burlington Northern*, 129 S. Ct. at 1881; *United States v. Vertac Chem. Corp.*, 453 F.3d 1031, 1040

Divisibility may be provable even where wastes have become cross-contaminated and commingled, for “commingling is not synonymous with indivisible harm.”¹⁰⁸

Though the burden of proof on divisibility ordinarily lies with the defendant, this is not always the case in light of the Supreme Court’s affirmation of the district court’s independent apportionment in that case. After *Burlington Northern*, the plaintiff, frequently the Government, more often will have to come forward with its own evidence on the issue and will not be able to avoid trial of the issue through summary judgment.¹⁰⁹ Most of the early CERCLA decisions regarding joint and several liability were district court rulings on motions for summary judgment. For example, the *Chem-Dyne* decision, which the *Burlington Northern* court followed, is an opinion resolving arranger defendants’ motion for partial summary judgment regarding their joint and several liability, in which the defendants only presented their legal argument that “because joint and severally[sic] liability is not expressly provided for in CERCLA, there is no basis for its imposition.”¹¹⁰ As to divisibility, the court only found “an insufficient evidentiary basis, with unresolved factual questions, which precludes the resolution of this case in the form of a summary judgment motion.”¹¹¹

The Supreme Court’s endorsement of the district court’s independent apportionment (in the sense of divisibility of the damages by causation) also avoids serious constitutional difficulties that would be presented were CERCLA to impose disproportionate, retroactive liability for all damages where an arranger defendant’s proven maximum contribution to the harm is comparatively slight. The Court’s endorsement protects the proverbial “one-drum” contributor to a massive hazardous waste disposal facility

(8th Cir. 2006) (ultimately concluding that Hercules did not establish geographic divisibility by operable units of the remediation).

108. *Hercules*, 247 F.3d at 718 (quoting *Alcan Aluminum Corp.*, 990 F.2d at 722), cited in *Burlington Northern*, 129 S. Ct. at 1881.

109. So long as there is a “genuine issue of material fact” as to divisibility of the damages, the plaintiff’s motion for summary judgment must be denied even though the defendant bears the ultimate burden of persuasion at trial. FED. R. CIV. P. 56(c).

110. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983).

111. *Id.* at 811. *But cf.* *Transport Leasing Co. v. Cal. (Caltrans)*, 861 F. Supp. 931, 939–40 (C.D. Cal. 1992) (showing divisibility of harm could not be resolved in the context of pre-trial motions); *Am. Int’l, Inc. v. DataCard Corp.*, 146 B.R. 391, 402 (N.D. Ill. 1992) (adopting report and recommendations of magistrate judge denying summary judgment and finding that divisibility issue involved unresolved questions of fact); *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1309, 1327–31 (D.N.J. 1992) (denying plaintiff’s summary judgment motion on divisibility because defendant raised “sufficient fact questions as to the relative degrees of harm caused by [the plaintiff]”); *Weyerhaeuser Corp. v. Koppers Co.*, 771 F. Supp. 1406, 1416 (D. Md. 1991) (declining to rule on apportionment issue at summary judgment phase); *United States v. Marisol, Inc.*, 725 F. Supp. 833, 841–42 (M.D. Pa. 1989) (defendants are at the very least entitled to conduct some discovery of defenses alleging divisibility of the harm).

requiring cleanup. The Department of Justice consistently maintained in Congressional hearings during the CERCLA reauthorization process in 1985 that it did not intend and did not think it could “impose liability for one hundred percent of the costs on a *de minimis* generator.”¹¹² The Assistant Attorney General for Environment and Natural Resources explained, “Congress indicated in the legislative history in 1980 that joint and several liability was deleted expressly from the statute because it should be left to the courts to deal with on a case-by-case basis so that it would not be oppressively or unfairly applied in inappropriate circumstances.”¹¹³ Even if “CERCLA . . . does not require causation as a prerequisite to liability,”¹¹⁴ a less stringent attitude toward the burden regarding apportionment permits courts to avoid violating the requirement of “fair play and substantial justice” embodied in the Due Process Clause of the Fifth Amendment.¹¹⁵ If a generator’s maximum contribution is small enough, its apportioned share of the liability may be nothing, particularly in light of section 107(o), added to CERCLA in 2002, presumptively exempting persons who arranged for disposal or treatment of less than 110 gallons of liquid materials or less than 200 pounds of solid wastes from liability for response costs at a facility on the National Priorities List.¹¹⁶

112. *Insurance Issues and Superfund: Hearing before the Comm. on Environment and Public Works, United States Senate, 99th Cong.* 13 (1985) (testimony of Assistant Attorney General Henry Habicht); see generally Alfred R. Light, “Minimum Contacts” Under CERCLA: Joint and Several “Generator” Liability and the Fifth Amendment, 24 *TOXICS L. REP.* (BNA) 545, 547–49 (2009) (detailing the government’s view of joint and several liability in the 1985 Superfund Amendments and Reauthorization Act (SARA) hearings).

113. *Superfund Improvements Act of 1985: Hearings Before the Comm. on the Judiciary, United States Senate, 99th Cong.* 71 (1985) (statement of Henry Habicht).

114. *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 937 (9th Cir. 2008), *rev’d on other grounds*, *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009).

115. See generally Light, *supra* note 112, at 546, 548–50 (exploring this requirement through a CERCLA hypothetical based on the facts regarding Shell Oil Co. in *Burlington Northern*).

116. 42 U.S.C. § 9607(o) (2006), added to CERCLA by the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. 107-118, 115 Stat. 2356 (2002).

