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### **ENVIRONMENTAL LAW—CERCLA ENFORCEMENT: TERMINOLOGY AND MEANING OF “TREATMENT” ARRANGER LIABILITY**

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ENVIRONMENTAL LAW—CERCLA ENFORCEMENT:  
TERMINOLOGY AND MEANING OF “TREATMENT” ARRANGER  
LIABILITY

*Daniel J. DePasquale* \*

*CERCLA arranger liability was forever changed by the Supreme Court decision in Burlington Northern & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009). In the aftermath, EPA has been hamstrung with the difficulty of substantiating a Potentially Responsible Party’s (“PRP”) intent to arrange for disposal of a hazardous substance, as well as attempting to overcome the ever-increasing scientific capabilities of PRPs to demonstrate that proportionality of damages is appropriate for a given Superfund site. This Article is the first in depth analysis teasing apart what it means for a PRP to arrange for disposal, as opposed to arrange for treatment—both found under CERCLA § 107(a)(3)—and to establish that the use of the treatment terminology could strengthen the Environmental Protection Agency’s (“EPA”) enforcement efficiency and effectiveness.*

*In particular, this Article opines on the following: (1) Congress included the treatment term because the treatment of hazardous substances inherently generate the possibility of Superfund sites; (2) Congress intended liability to attach to the transferor anytime the selling party intends—whether implicitly or explicitly—to alter the hazardous substance through some process to make it more useful or reuseable, and that process was the proximate cause of the release of hazardous waste at the site; and (3) attaching liability under the treatment term is an easier standard to meet and would result in an increased percentage of successful CERCLA enforcement actions and contribution claims. To illustrate, this Article discusses two real-world scenarios in an effort to shed light on situations in which treatment arranger liability could and should be utilized as a litigation tactic over disposal arranger liability.*

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\* 2016 Western New England University School of Law, graduate. I would like to thank the members of the *Western New England Law Review* for their hard work and diligence during the editing process. A special thank you, as well, to my family for their unwavering support and encouragement.

## INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act<sup>1</sup> (“CERCLA” or “Superfund”) is a highly developed statutory scheme passed by Congress in 1980. This legislation was enacted to address health and environmental risks resulting from continuing industrial pollution from chemical spills and increasing amounts of abandoned hazardous dump sites.<sup>2</sup> CERCLA empowers the President “to command government agencies and private parties to clean up hazardous waste sites.”<sup>3</sup> The statute holds all Potentially Responsible Parties (“PRP”) strictly liable, many of them by way of joint and several liability.<sup>4</sup>

Section 107(a) of CERCLA sets out the means by which a person or corporate entity can be found liable for cleanup costs of hazardous waste sites.<sup>5</sup> Liability attaches to the following: (1) the current owner or operator of the contaminated premises; (2) the owner or operator of the contaminated premises at the time of the disposal of the hazardous substance; (3) generators and parties who arranged for *treatment* or *disposal* of hazardous substances; and (4) transporters that select the disposal site.<sup>6</sup> These categories can be discussed endlessly, as each is more complicated than meets the eye. Nevertheless, the focus of this Article is on the third category—arranger liability.<sup>7</sup> More specifically, this Article will

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1. Comprehensive Environmental Response, Compensation, and Liability Act §§ 101–175, 42 U.S.C. §§ 9601–9675 (2014) [hereinafter CERCLA §§ 101–175].

2. See *id.*; United States v. Bestfoods, 524 U.S. 51, 55 (1998); Exxon Corp. v. Hunt, 475 U.S. 355, 358–59 (1986). The statute was enacted in direct response to Love Canal, in Niagara, New York, and the Valley of Drums in Brooks, Kentucky. See GIBBS M. LOIS, LOVE CANAL: MY STORY (Grove Press, 1982); see also EPA Superfund Program: A.L. Taylor (Valley of Drums), Brooks, KY, ENVTL. PROT. AGENCY, <http://cumulis.epa.gov/supercpad/cursites/csinfo.cfm?id=0402072> (last visited Mar. 4, 2016).

3. Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994); see CERCLA §§ 101–175.

4. See generally CERCLA §§ 101–175. CERCLA does not explicitly state that there is joint and several liability; however, courts have readily implemented it as per the Restatement (Second) of Torts. See RESTATEMENT (SECOND) OF TORTS § 433A (AM. LAW INST. 1965); see, e.g., United States v. Chem-Dyne Corp., 572 F. Supp. 802, 802 (S.D. Ohio 1983) (explaining how there were joint and several liability provisions in Senate CERCLA drafts previously and how those provisions were stripped with the final amendments to the bill in order to put the emphasis on common law principles to determine on a case-by-case basis when a party should be held joint and severally liable).

5. CERCLA § 107(a).

6. CERCLA § 107(a); see generally Tippins Inc. v. USX Corp., 37 F.3d 87 (3d Cir. 1994) (clarifying transporter liability within CERCLA).

7. See CERCLA § 107(a)(3).

delve into what it means to arrange for treatment of hazardous waste.<sup>8</sup> The topic of treatment-based arranger liability is rather unique, as most articles—and cases for that matter—tackle arranger liability through the lens of disposal.<sup>9</sup> There is a dearth of academic scholarship on treatment arranger liability. In fact, this is the first academic Article to focus on treatment arranger liability and pinpoint the differences between treatment, as opposed to disposal arranger liability under CERCLA.

Before examining the specifics of treatment-based arranger liability, it is first important to understand *Burlington Northern & Santa Fe Railway Company, et al. v. United States*.<sup>10</sup> *Burlington Northern* is a 2009 Supreme Court case that has had significant implications for CERCLA arranger liability.<sup>11</sup> The case involved the sale of numerous hazardous chemicals by Shell Oil Company ("Shell") to Brown & Bryant, Inc. ("B & B") via a common carrier service.<sup>12</sup> Spills and leaks of the chemicals often occurred during the delivery of these chemicals.<sup>13</sup> Shell took notice of this problem, and took steps in an attempt to diminish the occurrence of spills.<sup>14</sup> Even with Shell's various attempts, B & B continued to conduct sloppy operations at the site, and eventually became insolvent in 1989.<sup>15</sup>

The Supreme Court made two important holdings in the *Burlington Northern* case,<sup>16</sup> but for purposes of this Article emphasis will be placed on one of these holdings. The Supreme

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8. CERCLA § 107(a)(3).

9. See CERCLA § 107(a)(3); Heidi Rasmussen, *Re-"Arranging" CERCLA Liability: What is the State of Arranger Liability Post-Burlington Northern Santa Fe Railroad Company v. United States*, 45 TEX. ENVTL. L.J. 381, 382–83 (2015); Marc P. Lawrence, *To Arrange or Not to Arrange: Intent is the Question*, MICH. B.J., Oct. 2009, at 48; Alexandra E. Shea, *CERCLA Arranger Liability and the Intent to Dispose of Hazardous Waste*, FED. LAW., July 2012, at 42.

10. 556 U.S. 599 (2009).

11. *Id.*

12. *Id.* at 602–03.

13. *Id.* at 604.

14. *Id.*

15. *Id.* at 604–05.

16. The other holding—which has equal, if not greater implications—upholds the use of proportioning cost for a responsible party in certain cases. *Id.* at 613–15. The Court reasoned that the defendant can avoid joint and several liability if—and only if—they can prove that a "reasonable basis for apportionment exists." *Id.* at 614. In contrast, if multiple causes create a single, indivisible harm, joint and several liability is applied—thus all defendants are held liable for the entire harm. *Id.* at 614–15. In this case, the Supreme Court upheld apportionment of nine percent for the railroad company. *Id.* at 618–19.

Court opined that Shell was not liable for arranging for the disposal of hazardous substances under CERCLA § 107(a).<sup>17</sup> The Court began its analysis by asserting that if a party enters into a transaction for the sole purpose of discarding a no longer useful hazardous substance, that party is clearly liable under CERCLA § 107(a).<sup>18</sup> This a clear-cut instance of a PRP arranging for the disposal of a hazardous substance.<sup>19</sup> On the other end of the spectrum, if a party sells a new and useful product and that product later—unbeknownst to the original seller—causes contamination during disposal, there is no liability to the seller under 107(a).<sup>20</sup> What remains unclear is assignment of liability when the seller has knowledge of the contamination, but the seller's intent is unknown.<sup>21</sup> The Court determined that in such cases, arranging for disposal liability “requires a fact intensive inquiry that looks beyond the parties' characterization of the transaction as a ‘disposal’ or a ‘sale’ and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions.”<sup>22</sup> This new approach has constrained the Environmental Protection Agency's (“EPA”) ability to bring enforcement actions against arrangers for disposal, as the requisite intent is significantly harder to demonstrate than the mere knowledge that eventual disposal would indeed take place.

This Article utilizes the *Burlington Northern* framework and other case law to analyze the meaning of the phrase “arranged for . . . treatment” within CERCLA § 107(a)(3).<sup>23</sup> Specifically, this Article intends to answer the following questions: (1) why did Congress include this phrase; (2) what types of transactions did Congress intend to have liability attach to the transferor; and (3) whether courts analyze “arranged for . . . treatment” similarly or differently than “arranged for disposal,” which is also in CERCLA § 107(a)(3).<sup>24</sup> This Article will survey CERCLA Congressional records and the few instances that courts have scrutinized treatment arranger liability, in order to better construe how EPA—

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17. *Id.* at 613.

18. *Id.* at 609–10.

19. *See id.*

20. *Id.*; *see Freeman v. Glaxo Wellcome Inc.*, 189 F.3d 160, 164 (2d Cir. 1999); *see also Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1318 (11th Cir. 1990).

21. *Burlington*, 556 U.S. at 610.

22. *Id.*

23. *See CERCLA § 107(a)(3).*

24. *CERCLA § 107(a)(3).*

and private parties involved in CERCLA contribution claims—can utilize the term treatment in select enforcement actions.

This Article will ultimately conclude that: (1) Congress included this phrase because treatment of hazardous substances inherently generates the possibility of Superfund sites; (2) Congress intended liability to attach to the transferor anytime the selling party intends—whether implicitly or explicitly—to alter the hazardous substance through some process to make it more useful or reuseable, and that process was the proximate cause of the release of hazardous waste at the site; and (3) while some courts have analyzed the terms treatment and disposal within the same analysis—provided they are not mutually exclusive terms—it is evident that attaching liability under the treatment term is an easier standard to meet and would result in an increased percentage of successful CERCLA enforcement actions and contribution claims. This Article provides two classic real-world scenarios as examples to shed light on situations that treatment arranger liability could and should be utilized as a litigation tactic.

#### I. DEFINITION OF "TREATMENT"

To begin, CERCLA § 107(a)(3), which provides the term "arranged for . . . treatment," states in full:

[A]ny 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 . . . .<sup>25</sup>

The term treatment in CERCLA 42 U.S.C. § 9601(29), is defined the same way as it is under the Resource Conservation and Recovery Act ("RCRA") § 1004(34).<sup>26</sup>

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25. CERCLA § 107(a)(3) (emphasis added).

26. See CERCLA § 101(29) ("The terms 'disposal,' [sic] 'hazardous waste,' [sic] and 'treatment' shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. § 6903]."); 42 U.S.C. § 6903(34) (2012) (establishing, through RCRA, a statutory scheme for waste management and disposal of hazardous wastes; it was enacted in 1976, was a precursor to CERCLA, and thus Congress utilized pieces of the program in enacting CERCLA; the difference between the two statutes is that CERCLA emphasizes historic and abandoned sites, while RCRA's scheme is focused on currently active facilities as well as future facilities that will need to dispose of hazardous wastes). See also *EPA History: Resource Conservation and Recovery Act*, ENVTL. PROT. AGENCY, <https://www.epa.gov/aboutepa/epa-history-resource->

The term ‘treatment’, when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amendable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.<sup>27</sup>

This definition requires some procedure be conducted to the hazardous waste,<sup>28</sup> which changes or alters it to be safer or more useful. For instance, if Party A sends a used natural resource to Party B, and Party B separates the useful resource from what was not useful, Party B’s separation would constitute treatment under the RCRA definition that was adopted by CERCLA. If Party B’s operation and treatment of said natural resource causes contamination to the property, then Party A would be liable under CERCLA since it “arranged for . . . treatment.”<sup>29</sup>

## II. ANALYSIS OF “TREATMENT”

### A. *Legislative History of “Treatment”*

The legislative history demonstrates that Congress was aware that when hazardous substances are treated, they have the potential to cause a release, disposal, or other contamination that may lead to the eventual creation of Superfund sites.<sup>30</sup> Therefore, arranging for treatment necessitates the strict liability that the CERCLA statutory scheme provides in cases where the PRP cannot demonstrate the need for apportionment. The legislative history also implements a shorthand definition of treatment, getting

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conservation-and-recovery-act [<https://perma.cc/J6RC-QZZ3>] (last updated Jan. 5, 2016) (explaining that RCRA was created to protect “human health and the environment from the potential hazards of waste disposal” and reduce the amount of generated waste while conserving natural resources and energy).

27. 42 U.S.C. § 6903(34) (2012).

28. It should be noted that the RCRA definition utilizes the term “hazardous waste,” rather than “hazardous substance,” which is utilized throughout CERCLA. Compare 42 U.S.C. § 6903(34) (2012), with CERCLA § 107(a)(3).

29. CERCLA § 107(a)(3). See *infra* Part III for more in-depth hypotheticals.

30. See ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510, VOL. 1 (1983).

at the heart of the Congressional intent.<sup>31</sup>

Within CERCLA's legislative history, Congresswoman Niki Tsongas of Massachusetts asserted that for the "purposes of this [A]ct, Congress declares the manufacture, use, transportation, treatment, storage, disposal, and release of hazardous substances are ultrahazardous activities."<sup>32</sup> This lends some support to the conclusion that Congress intended to utilize the term treatment within CERCLA to protect against the numerous liabilities associated with the treatment processes. More importantly, it provides evidence that treatment and disposal are not two separate acts with differing levels of CERCLA liability, but are equally "hazardous acts" in the eyes of Congress.<sup>33</sup>

Additionally, within a RCRA Senate Report Summary, the term treatment was defined as "any process which changes the character of waste so as to render it amendable to further use or storage."<sup>34</sup> This Senate Report effectively took the definition of treatment from RCRA and condensed it further, demonstrating some Congressional intent or support for this definition.<sup>35</sup> However, unlike RCRA's definition of treatment, which uses the word amendable as well as amenable, this Senate Report uses only the word amendable.<sup>36</sup>

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31. *Id.*

32. *See id.*

33. *See id.* The statements made by Tsongas were not refuted by any other member of Congress during the hearing on CERCLA. *Id.*

34. S. REP. NO. 94-988, at 25 (1976).

35. *See id.* It should be noted that there was nothing within the Senate Report that refuted the use of this definition.

36. The words have different definitions, and thus convey different meanings. *Amenable* is defined as "capable of submission," "readily brought to yield, submit, or cooperate," or "willing." *Amenable*, MERRIAM-WEBSTER DICTIONARY ONLINE (2015), <http://www.merriam-webster.com/dictionary/amenable> [https://perma.cc/H7L4-RW5A]. Interestingly, the primary definition of "amenable" is "liable to be brought to account," which does not fit well into the framework of CERCLA. *Id.* On the other hand, *amend* is "to put right," or "to change or modify for the better." Amendable, MERRIAM-WEBSTER DICTIONARY ONLINE, (2015), <http://www.merriam-webster.com/dictionary/amendable> [https://perma.cc/QPJ4-HHHH]. The definitions are similar, but it is intriguing, as some courts have emphasized amendable rather than amenable in their CERCLA treatment analysis. *See Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1275 n.7 (E.D. Va. 1992) (utilizing amendable when quoting RCRA for the definition of treatment and subsequently using the term in its analysis on whether a battery generator/recycler treated the batteries when breaking them open). This may be because the word amendable linguistically fits the RCRA definition of treatment better than amenable. The treatment of a hazardous substance is relative to "reform[ing]" or "chang[ing] or modify[ing] for the better," rather than making the substance "capable of submission," or one of the other amenable definitions that feel out of place within the definition of treatment.



### B. *How Courts Define “Treatment”*

Courts have defined treatment in a multitude of ways, such as making a hazardous substance useable again,<sup>37</sup> recovering the usable material from the hazardous substance,<sup>38</sup> merely reducing the hazardous substance in volume, any neutralization process,<sup>39</sup> and any processing of already discarded hazardous substances or processing that resulted in such discard.<sup>40</sup> This section examines numerous courts’ analyses in greater detail; however, there is a broad array of possible definitions that can be conditioned to meet different sets of fact patterns. The takeaway is that any analysis has included some type of altering of the hazardous substance.

In *United States v. Pesses*, defendants sent unusable scrap metal to a facility, which was treated and later disposed of at another site.<sup>41</sup> The unusable scrap metal was a by-product that was not usable as intended and was then processed to be made suitable for said use once again.<sup>42</sup> The court concluded that treatment occurred by the processes used to make the metal useable once again.<sup>43</sup> The processes included “melt[ing], shear[ing], clean[ing], crush[ing], saw[ing], band[ing], drill[ing], tapp[ing], briquett[ing], and/or ball[ing] it.”<sup>44</sup> The court noted that there clearly was treatment and disposal evident, as per their RCRA definitions.<sup>45</sup>

In *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, defendants sent spent lead acid batteries for recycling at a lead reclamation operator.<sup>46</sup> While mentioning disposal, the court here clearly held that the defendants arranged for treatment of the lead,

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*Amendable*, MERRIAM-WEBSTER DICTIONARY ONLINE, (2015), <http://www.merriam-webster.com/dictionary/amendable>; *Amenable*, MERRIAM-WEBSTER DICTIONARY ONLINE (2015), <http://www.merriam-webster.com/dictionary/amenable> [<https://perma.cc/H7L4-RW5A>].

37. *United States v. Pesses*, 794 F. Supp. 151, 156–57 (W.D. Pa. 1992).

38. *California v. Summer del Caribe, Inc.*, 821 F. Supp. 577, 580 (N.D. Cal. 1993).

39. *Pneumo Abex Corp. v. High Point, T & D R.R.*, 142 F.3d 769, 774 (4th Cir. 1998); *Douglass County v. Gould, Inc.*, 871 F. Supp. 1242, 1244, (D. Neb. 1994).

40. 142 F.3d at 774.

41. *Pesses*, 794 F. Supp. at 156–57.

42. *Id.*

43. *Id.* at 154.

44. *Id.*

45. *Id.* at 156. In the wake of the *Burlington Northern* decision, the disposal analysis here, and in most of the future cases to be covered within this Article may be outdated in part. This specific decision, however, may not have bearing on a CERCLA treatment analysis.

46. See *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269 (E.D. Va. 1992).

falling under CERCLA liability.<sup>47</sup> Moreover, within a footnote, the Eastern District of Virginia noted the definition of treatment within RCRA, but more specifically that the company's process of breaking open batteries changed the characteristics of the waste "so as to render such waste . . . amendable for recovery."<sup>48</sup>

In a later decision, the Northern District of California in *California v. Summer del Caribe, Inc.* determined that RCRA regulations define treatment to include "any process . . . designed . . . so as to recover . . . material resources from the waste."<sup>49</sup> Defendant, here, was a can manufacturer, the manufacturing of which generates solder dross.<sup>50</sup> The defendant was capable of reclaiming and reusing one-third of the solder, or metals, while two-thirds contained "high levels of lead and zinc compounds."<sup>51</sup> The defendant sold the solder dross to a metal reclamation facility, which reclaimed the reusable portion while storing the hazardous portion in drums on the reclamation site.<sup>52</sup> The drums became corroded over time, resulting in creation of a Superfund site.<sup>53</sup> The court went on to hold that treatment was evident in this case since the process of refinement utilized by the defendant was intended to "recover material resources from waste."<sup>54</sup> This decision, although dating back to 1993, looks to the intent of the transaction by the PRP, which would certainly pass muster under the *Burlington Northern* framework for arranger liability.<sup>55</sup> It should be noted that the court's holding was not limited to treatment arranger liability, as the defendant arranged for disposal as well.<sup>56</sup>

In *Catellus Development Corporation v. United States*, the defendant sold depleted and no longer useful automobile batteries

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47. *Id.* at 1275–76.

48. 42 U.S.C. § 6903(34) (2012); Chesapeake & Potomac Tel. Co., at 1275 n.7 (E.D. Va. 1992).

49. *California v. Summer del Caribe, Inc.*, 821 F. Supp. 577, 580 n.3 (N.D. Cal. 1993) (quoting 40 C.F.R. § 260.10).

50. *Id.* at 577.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Summer del Caribe*, 821 F. Supp. at 580 n.3 (quoting *Pesses*, 794 F. Supp. at 157).

55. *Id.*; see generally *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009) (holding that in order to find a PRP liable as an arranger for disposal, there must be demonstrated proof that the PRP intended to arrange for disposal).

56. *Summer del Caribe*, 821 F. Supp. at 581.

to a battery cracking plant.<sup>57</sup> Lead was subsequently extracted from the batteries at the plant, and the batteries were then disposed of at plaintiff's property.<sup>58</sup> The property became contaminated with lead, becoming a Superfund site.<sup>59</sup> The court held that there was no treatment arranger liability here because the sale by defendant of the batteries had neither contractual condition pertaining to said treatment, nor had the defendant retained any ownership interest in the batteries once they were sold to the plant.<sup>60</sup>

The important aspect of the *Catellus* district court decision was that Congress clearly intended the terms treatment and disposal to be separate, thus necessitating separate analyses.<sup>61</sup> Provided that there is little legislative history, any analysis on this is premised on treatment and disposal being two separate terms listed under arranger liability within CERCLA § 107(a)(3).<sup>62</sup> However, the *Catellus* district court looked to RCRA for the definition of treatment summarizing it as "necessarily involv[ing] more than a mere transfer of possession and connot[ing] some process designed to alter the character or composition of a product."<sup>63</sup> On appeal, the Ninth Circuit *Catellus* court looked to the RCRA definition, utilizing only a piece of the definition for the purposes of this case, "amenable for recovery . . . or reduced in volume," which is relative to the Eastern District of Virginia court's use within *Chesapeake*.<sup>64</sup> The circuit court upheld the decision on treatment arranger liability, but on different grounds that will be discussed further within Section C.

The court in *Douglass County v. Gould, Inc.* summarized treatment under RCRA to be defined as "the process of neutralizing a hazardous substance," concluding that this was not the intention of the transaction, which was to sell used plates from spent batteries.<sup>65</sup> The buyer then used the plates in its smelting

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57. *Catellus Dev. Corp. v. United States*, 828 F. Supp. 764, 766 (N.D. Cal. 1993).

58. *Id.*

59. *Id.*

60. *Id.* at 773.

61. *Id.* at 772-73.

62. See CERCLA § 107(a)(3).

63. *Catellus*, 828 F. Supp. at 773.

64. *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 753 (9th Cir. 1994); see also 42 U.S.C. § 6903(34) (2012); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1275 n.7 (E.D. Va. 1992).

65. *Douglass County v. Gould, Inc.*, 871 F. Supp. 1242, 1244 (D. Neb. 1994).

operation, which became a Superfund site.<sup>66</sup> The problem with the analysis in this case was that the court paid no attention to the following phrases within the treatment definition, "amendable for recovery, amenable for storage, or reduced in volume."<sup>67</sup> While, it is appropriate that the court wanted to give increased attention to the term neutralizing, this is not the only way to define treatment within CERCLA.

In *Chatham Steel Corp. v. Brown*, defendants—consisting of battery shops, scrap yards, and battery brokers—sold batteries by the pound to a reclamation site.<sup>68</sup> Without mentioning specific language, the Northern District of Florida, held that "[t]he process of breaking open the batteries, recovering the lead groups, washing the lead, and disposing of the acid and battery casings amounted to 'treatment' of a hazardous substance as defined by CERCLA."<sup>69</sup> This is in stark contrast to the *Douglass* opinion.

In *Ekotek Site PRP Comm. v. Self*, the Central District of Utah also looked to the RCRA definition of treatment, concluding that the "extensive chemical reworking" of used oil clearly constituted treatment of a hazardous waste under CERCLA.<sup>70</sup> The defendants in this case sent used motor oil to a refinery to be recycled.<sup>71</sup> The process of the treatment changed in 1982, but the following was deemed treatment by this court:

after the oil was heated, it was subjected to a distillation process to separate the oil into its various components. During . . . distillation, clay was used to removed [sic] carbon from the oil and to improve its color. Given the extensive chemical reworking of the used oil at the Ekotek plant, it is impossible to say that these processes did not constitute treatment of hazardous waste within the meaning of CERCLA.<sup>72</sup>

In *Pneumo Abex Corp. v. High Point, T & D R.R.*, a company operated a railroad parts foundry, and entered into contracts with defendants to buy their used wheel bearings in order to process them into new bearings.<sup>73</sup> The process included the melting of the

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66. *Id.*

67. 42 U.S.C. § 6903(34) (2012).

68. *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1135–36 (N.D. Fla. 1994).

69. *Id.* at 1141.

70. *Ekotek Site PRP Comm. v. Self*, 881 F. Supp. 1516, 1528 (C.D. Utah 1995).

71. *Id.*

72. *Id.*

73. *Pneumo Abex Corp. v. High Point, T & D R.R.*, 142 F.3d 769, 772–73 (4th Cir. 1998).

metals that make up the bearings, resulting in impurities separating from the bearings.<sup>74</sup> The court held that the transactional intent of both parties was to have the bearings reused in their entirety, and thus the transaction was not covered under CERCLA.<sup>75</sup>

Nonetheless, the court determined that Congress intended no other definition of treatment than what was in RCRA, or they would have provided a new definition of treatment within CERCLA itself.<sup>76</sup> The court held that the plain meaning of the term “arranging for . . . treatment”<sup>77</sup> “shall have the same meaning provided in section 1004 of the Solid Waste Disposal Act,”<sup>78</sup> which provides, “a party arranging for the processing of discarded hazardous substance or processing resulting in the discard of hazardous substances.”<sup>79</sup> This definition is broader than other courts have used, as this would include processing of a substance that was not hazardous, but becomes so as a result of the given process. With this definition in mind, the question within the case then became whether the transaction was for the discard of hazardous substances or the sale of “valuable materials.”<sup>80</sup> This analysis has been used in the past for arranging for disposal, and is here being used for arranging for treatment. In its *Burlington Northern* opinion, the Supreme Court referenced *Pneumo Abex* in a positive light, but the reference did not endorse the treatment analysis per se.<sup>81</sup>

### C. “Intent” to “Arrange for Treatment”

To be found liable as an arranger for treatment, there must be a demonstration of the party’s intent for the hazardous substance

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74. *Id.* at 772.

75. *Id.*

76. *Id.* at 774.

77. CERCLA § 107(a)(3).

78. *Pneumo Abex*, 142 F.3d at 774.

79. *Id.*

80. *Id.* at 775.

81. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 610 (2009). “[T]he determination whether an entity is an arranger requires a fact-intensive inquiry that looks beyond the parties’ characterization of the transaction as a ‘disposal’ or a ‘sale’ and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA’s strict-liability provisions.” *Id.* See also *Freeman v. Glaxo Wellcome Inc.*, 189 F.3d. 160, 164 (2d Cir. 1999); *Pneumo Abex*, 142 F.3d at 775. “[T]here is no bright line between a sale and a disposal under CERCLA. A party’s responsibility . . . must by necessity turn on a fact-specific inquiry into the nature of the transaction.” *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1354 (ND Ill. 1992); *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1318 (11th Cir. 1990).

to be treated, whether or not this specific intent was explicit within the transaction. Most recently, in *Wells Fargo Bank, N.A. v. Renz*,<sup>82</sup> the court referenced how treatment should be analyzed in arranger liability cases after *Burlington Northern*.<sup>83</sup> This case dealt with commercial property that was leased to numerous dry cleaners between the years of 1975 to 2008.<sup>84</sup> The site was contaminated with perchloroethylene ("PCE"), which is a chemical used in dry cleaning operations.<sup>85</sup> The defendants contended that the claims made by plaintiff were based on arranging for treatment, as opposed to disposal.<sup>86</sup> The court discussed within a footnote that *Burlington Northern*,

[i]n examining the "ordinary meaning" of the words contained in the statute, the Court noted that "the word 'arrange' implies action directed to a specific purpose[.]" Based on this interpretation, the Court extrapolated that the term "arranged" as used in the phrase "arranged for disposal or treatment," 42 U.S.C. § 9607(a)(3), requires a showing of "intentional steps" by the putative PRP. In addition, the Court reasoned that mere knowledge of disposal or treatment is not sufficient to establish an intention. Thus, while it is true that the *Burlington* court was discussing the meaning of "arranged" in the context of "disposal," the Court's reasoning and logic thus apply equally to the term "treatment."<sup>87</sup>

The court here went further to analyze treatment using the same tests as it would for disposal. It determined that the Supreme Court in *Burlington Northern* was looking to define the word arrange in relation to that of disposal or treatment, and thus the requisite mind frame to arrange—that of intent—is the same for either of the two.<sup>88</sup> Whether this is correct or not, certainly is a point of contention that was not clarified within the Supreme Court's *Burlington Northern* decision.

Prior to *Wells Fargo*, the court in *Chatham Steel* came to a similar conclusion—although notably prior to the *Burlington Northern* decision.<sup>89</sup> The court found defendants liable for arranging for disposal and treatment when the PRP made the

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82. *Wells Fargo Bank, N.A. v. Renz*, 795 F. Supp. 2d 898 (N.D. Cal. 2011).

83. *Id.* at 920.

84. *Id.* at 903.

85. *Id.*

86. *Id.* at 921.

87. *Id.* at 921–22, n.14 (citations omitted).

88. *Id.*

89. *See Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1143 (N.D. Fla. 1994).

“crucial decision” to sell batteries to a recycling facility in the first place, making the decision as to “when, and by whom the hazardous substances would be treated or disposed.”<sup>90</sup>

The Eastern District of California in *California Dept. of Toxic Substances v. Interstate Non-Ferrous Corp.* also found a defendant liable as an arranger for treatment, when the sole purpose of the transaction was to treat the “valuable components” of the product.<sup>91</sup> In this case, the defendant truck parts company brought scrap material, including battery parts, to a smelter for recovery of lead.<sup>92</sup> The defendant retained ownership of the battery parts throughout the process of the treatment.<sup>93</sup>

More interestingly, the Ninth Circuit opined that there is no requirement in treatment cases that there be a contract stating how and what treatment will occur.<sup>94</sup> The court held “all that is necessary is that the treatment be inherent in the particular arrangement.”<sup>95</sup> In other words, a court can find intent to treat a hazardous substance even when it is implicit, rather than explicitly laid out by the parties involved. There is a limit to a finding of intent, as the court in *Pneumo Abex* concluded that the intent of both parties in the relevant transactions was for the product to be reused in its entirety, thus the transaction was not covered under CERCLA arranger liability.<sup>96</sup> In *Pneumo Abex* defendants entered a transaction with Abex Corporation where defendants were to give Abex Corporation old wheel bearings in order for the Corporation to reuse the entirety of the metals to construct new wheel bearings and return to defendants.<sup>97</sup> When Abex Corporation’s process resulted in the creation of a Superfund site, defendants were not held liable as there was no intent by defendants to enter into the contract that would result in such.<sup>98</sup>

The Circuit Court in *Catellus* introduced a caveat to treatment arranger liability, holding that CERCLA requires the treatment to take place at the specific facility at which are the hazardous

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90. *Id.*

91. Cal. Dep’t of Toxic Substances Control v. Interstate Non-Ferrous Corp., 298 F. Supp. 2d 930, 964 (E.D. Cal. 2003).

92. *Id.* at 942.

93. *Id.* at 944.

94. *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 753 (9th Cir. 1994).

95. *Id.*

96. *Pneumo Abex Corp. v. High Point, T & D R.R.*, 142 F.3d 769, 775 (4th Cir. 1998).

97. *See id.*

98. *Id.*

substances that are subject to the cleanup action.<sup>99</sup> In this case it was the eventual arrangement for disposal at Site B that lead to contamination, not the arrangement for treatment at the intermediary, Site A.<sup>100</sup> In other words, Party X is not liable when arranging for treatment of a hazardous substance at Facility A if Facility A treats the substance, then takes that substance and arranges for disposal at Facility B that thereafter becomes a Superfund site. If treatment cases were to become more prominent within CERCLA claims, this could be another point of contention that has the potential to create a circuit split. The argument against this is that even though the hazardous substance was not disposed of on-site, Party X still had the requisite mindset to have the substance treated with full knowledge and intent that the resulting hazardous waste would be discarded or disposed of by Party Y somewhere, whether it be on that site or another owned by a third party.

#### D. *Useful Product Defense*

The useful product defense is available to PRPs when the hazardous substance sold can be utilized for its original purpose.<sup>101</sup> Courts have disagreed on the specifics of this defense, especially when the sold product was not considered a "hazardous waste" at the time of the sale. This is especially true in cases for mining property where the hazardous waste was not present until after the mining operation began or concluded.<sup>102</sup>

The court in *Summer del Caribe, Inc.*, characterized the useful product defense as only applicable when there is a sale of a new product, manufactured specifically for sale and used for its ordinary purpose.<sup>103</sup> The defense has been readily rejected by courts when the purpose of the sale is to treat or get rid of a waste or by-product.<sup>104</sup>

The Northern District of Florida, in *Chatham Steel*, disagreed with the *Catellus* district court analysis, which had looked to a

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99. *Catellus*, 34 F.3d at 753.

100. *Id.*

101. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 609–10 (2009).

102. *See Pakootas v. Teck Cominco Metals, Ltd.*, 832 F. Supp. 2d 1273 (E.D. Wash. 2011).

103. *Summer del Caribe, Inc.*, 821 F. Supp. 574, 581 (N.D. Cal. 1993).

104. *Id.*; *see also United States v. Pesses*, 794 F. Supp. 151 (W.D. Pa. 1992) (explaining that CERCLA liability can attach to those who do not own or control the material, as liability attaches also to those who arranged for treatment or disposal).



product's "productive use" rather than whether it was a "useful product."<sup>105</sup> As per the *Chatham Steel* case, a product could be of "productive use" for recycling, although not a "useful product" in terms of the originally intended purpose of the product.<sup>106</sup> The court in *Chatham Steel* decided to utilize the useful product analysis from *Pesses* and *Chesapeake*, rather than the *Catellus* district court test.<sup>107</sup>

In *Pakootas v. Teck Cominco Metals, Ltd.*, the court—in a post *Burlington Northern* analysis—explained that the useful product defense does not apply if the plaintiff can show that the product or substance transacted for "has the characteristic of waste at the time it is delivered to another party."<sup>108</sup> The court distinguished the *Cadillac Fairview* and *Catellus* Circuit Court treatment analyses by explaining that the transactions within those cases involved a product, which had the "characteristic of waste" at the point of delivery.<sup>109</sup>

In *Pakootas*, plaintiff Teck Cominco alleged that the State of Washington qualified as an arranger when it leased public lands for ore mining, a process that generated waste rock and tailings.<sup>110</sup> The court concluded that there was a valid useful product defense here, since the mines "did not have the 'characteristic of waste'" until the plaintiff mined them to produce such waste.<sup>111</sup> In *Cadillac Fairview*, the product sold was previously contaminated styrene,<sup>112</sup> while in *Catellus* it was spent batteries.<sup>113</sup> The court concluded that since the mines were not a "hazardous waste when the State entered into the contracts," the purpose of the State in the contracts could not have been "to dispose of or treat hazardous

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105. *Catellus*, 828 F. Supp. at 766; *Chatham Steel Corp. v. Brown*, 858 F. Supp. 1130, 1141 (N.D. Fla. 1994).

106. *Chatham Steel*, 858 F. Supp. at 1141.

107. *Id.*

108. *Pakootas*, 832 F. Supp. 2d at 1273 (quoting *Team Enters., LLC v. W. Inv. Real Estate Tr.*, 647 F. 3d 901, 909 (9th Cir. 2011)).

109. *Id.* at 1277.

110. *Id.* at 1270.

111. *Id.* at 1277, 1281; see *Cadillac Fairview/California, Inc. v. United States*, 41 F.3d 562 (9th Cir. 1994); see also *Catellus*, 828 F. Supp. at 766.

112. "Styrene is used predominately in the production of polystyrene plastics and resins. Styrene is also used as an intermediate in the synthesis of materials used for ion exchange resins and to produce copolymers." *Styrene Fact Sheet*, U.S. ENVTL. PROT. AGENCY, <http://www3.epa.gov/airtoxics/hlthef/styrene.html> [<https://perma.cc/JHM3-2S8S>] (last visited Mar. 4, 2016).

113. *Id.*; *Catellus*, 828 F. Supp. at 764–65.

waste."<sup>114</sup> Treatment by the mining companies was the peripheral result of a new and unused product.<sup>115</sup>

The court in *Pakootas* clearly misunderstood the purpose of the CERCLA statute when coming to its decision on the matter of treatment and disposal.<sup>116</sup> As Teck Cominco asserted in its brief, the State arranged for treatment and disposal of hazardous waste when it leased the land, as the "waste in the form of tailings and waste rock is inherent to the mining and milling processes," which the State intended Teck Cominco to perform.<sup>117</sup> The State intended to enter into the contract so that Teck Cominco would separate the ore from the waste rock and treat the ore, which generated tailings that were disposed of.<sup>118</sup> There is no other purpose for the State to lease the mines to Teck Cominco than to arrange for the mining, which results in the treatment and subsequent disposal of hazardous waste.<sup>119</sup> This is not a case of mere knowledge by the defendant, but rather one where intent is implicit within the transaction.<sup>120</sup> Even if the court asserted that there was no hazardous waste to treat, it must at least admit that the contract arranged for the disposal of future waste at the site.

More in line with a typical useful product analysis, the *Ekotek* court claimed that the "defense focuses only upon whether the product is still fit for its original purpose."<sup>121</sup> The standard applies to not just disposal, but also treatment as well,<sup>122</sup> and could easily be applied to the necessary processing of a mineral at a refinery.

#### E. *Retention of Ownership*

To be held liable for arranging for the disposal or treatment of a hazardous substance it does not matter whether the liable party "retain[ed] ownership of the materials" they shipped away or sold, or whether they had control of the handling or storage by the treating or disposing party.<sup>123</sup> In sum, a party can be liable as an arranger for treatment even if it did not receive any materials back after the treatment occurred. Ownership of the hazardous

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114. *Pakootas v. Teck Cominco Metals, Ltd.*, 832 F. Supp. 2d at 1281.

115. *Id.*

116. *See id.*

117. *Id.* at 1270.

118. *Id.* at 1271 n.2.

119. *See id.* at 1270.

120. *See id.*

121. *Ekotek Site PRP Comm. v. Self*, 881 F. Supp. 1516, 1527 (C.D. Utah 1995).

122. *Id.*

123. *United States v. Pesses*, 794 F. Supp. 151, 157 (W.D. Pa. 1992).

substance after treatment is covered under a different CERCLA liability analysis.<sup>124</sup>

The court in *Cadillac Fairview* held that for arranger liability to attach, it does not matter if the arranger owned the hazardous substance, or was the one who disposed of or treated it, but merely that the person or entity arranged for treatment or disposal.<sup>125</sup> The court used the terms disposal and treatment interchangeably within this analysis, as the emphasis was more on the word arrange.<sup>126</sup> In agreement, the court in *Summer del Caribe* explained that a person or company could be liable even when it did not own and decide how to specifically treat or dispose of said product.<sup>127</sup> The only factor necessary to attach liability is a party's intended treatment or disposal when the product was sold.<sup>128</sup>

### III. REAL WORLD SCENARIOS

There are many different real-world scenarios that can call for the use of a treatment arranger argument; however, for purposes of this Article, I propose two examples that demonstrate such. The main point is that treatment arranger liability may be easier to argue in some cases than that of disposal arranger liability.

#### A. *Battery Casings*

Party A is an auto parts store ("Store A"), which received automotive batteries from customers via trade-ins.<sup>129</sup> Store A's policy for dealing with these spent batteries was to crack them open, and then to sell them to a battery cracking plant operated by Company B.<sup>130</sup> Company B then extracted and smelted the lead from the batteries, taking on ownership and control of these batteries.<sup>131</sup> Company B then washed and crushed the battery casings, to be stored on a truck to be dumped on another end of the property owned by Company B. The casings contained lead,

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124. See CERCLA § 107(a).

125. *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 565 (9th Cir. 1994).

126. See *id.*

127. *California v. Summer del Caribe, Inc.*, 821 F. Supp. 574, 581 (N.D. Cal. 1993).

128. *Id.*

129. A majority of the facts presented within this scenario derive from case law, with few changes. See generally *Catellus Dev. Corp. v. United States*, 34 F.3d 748 (9th Cir. 1994).

130. See *id.* at 749.

131. See *id.* at 749–50.

contaminating the property that soon became a Superfund site. EPA issued a unilateral administrative order under CERCLA § 106(a) for Company B to cleanup the site, which it did.<sup>132</sup>

The present case has arisen out of a contribution action taken by Company B under CERCLA § 113(f) to mitigate its impact from joint and several liability under CERCLA.<sup>133</sup> The premise here is that Company B could assert that Store A entered into a contractual relationship in order to dispose of the hazardous substance, which it did effectively. The problem with this argument is that it is much harder to demonstrate to a court of law that Store A had the intent to dispose of the hazardous substance, as it could argue that the contract was for the sale of a useful product, and that if anything, they had knowledge of the eventual disposal of the lead inside. The more effective litigation tactic here would be to assert that Store A entered into the transactions with Company B intending for Company B to treat the batteries, as there are minimal uses that Company B can conjure up for spent car batteries. The treatment here takes place whenever Company B engages in any actions to the batteries, which effectively separates the non-hazardous from the hazardous substance or diminishes the hazardous substances within, or connected to the non-hazardous substances in any respect.<sup>134</sup>

#### B. *Transformer/Barrel Reconditioning*

Another instance where an arranger treatment analysis would be practical is where Company A transacts with Company B to recondition or repair transformers,<sup>135</sup> barrels, or some other

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132. Pursuant to CERCLA § 106(a) a unilateral administrative order works as follows:

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

CERCLA § 106(a).

133. CERCLA § 113(f).

134. See *supra* Part I.

135. Consolidation Coal Co. v. Ga. Power Co., 781 F.3d 129, 144 (4th Cir. 2015) (The type of transformer being referenced “‘step[s] down’ the voltage of electricity as it

product in order for Company A to then reuse said product. For example, a transformer is filled with oil, in order to keep all of the parts lubricated and properly working.<sup>136</sup> When delivering the transformers they are often stripped of “free flowing oil,” leaving a coating of oil on the inside edges.<sup>137</sup> The oils within the transformer may, and often do, contain polychlorinated biphenyls (“PCB”), as was the case in *Consolidation Coal Co. v. Georgia Power Co.*<sup>138</sup> During repair of the transformer, PCBs could leak out and create a Superfund site.<sup>139</sup>

The key to this is that the reconditioning desired by Company A was with the intent that Company B remove any hazardous substance from the product, such as PCB liquids lining the product.<sup>140</sup> The act of removing the hazardous substance is treatment under CERCLA, and therefore Company A should be found liable if Company B’s property becomes a Superfund site. Intent for disposal of that same hazardous substance is further attenuated from the purpose of the transaction than was the treatment of the product; therefore the easier argument to make is for CERCLA treatment arranger liability. It should be noted that this may not work in a case like *Consolidation Coal*, where the power company sold the PCB contaminated transformers as a useful product, as there is no requisite intent to have the PCBs themselves disposed of, or even treated, for that matter.<sup>141</sup>

#### CONCLUSION

In the end, a CERCLA treatment analysis is different from that of disposal, and the legislative intent coupled with case law clearly differentiates the two terms. The definition of treatment under RCRA includes a vast array of situations, encompassing anytime a seller of a product intends for the product to be treated in some capacity, whether it be by separating the hazardous waste

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moves from power plants to end users. . . . [T]ypically contains an enclosed, vacuum-sealed external tank, an internal iron core, and coils consisting of copper or aluminum windings wrapped in cellulose insulation that tightly surround the core.”).

136. *Id.* at 144.

137. *Id.* at 145.

138. *Id.* at 144.

139. *See id.*

140. *See generally Consolidation Coal*, 781 F.3d 129 (holding by way of a strict arrange for disposal analysis that the seller of transformers was not liable for sale to a second party who then reconditioned and sold to others, creating a Superfund site at the reconditioning party’s property).

141. *See id.*

from the non-hazardous, or by making the waste "amenable for recovery, amenable for storage, or reduced in volume."<sup>142</sup> The seller does not need to have control over the treatment of the hazardous waste. The purpose of the arranger provision within CERCLA § 107(a) is not just to find a party liable for arranging for the disposal of a hazardous substance that results in a hazardous waste spill, but to also hold such a party liable if they arrange for treatment of a hazardous substance at a facility. As there are currently few CERCLA treatment arranger related cases, an increase would result in an increase in successful enforcement actions. A multitude of successful treatment arranger cases has the potential to speed up the litigation process in the short term, and culminate in a boost in settlements with PRPs in the long term.

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142. 42 U.S.C. § 6903(34) (2012).