No. 07-1607

In the Supreme Court of the United States

SHELL OIL COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA; DEPARTMENT OF TOXIC SUBSTANCES CONTROL, STATE OF CALIFORNIA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The Civil Justice Association of California (CJAC) is a 30-year old nonprofit organization whose membership consists of hundreds of businesses, professional associations and local governments. Our principal purpose is to educate the public about ways to make our civil liability laws more fair, certain, and efficient. Toward these ends, CJAC regularly petitions the co-equal and coordinate branches of government for redress concerning who pays, how much, and to whom when potentially liable conduct is charged or implicated.

CJAC participated as amicus curiae in urging the Court to grant certiorari from the panel opinion because it expands "arranger" liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA", 42 U.S.C. § 9601) in ways that conflict with other circuit courts, and imposes an unworkable "adequate records" requirement for apportionment of clean-up costs at the liability stage of CERCLA proceedings.

Resolving conflicting legal opinions within and between our federal judicial circuits is, of course, consistent with CJAC's goal of educating the public about how to make our civil liability laws more fair, certain, and efficient. We now explain why these goals

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel, made a monetary contribution to its presentation or submission.

are best achieved by this Court's holding that "arranger" liability under CERCLA should not attach to a bona fide seller of a useful product who relinquishes ownership and control of it upon its delivery to the buyer who carelessly handles and disposes of that product as waste; and that apportionment of clean-up costs amongst responsible parties should not be denied at the liability phase of CERCLA litigation due to the absence of "adequate records" for which there is no utility for anyone to maintain.

BACKGROUND AND PROCEEDINGS BELOW

Under CERCLA, federal and state governments can clean up hazardous waste sites and later sue potentially responsible parties for reimbursement. Four categories of "potentially responsible parties" (PRPs) are defined from whom recovery of clean-up costs are permitted. Only one of these four categories, the third enumerated one in CERCLA, is at issue here – "arrangers," defined as "as 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 . . .."[2]

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[2] 42 U.S.C. § 9607(a). The other three numbered categories are, in ordinal position, "(1) the owner and operator of . . . a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities." *Id*.

Those who make *useful products*, in contrast to hazardous products for disposal or treatment, are not listed as PRPs under CERCLA, but are instead taxed to defray clean-up costs by the federal government through contributions to the Hazardous Substance Superfund. (42 U.S.C. §§ 4611, 4661 & 4662.)

Since CERCLA's 1980 enactment, its effect on businesses in the United States has been costly.

> Businesses spend over thirty million dollars cleaning up an average Superfund site, with larger sites costing businesses over 100 million dollars. By 1991, businesses spent over 11.3 billion dollars on CERCLA cleanups. Obviously, liability for even a single Superfund site has disastrous effects on a business, and the cost to businesses is going up. By even the most conservative estimates, the total cost of cleaning all Superfund hazardous waste sites in the United States will be well over 100 billion dollars.[3]

One of many costly CERCLA enforcement actions by the government began in 1983, when the

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[3] Martin A. McCrory, *The Equitable Solution to Superfund Liability: Creating a Viable Allocation Procedure for Businesses at Superfund Sites* (1998) 23 *VT. L. REV.* 59. While the estimates of CERCLA cleanup costs vary, spending is certainly exorbitant. The cleanup of an individual CERCLA site may range from $26 million to $50 million. See Jerry L. Anderson, *The Hazardous Waste Land*, 13 *VA. ENVTL. L.J.* 1, 10 n.50 (1993). Total nationwide cleanup costs could be as high as $750 billion. See John T. Ronan III, *A Clean Sweep on Cleanup*, *THE RECORDER*, Sept. 30, 1992, at 10, available in LEXIS, News Library, Recrdr File.

Environmental Protection Agency (EPA) and the California State Department of Toxic Substances Control (DTSC) separately investigated an agricultural chemical storage and distribution facility in Arvin, California to determine whether repeated leaks and spills had caused soil and groundwater contamination. Finding several violations of hazardous waste laws, the agencies proceeded to clean up the site and in doing so incurred substantial cost.

In 1996, the United States, acting through the EPA and DTSC, brought a CERCLA suit against Brown & Bryant, Inc., owner and operator of the facility; Burlington Northern & Santa Fe Railway and Union Pacific Transportation Co. ("Railroads"), part landowners of the facility; and Shell Oil Company (Shell), distributor of the agricultural chemical products involved. The district court determined that the Railroads fell into the category of "owner" PRPs and Shell an "arranger" PRP, and that the harm sustained at the site was capable of apportionment. (*United States v. The Atchison, Topeka, & Santa Fe Railway Co.*, Nos. CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228 OWW (E.D. Cal. July 15, 2003.) B & B was insolvent.

For the Railroads, the district court multiplied the percentage of ownership, percentage of time owned in relation to total operations, and fraction of hazardous products attributable to the Railroads' parcel to determine that they were liable for 9% of the total cleanup costs. For Shell, the district court multiplied the percentages of leaks attributable to Shell to determine that Shell was liable for 6% of the total cleanup costs. Both parties appealed the judgment: the EPA and DTSC arguing that the Railroads and Shell

are jointly and severally liable for the entire judgment, and Shell arguing that it is not an "arranger" under CERCLA and therefore not a party upon whom any cleanup liability can be imposed.

The Ninth Circuit affirmed the district court's ruling that CERCLA liability attached to the Railroads as "owners" and Shell as an "arranger." (*U.S. v. Burlington Northern & Santa Fe Ry*. 520 F.3d 918 (9th Cir. 2008) ("*Burlington Northern*").) Relying heavily on *U.S. v. Chem- Dyne, Corp*., 572 F. Supp. 802 (S.D. Ohio 1983), it also held that apportionment of clean-up costs may be determined at the liability phase of the CERCLA proceedings, but ultimately disagreed with the district court's method of apportionment. Regarding the Railroads, the Ninth Circuit found that the factors the district court used (percentages of land area, time of ownership, and types of hazardous products) bore an insufficient logical connection to the pertinent question: what part of the contaminants found on the land in question were attributable to the presence of toxic substances or to activities on the Railroad parcel? The Ninth Circuit rejected the district court's apportionment calculation and held that the Railroads had failed to prove a "reasonable basis" for apportioning liability. With regards to Shell, the Ninth Circuit found that because the appropriate consideration for apportionment is contamination, by presenting evidence of leakage Shell failed to prove whether its chemicals that were leaked had contaminated the soil in any specific proportion as compared to other chemicals spilled at the site. The Ninth Circuit held that Shell's evidence concerning leakage was insufficient to prove a "rational basis" for apportionment of liability.

Finally, the Ninth Circuit agreed with the district court that Shell was an "arranger" for purposes of CERCLA. On appeal Shell contended the district court used the wrong standard in determining whether it was an "arranger," that the "useful product" doctrine precludes imposition of "arranger" liability on Shell, that Shell lacked ownership and control over the chemicals at the time of the transfers, and the district court erred when it determined Shell contributed to the groundwater contamination. The Ninth Circuit rejected Shell's arguments, finding that an entity can be an "arranger" even if it did not "own" or "control" the hazardous material and did not intend to dispose of it (under CERCLA, "dispose" can mean "spill" or "leakage"); the "useful product" doctrine does not apply where the sale of a useful product necessarily and immediately results in the leakage of hazardous substances; and Shell had sufficient control over, and knowledge of, the transfer process to be considered an "arranger" under CERCLA.

SUMMARY OF ARGUMENT

"Arranger" liability under CERCLA should not attach to a bona fide seller of a useful product who, even if it is a hazardous substance, relinquishes ownership and control of it upon delivery to the buyer. That is the law in every jurisdiction except, as a result of this opinion, the Ninth Circuit. Nor should apportionment of CERCLA clean-up costs be denied at the liability phase of litigation due to the absence of "adequate records" for which there is no utility for anyone to maintain. That, again because of this opinion, now occurs only in the Ninth Circuit.

Bad law should be nipped in the bud lest it infect future courts considering similar or analogous issues. The opinion in this case is "bad" law, not because it is animated, as Holmes intimated, by "hard facts;"[4] but because it is at odds with better reasoned decisions from other circuits and common-sense. The Court should reverse in its entirety the judgment of the Ninth Circuit and adopt the better reasoned opinions from the majority of circuits on CERCLA "arranger" liability and "apportionment."

ARGUMENT

I. THE SELLER OF A "USEFUL PRODUCT" WHO RELINQUISHES OWNERSHIP AND CONTROL OF IT UPON RECEIPT BY THE BUYER IS NOT AN "ARRANGER" UPON WHOM CERCLA LIABILITY SHOULD BE IMPOSED.

A. A Seller's "Intent," "Ownership" and "Control" of Hazardous Substances Should be Key Factors for Determining whether CERCLA "Arranger" Liability Attaches.

As mentioned, CERCLA provides that "any person who by contract, agreement or otherwise, arrange[s] for disposal or treatment, or arranges[s] with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person" is liable as an "arranger." (42 U.S.C.

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[4] "Great cases, like hard cases, make bad law." *Northern Secs. Co. v. United States,* 193 U.S. 197, 400 (1904).

§9607(a)(3).) Other than this language, there is little else surrounding CERCLA to guide courts in its application and enforcement. "Any inquiry into CERCLA's legislative history is somewhat of a snark hunt. Like other courts that have examined the legislative history, we have found few truly relevant documents." (*Carson Harbor Vill., Ltd. v. Unocal Corp*., 270 F.3d 863, 885 (9th Cir. 2001).)[5]

Not surprisingly, courts which have grappled with the content and contours of "arranger" liability disagree as to how best to determine the conditions upon which liability attaches, with the better reasoned opinions standing in sharp contrast to the Ninth Circuit panel's opinion here. Indeed, the panel opinion is an outlier compared with other circuit courts regarding the test it adopts for determining "arranger" liability, particularly the lack of importance it accords to the elements of "intent," "ownership" and "control" by the seller with respect to disposal or treatment of the hazardous material. What the Ninth Circuit has finally wrought by this opinion is the stripping away of three key, commonsense elements to "arranger" liability, none of which it finds to any longer have much importance, and their replacement with a vague *knowledge* given the "totality of the circumstances"[6]

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[5] See also *Rhodes v. County of Darlington, S.C.*, 833 F. Supp. 1163, 1174 (D.S.C. 1992) ("CERCLA is oft-criticized for its hasty passage and lack of clarity. There is virtually no legislative history to guide the courts in interpreting the Act. The statute as originally enacted was, at best, vague and indefinite.").

[6] See also *California Dep't of Toxic Substances Control v. ALCO Pacific, Inc*., 508 F.3d 930, 939 (9th Cir., 2007). This Court has criticized the "totality of circumstances" approach in numerous

test that leaves determinations of "arranger liability" uncabined and unconfined.

1. Considering "intent" for "arranger" liability is consistent with the language of the statute and not contrary to the strict liability principle underlying CERCLA.

We begin with *intent*, an implied element of "arranger" liability the panel mistakenly found unnecessary under CERCLA. "[A]n entity [like Shell] can be an arranger even if it did not intend to dispose of the product." (*U.S. v. Burlington Northern & Santa Fe Ry. Co.*, 502 F.3d 781, 808 (9th Cir. 2007), *amended by* order denying petition for rehearing en banc.) This conclusion is, we are told, fortified by the observation that "disposal" under CERCLA includes "leaking," and since "leaking" may not "require affirmative . . . conduct,"[7] "disposal" need not be "purposeful." (*Id.*) Ergo, "arrang[ing] for" liability under CERCLA has nothing to do with the seller's *intent*. The panel opinion concludes a seller can be found liable as an "arranger" absent an intent to dispose of the product.

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contexts, including its use to determine whether an act falls within the "statutory public use" or "on sale" as being unnecessary, vague, and uncertain. See *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 66 (1998). See also *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001) (Scalia, J., dissenting) (criticizing the majority's replacement of the Chevron doctrine with a "totality of the circumstances" test).

[7] *See Carson Harbor Vill., supra*, 270 F.3d at 880 (holding that "leaking" may not "require affirmative . . . conduct" (internal quotation marks omitted)).

"Arranging for a transaction in which there necessarily would be leakage or some other form of disposal of hazardous substances is sufficient." (*Burlington Northern*, *supra*, 520 F.3d at 808.)

This construction of the "arranger liability" language of CERCLA is syntactically clever, but semantically wrong; it ignores the plain meaning of the words used and their relationship to each other. CERCLA's definition of an "arranger," which includes those who by "contract or agreement" or who "otherwise arrange for" disposal of hazardous substances, evinces an "indispensable role" for *state of mind* in applying the statute. "Although the statute defines 'disposal' to include 'spilling,' the critical words for present purposes are 'arranged for.' The words imply intentional action." (*Amcast Indus. Corp. v. Detrex Corp*., 2 F.3d 746 (7th Cir. 1993) (*Amcast*).)

> "Otherwise arranged" is a general term following in a series two specific terms and embraces the concepts similar to those of "contract" and "agreement." 2A Norman J. Singer, *SUTHERLAND STATUTORY CONSTRUCTION* § 47.17 (1992); *Woods v. Simpson,* 46 F.3d 21, 23 (6th Cir.1995). All of these terms indicate that the court must inquire into what transpired between the parties and what the parties had in mind with regard to disposition of the hazardous substance. *Therefore, including an intent requirement into the "otherwise arranged" concept logically*

> *follows the structure of the arranger liability provision.*[8]

This parsing of the pertinent statutory language is neither novel nor new. Judge Posner had occasion to discern the meaning of "arranger" liability from analysis of the statutory language in *Amcast*. In that case the defendant, a chemical manufacturer, contracted with a common carrier for transportation of a hazardous substance, which "spilled" when the buyer filled his storage tanks with it. The Court of Appeal reversed the district court and held there was no "arranger" liability for the seller of the hazardous substance because defendant did not contract with the transporter for the purpose of spilling the substance on the premises. As if anticipating the panel's explanation in this case as to why intent is irrelevant to determining arranger liability, Judge Posner addressed and laid to rest the argument that since "disposal" in CERCLA's definitions includes the "accidental spilling" or "leaking" of a substance, intentionality cannot be implied as a required element of CERCLA arranger liability:

> Statutes sometimes use words in nonstandard senses, and do so without benefit of a definitional section. . . . But since context determines meaning, the same word can mean different things in different sentences – to monopolize a conversation doesn't mean the same thing as to monopolize the steel industry – even in the same statute, especially when the

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[8] *United States v. Cello-Foil Prods., Inc*., 100 F.3d 1227, 1231 (6th Cir. 1996); emphasis added.

> statute does not attempt to impose a single meaning by defining the word. In the context of the operator of a hazardous-waste dump, "disposal" *includes* accidental spillage; in the context of the shipper who is arranging for the transportation of a product, "disposal" *excludes* accidental spillage because you do not arrange for an accident except in the Æsopian sense illustrated by the staged accident.[9]

Ascertaining the *intent* of the seller to determine if arranger liability is appropriate does not run counter to the strict liability principles undergirding CERCLA. The intent inquiry is geared only towards determining whether the party in question, here Shell, is potentially liable, a PRP. Once a party is determined to have the requisite intent to be an "arranger," then strict liability takes effect. If an arrangement has been made, that party is liable for damages caused by the disposal regardless of the party's intent that the damages not occur. But if there is no intent to make an "arrangement for" disposal or treatment of waste, there should be no liability as an "arranger."

2. "Ownership" and "Control" are More Sensible Criteria for Determining "Arranger Liability" than the Ninth Circuit's Use of "Knowledge."

Besides dispensing with *intent* as an element of CERCLA arranger liability, the panel opinion in this case vastly alters the importance of the "ownership" and "control" elements from previous Ninth Circuit

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[9] *Amcast*, *supra*, 2 F.3d at 751; emphasis added.

opinions and those of other circuits that have considered the content of arranger liability. In *United States v. Shell Oil Co*., 294 F.3d 1045, 1055 (9th Cir. 2002), for instance, the court hailed control as "a crucial element of the determination" and, in the absence of ownership, indicated that "actual control" is *necessary*. Here, however, the Ninth Circuit placed a revisionist gloss on *Shell* and its antecedents by asserting that thee authorities did *not* deem ownership or control to be "crucial" elements of arranger liability, but merely "useful indices or clues"[10] in the analysis.

United States v. Aceto Agr. Chemicals Corp., 872 F.2d 1373, 1381-82 (8th Cir. 1989) ("*Aceto*") underscores the importance of *ownership* and *control* as factors to be considered in determining arranger responsibility. That opinion upholds a district court's assignment of CERCLA arranger liability on pesticide manufacturers for the environmental contamination of a facility used to formulate market-grade products. Based on the manufacturers' *ownership* of the raw materials in addition to the final products, the district court held the manufacturers liable for the environmental torts of their independent contractor. In its opinion, the Eighth Circuit emphasized that the authority to control the pollution-causing process is not the sole critical factor in imposing CERCLA liability for resulting environmental harm. Rather, the Act specifies *ownership* of the released substances as a distinct basis for assigning such liability.[11] "Plaintiffs

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[10] *Burlington Northern*, *supra*, 520 F.3d at 951.

[11] *Aceto* was vacated after the Court granted rehearing en banc. *See FMC Corp. v. U.S. Dep't of Commerce,* 10 F.3d 1003 (3d Cir. 1994). In the superseding *en banc* decision, the Court affirmed the

alleged that defendants retained *ownership* of their hazardous substances throughout the formulation process; and [w]e hold these allegations . . . sufficient to establish . . . that defendants 'arranged for' the disposal of hazardous substances under CERCLA." (*Id*. at 1384; emphasis added.)

To be sure, there has been some disagreement between the circuits over whether *ownership* or *control* of the material being processed is the more critical factor in "arranger liability" analysis. (*C.f. United States v. Hercules,* 247 F.3d 706, 720 (8th Cir. 2001) (implying that ownership without control would suffice and stating that "[c]ontrol ... is not a necessary factor") and *Jones-Hamilton Co. v. Beazer Materials & Services Inc.,* 973 F.2d 688, 695 (9th Cir. 1992) (liability based on ownership without control); *with United States v. Shell Oil Co., supra*, 294 F.3d at 1055-56 (proof of ownership not required because actual control is the "crucial element").) But the panel opinion in this case stands alone in relegating ownership and control to nothing more than "clues," as opposed to "crucial" factors, in ascertaining arranger liability.

Denigrating the importance of "ownership" as a critical element in ascertaining arranger liability under CERCLA, which the panel opinion here does, makes no sense. After all, proof of ownership or

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district court's judgment holding the government liable as an arranger without discussion because the Court was "equally divided on this point." *FMC Corp. v. U.S. Dep't of Commerce,* 29 F.3d 833, 846 (3d Cir. 1994). Accordingly, to this date the Eighth Circuit has neither ruled on the validity of the *Aceto* test for "arranger liability," nor articulated its own test. *See United States v. Occidental Chem. Corp.,* 200 F.3d 143, 145 (3d Cir. 1999).

possession of the hazardous substance is required by the plain language of the statute. (See 42 U.S.C. § 9607(a)(3) ("any person who . . . arranged for disposal or treatment . . . of hazardous substances *owned or possessed by such person* . . ..) (emphasis added).) This required factor is the starting point in determining "arranger liability" because, of course, with ownership comes responsibility. See *Aceto, supra,* 872 F.2d at 1382 (imposing "arranger liability" upon defendant that owned hazardous substance throughout formulation process because finding otherwise "would allow defendants to simply 'close their eyes' to the method of disposal of their hazardous substances").

While ownership often equates with "control," it is obviously possible for one to lack "ownership" over a hazardous substance but still have "control" over the disposal or treatment of that substance. In these situations, courts have understandably found "control" instead of ownership to be the decisive factor. (*C.f.*, *Shell Oil, supra*, 294 F.3d at 1055, 1057 (suggesting that "actual control" rather than simply "authority to control" must be shown); *General Elec. Co. v. AAMCO Trans., Inc.,* 962 F.2d 281, 286-87 (2d Cir. 1992) (implying that obligation to exercise control alone satisfies the "arranger liability" standard).)

Here, however, "arranger" liability" is imposed by the Ninth Circuit upon Shell absent any evidence that Shell *intended* to arrange for the disposal of its soil fumigant by B & B or that it *owned* or *controlled* what happened to the product once ownership transferred to B & B. Lacking any evidence in the record of the key factors of "intent," "ownership" or "control," the Ninth Circuit opinion nonetheless attempts to cobble together through tenuous reasoning some satisfaction

of these criteria only to end up substituting in their place an independent criterion – *knowledge*.

"Ownership," the opinion tells us, is satisfied by the fact that Shell owned its product *before* it sold it to B & B. "Shell . . . owned the chemicals at the time the sale was entered into. The statute requires nothing more in terms of ownership." (*Burlington Northern*, *supra*, 520 F.3d at 951.) But this cannot be the "ownership" or "possession" CERCLA intends. If the statute is construed in this way one can never sell an allegedly hazardous substance to another without incurring arranger liability for whatever the buyer does with regard to disposing of or treating the product. In other words, a seller can never escape liability for sale of its product – however useful – no matter how much the buyer assumes liability for its disposal or treatment, which means no one of sound mind would ever manufacture or sell any substance to another that may be hazardous when disposed of or treated and incur costs greater than the return made from the sale.

"Control," which along with "ownership" has been reduced by the panel opinion from a "crucial" element to a mere "clue" for determining arranger liability, is supposedly satisfied by Shell's arranging for the delivery of its fungicide D-D through common carrier, and its knowledge that spills occurred every time delivery was made to B & B. Petitioner has persuasively addressed the factual errors and logical flaws in the Ninth Circuit's musings toward this end,[12] but the bottom line is the opinion's

[12] Brief for Petitioner, pp. 29-31.

pronouncement that Shell had "sufficient *knowledge* of the transfer process to be considered an "arranger," within the meaning of CERCLA . . .." (*Burlington Northern*, *supra*, 520 F.3d at 951.) Thus *knowledge* of the transfer process, by itself, is sufficient to render one an "arranger" in the current view of the Ninth Circuit. *Knowledge*, however, whether actual or constructive, is a highly subjective element and too slim a reed upon which to rest arranger liability. Indeed, if the Ninth Circuit is correct in its reasoning that *intent* is not relevant to arranger liability because "leaking" of a hazardous substance is a part of "disposal," then it is difficult to logically reconcile how the subjective element of "knowledge" can be essential to determining arranger liability.

B. Arranger Liability Should Not be Imposed Upon one who Makes and Sells a "Useful Product" to Another who Misuses it and then Disposes of it as Waste.

The "useful products" doctrine establishes that the "sale of a new useful product containing a hazardous substance" – as opposed to the sale of a substance merely "to get rid of it" – does not give rise to CERCLA liability. (*Prudential Ins. Co. of Am. v. United States Gypsum*, 711 F. Supp. 1244, 1254 (D.N.J. 1989).) Accordingly, courts have refused to impose arranger liability for the sale of asbestos-containing construction materials,[13] the subsequent sale of a

[13] *Id*. Nor does the mere installation of such materials constitute "disposal." *3550 Stevens Creek Assocs. v. Barclay's Bank of Cal*., 915 F.2d 1355 (9th Cir. 1990).

building containing such materials,[14] the sale of new and used electrical transformers containing hazardous polychloronated biphenals (PCBs),[15] the sale of wood treatment chemicals to a wood treatment facility,[16] the sale of PCBs for use as dielectric fluid in electrical equipment,[17] the sale of neoprene compounds for use in the manufacture of rubber goods,[18] and the transfer of hazardous chemicals for use in electroplating, heat treating, and waste water treatment.[19]

Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160 (2d Cir. 1999) explains why sellers of useful hazardous substances are not subject to arranger liability. Glaxo, upon closing a facility, sold chemical reactants used in its facility to Freeman Industries Incorporated (FII) for use in FII's business. FII used some of the chemicals in

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[14] *G.J. Leasing Co. v. Union Elec. Co*., 54 F.3d 379, 383 (7th Cir. 1995).

[15] *Florida Power & Light Co. v. Allis Chalmers Corp*., 893 F.2d 1313 (11th Cir. 1990) (sale of new transformers); *C. Greene Equip. Corp. v. Electron Corp*., 697 F. Supp. 983 (N.D. Ill. 1988) (sale of used transformers with useful life).

[16] *Edward Hines Lumber Co. v. Vulcan Materials Co*., 685 F. Supp. 651 (N.D. Ill.), aff'd on other grounds, 861 F.2d 155 (7th Cir. 1988).

[17] *United States v. Westinghouse Elec. Corp*., 22 Env't Rep. Cas. (BNA) 1230, 1232 (S.D. Ind. 1983).

[18] *Kelley v. Arco Indus. Corp*., 739 F. Supp. 354 (W.D. Mich. 1990).

[19] *AM Int'l. v. Int'l. Forging Equip*., 982 F.2d 989, 998 (6th Cir. 1993). Here, there was some question as to whether ownership of the chemicals at issue was actually transferred between the parties. *Id*. at 998 n.10.

its business, stored some of them, and sold some of them. The stored chemicals became the source of a remedial action by the EPA at the FII facility. FII commenced a third party action for contribution against Glaxo, claiming that Glaxo had arranged for disposal of its chemicals at the FII facility. Glaxo's defense was, as Shell argued here, that it merely sold the chemicals and did not arrange for their disposal. After citing cases holding that one cannot circumvent the Superfund Law by characterizing disposal as a sale, the court noted that Glaxo sold valuable products to FII for use or resale. The court determined that these were virgin chemicals, not waste, and liability for the arrangement for disposal requires the presence of waste. Therefore, Glaxo did not arrange for disposal at the FII facility.

Similarly, *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*, 142 F.3d 769 (4th Cir. 1998) provides further analysis of how to determine whether a transaction is a sale or an arrangement for disposal. The court explained that the key factors "[i]n determining whether a transaction was for the discard of hazardous substances or for the sale of valuable materials" were the *intent* of the parties, the value and state of the materials, and the *usefulness of the product*. The transaction in *Pneumo* was for the sale of used bearings to be processed into new bearings. The processing generated waste, but the court found that the essence of the transaction was payment in exchange for bearings, not an attempt to dispose of unwanted metal. Thus, the seller did not arrange for disposal.

The Ninth Circuit opinion here attempts to evade the "useful product" defense to arranger liability by, as

previously discussed, pointing out that under CERCLA's definitions "waste" includes "leakage," and then grafting onto that the assertion Shell knew that its fungicide D-D was subject to "leakage" and, given that it was also hazardous, it was *ipso jure*, "waste." But this spin on CERCLA strips the useful products doctrine of any viability whatsoever. All "leakage" of a useful product that is also a hazardous substance becomes, under the Ninth Circuit's reading of the statute, the "disposal" of "waste" for which a seller is liable as an "arranger." Once again, the panel opinion goes too far and proves too much; it is a literal, but not a literate reading, of CERCLA's arranger liability provision.

II. THE OPINION IMPOSES AN IMPRACTICAL AND UNWORKABLE "ADEQUATE RECORDS" REQUIREMENT FOR APPORTIONMENT OF CLEAN-UP COSTS TO OCCUR AT THE LIABILITY STAGE OF CERCLA PROCEEDINGS.

Liability under CERCLA is normally joint and several, meaning each defendant is potentially liable for the entire amount of clean-up costs, with the possibility of then seeking contribution from other defendants. Some courts, however, have allowed apportionment of responsibility on the basis of equitable factors at the liability stage. See, e.g., *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996) ("Liability under the Act is joint and several, unless potentially responsible parties can prove that the harm is divisible."); *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989) ("[D]amages should be apportioned only if the defendant can demonstrate that the harm is divisible."); cert. denied *sub. nom*, *American Cyanamid*

Co. v. O'Neil, 493 U.S. 1071 (1990). Congress intended CERCLA apportionment to be governed by common law tort principles and guided by the Restatement (Second) of Torts § 443. See, *e.g.*, *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 895 (5th Cir. 1993).

The opinion in this case recognizes the appropriateness of apportionment at the liability phase of CERCLA litigation, but then devises a test that, for all practical matters, obliterates that possibility. Not surprisingly, the stringent test devised by the opinion results in reversal of the district court's "reasonable basis" apportionment and saddles Shell and the Railroads with complete responsibility (joint and severally liable) for the total clean-up costs.

Factors to be considered by courts in determining whether apportionment is appropriate are explained in comment d to the *RESTATEMENT (SECOND) OF TORTS* § 433A(1), upon which other circuits apportioning CERCLA liability have relied:

> There are other kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible. Thus where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop, the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number. Where such apportionment can

> be made without injustice to any of the parties, the court may require it to be made.

Instead of cattle and crops, the district court considered the percentage of land ownership held by the various parties, the period in which the land was held in ownership, and the length of time of contamination to arrive at a "reasonable basis" for apportioning the respective costs to be borne by Shell and the Railroads. The district court's approach to apportionment was in keeping with the "whole point" of Restatement § 433A that, as the dissent remarks, "no specific evidence is required for apportionment so long as the evidence and method used are 'reasonable.'" (*Burlington Northern, supra,* 520 F.3d at 958.) Nonetheless, the Ninth Circuit panel reversed the district court's "apportionment" because the parties did not produce "adequate records" detailing "the amount of leakage attributable to activities on the Railroad parcel, how the leakage traveled to and contaminated the soil and groundwater . . ., and the cost of cleaning up the contamination." (*Burlington Northern, supra,* 520 F.3d at 957.)

Significantly, the opinion concedes that there would be little "utility" to either the operator of the waste facility or the owner of the land (not to mention the seller of the useful product) to make such records; but nonetheless faults the absence of such records as grounds for reversing the district court's apportionment.

Under the opinion's reasoning, it is difficult to imagine any practical circumstances allowing for apportionment of clean-up costs between and amongst responsible parties. "Adequate records," as the opinion

admits, are unlikely ever to be kept because there is no "utility" for parties to keep the kind of documentation the opinion says is a prerequisite for CERCLA "apportionment."

The opinion here accepts the theory of apportionment by paying lip service to it, but saddles courts attempting to perform apportionment at the liability phase of CERCLA litigation with an unreasonable and burdensome requirement that effectively makes it unlikely to ever occur. This is contrary to the law in numerous other circuits and Congressional intent. The Court should reverse the judgment on the grounds that a reasonable basis exists to apportion damages between Shell and the Railroads at the liability phase.

CONCLUSION

For all the aforementioned reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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