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SUPERFUND "ARRANGER" LIABILITY: WHY OWNERSHIP OF THE HAZARDOUS SUBSTANCE MATTERS

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980[1] (CERCLA or Superfund Law), lists four categories of parties who may be liable for remediation costs at inactive hazardous waste sites[2]: (1) the current owner or operator of a facility;[3] (2) the owner or operator of a disposal facility at the time of the disposal of hazardous substances;[4] (3) a person who arranged for disposal of hazardous substances "owned or possessed by such person";[5] and (4) a person who accepted hazardous substances for transport to a disposal facility, if that person chose the disposal facility.[6] This Article will examine the third category, the "arranger," and analyze the role played by the qualifier *owned or possessed by such person*. On its face, it would seem the statute should impose liability on the one who caused the environmental problem by arranging for the disposal of waste regardless of who has title to the waste. Indeed, asking who owned the waste sounds a lot like asking who owned the bullet after there has been a shooting.

No criminal defendant would argue, "I did not own the bullet; therefore, I cannot be responsible for having shot the victim." However, Congress has created a system in which waste dumpers can argue, "I did not own the waste; therefore, I cannot be responsible for its disposal." Courts have struggled to determine why Congress included this ownership requirement, sometimes even concluding that anyone with the authority to arrange for disposal of the waste has sufficient control of it to be deemed one who owned or possessed the waste.[7] This view eliminates the concept of ownership and possession from the statute because it suggests that everyone who arranges for disposal owns or possesses the waste. Other courts have reversed that reasoning and concluded arranger liability does not require that one

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1. 42 U.S.C. §§ 9601–9675 (2000).

2. Inactive hazardous waste sites are disposal or treatment facilities that have been abandoned or closed. CHARLES M. CHADD ET AL., AVOIDING LIABILITY FOR HAZARDOUS WASTE: RCRA, CERCLA, AND RELATED CORPORATE LAW ISSUES A-27 (1991). Congress recognized that existing legislation only applied prospectively. H.R. REP. NO. 96-1016, pt.1, at 17–18 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. In response, Congress enacted CERCLA "to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." *Id.* pt.1, at 22.

3. 42 U.S.C. § 9607(a)(1) (providing that "the owner and operator of a vessel or a facility" shall be liable).

4. *Id.* § 9607(a)(2) (imposing liability on "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").

5. *Id.* § 9607(a)(3) (imposing liability on "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances").

6. *Id.* § 9607(a)(4) (imposing liability on "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance").

7. *See infra* notes 105–18 and accompanying text.

make any arrangements for disposal because anyone who at some point owned or possessed hazardous waste is responsible as an arranger wherever the waste ends up.[8] By this view, the language *owned or possessed by* expands the meaning of arranger to include anyone who owned or possessed the waste.

Recently the Third Circuit reviewed the appellate decisions on arranger liability and noted a number of disagreements "among our sister circuits" regarding the role of ownership in arranger liability.[9] Part of the difficulty courts have had in explaining the role of the language *owned or possessed by* in arranger liability stems from the wide variety of scenarios that give rise to arranger liability.[10] This Article will argue there are not significant disagreements among the courts regarding the role of ownership; instead, there are four distinct scenarios that give rise to arranger liability, and the role of the language *owned or possessed by* differs depending on the scenario. Within each scenario, however, there is actually a great deal of consistency. In addition, this Article will show how the definition of *arranger* derived from this analysis can be used to resolve some other difficulties courts have had in determining who is an arranger.

II. PRE-SUPERFUND ENVIRONMENTAL LIABILITY

A. Common Law Actions: Nuisance and Strict Liability for Abnormally Dangerous Activities

Prior to the Superfund Law, there were a variety of attempts to impose environmental liability through the common law.[11] Among the leading theories were nuisance and strict liability for unreasonably dangerous activities.[12] None of the common law theories, however, provided a means to require remediation or to require a person who caused an environmental problem to fund remediation.[13]

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8. *See* discussion *infra* Part II.B.1.

9. Morton Int'l Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 677 (3d Cir. 2003); *see infra* notes 196–220 and accompanying text.

10. *Compare* Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990) (concluding that a manufacturer may be liable as an arranger although the manufacturer does not decide "how, when, and by whom" hazardous waste is disposed), *with* United States v. Ne. Pharm. & Chem. Co. (*NEPACCO*), 810 F.2d 726, 743–44 (8th Cir. 1986) (holding defendant's plant supervisor individually liable as an arranger where he knew about, supervised, and was directly responsible for arranging for disposal of hazardous waste).

11. *See* H.R. REP. NO. 96-1016, pt. 1, at 62 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119, 6139 (noting that one goal of CERCLA legislation was to "clarify and codify long-standing common law theories as they relate to liability for damages caused by hazardous waste disposal activities").

12. Jeff Civins & Mary Mendoza, *Transactional Environmental Due Diligence: When Is Diligence Due?*, NAT. RESOURCES & ENV'T, Winter 2006, at 22, 22.

13. H.R. REP. NO. 96-1016, pt. 1, at 62. Senator Gore stated that "[e]xisting state tort laws present a convoluted maze of requirements under which a victim is confronted with a complex of often unreasonable requirements." *Id.*

A nuisance is the unreasonable use of one's property in a manner that harms others in the use of their property.[14] The interest protected is a property interest[15]: the right to occupy one's property with "reasonable comfort."[16] Pollution of a stream constituted a nuisance in several early environmental cases.[17] The common thread throughout the cases was that each property owner discharged waste into a body of water that either abutted or passed through its property and caused injury to other users of that body of water. Several other uses of property have also been found to be nuisances, including uses that result in noise,[18] odors,[19] and flooding.[20]

Among the limitations on the effectiveness of a nuisance action are the emphasis on the use of one's property and the remedies it provides. Remedies for a nuisance action can include injunctive relief or damages[21] but do not include an obligation to remediate. The emphasis on the use of one's property means there will be many cases in which one party disposes of waste in a manner that causes injury to another party or to the public, but there will be no nuisance. There will be no nuisance because the injury either does not result from the defendant's use of the defendant's property (for example, where the defendant is a waste transporter who dumps waste on plaintiff's property) or because the injury to the plaintiff does not affect plaintiff's use of plaintiff's property (for example, where the defendant dumps waste on defendant's property). Thus, if the goal is to find a remedy for injuries caused by the disposal of hazardous waste, a nuisance action does not satisfy the goal on a consistent basis.

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14. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 617 (5th ed. 1984).

15. *Id.* at 618 ("A private nuisance is a civil wrong, based on a disturbance of rights in land.").

16. *Id.* § 87, at 619 ("The ownership or rightful possession of land necessarily involves the right . . . to . . . some reasonable comfort and convenience in its occupation.").

17. *See, e.g.*, Johnson v. City of Fairmont, 247 N.W. 572, 572 (Minn. 1933) (holding that plaintiff presented sufficient evidence that defendant's pollution of a stream constituted a nuisance); Beach v. Sterling Iron & Zinc Co., 33 A. 286, 290 (N.J. Ch. 1895) (identifying stream pollution as a nuisance), *aff'd sub nom.* Sterling Iron & Zinc Co. v. Sparks Mfg. Co., 41 A. 1117 (N.J. 1896) (per curiam); *cf.* Rose v. Standard Oil Co., 185 A. 251, 254 (R.I. 1936) (citing Rose v. Socony-Vacuum Corp., 173 A. 627 (R.I. 1934)) (finding a nuisance where oil, gasoline, and other substances escaped from defendant's refiner and polluted plaintiff's drinking water).

18. KEETON ET AL., *supra* note 14, § 87, at 619–20 (citing Gorman v. Sabo, 122 A.2d 475 (Md. 1956); Borsvold v. United Dairies, 81 N.W.2d 378 (Mich. 1957); Jenner v. Collins, 52 So. 2d 638 (Miss. 1951); Hooks v. Int'l Speedways, Inc., 140 S.E.2d 387 (N.C. 1965); Guarina v. Bogart, 180 A.2d 557 (Pa. 1962)).

19. *Id.* (citing Hedrick v. Tubbs, 92 N.E.2d 561 (Ind. Ct. App. 1950); Higgins v. Decorah Produce Co., 242 N.W. 109 (Iowa 1932); Sarraillon v. Stevenson, 43 N.W.2d 509 (Neb. 1950); Johnson v. Drysdale, 285 N.W. 301 (S.D. 1939); Aldred's Case, 9 Coke 57b, 77 Eng. Rep. 816 (K.B. 1611)).

20. *Id.* (citing William Tackaberry Co. v. Sioux City Serv. Co., 132 N.W. 945 (Iowa 1911); Mueller v. Fruen, 30 N.W. 886 (Minn. 1886); Town of Rindge v. Sargent, 9 A. 723 (N.H. 1887)).

21. *Id.* § 89, at 637–41 (citations omitted).

Strict liability for abnormally dangerous activities has also been a common law source of environmental liability.[22] This doctrine, often referred to as the rule of *Rylands v. Fletcher*,[23] provides strict liability for uses of property that are deemed to be abnormal or unreasonably dangerous.[24] Most cases like *Rylands v. Fletcher* would also be nuisance cases,[25] and, as a remedy for environmental contamination, they suffer from many of the same limitations. Moreover, the doctrine is based on the idea that the defendant is making use of its property in a manner that is abnormal.[26] This can vary the doctrine's application depending on location or other factors and provide, for example, that the use of solvent cleaners, which can pollute the groundwater, could be abnormally dangerous in a populated residential area but not abnormally dangerous in an industrial area. Thus, neither nuisance law nor strict liability in tort provided the type of remedy Congress was looking for when it created the arranger concept—a remedy for the presence of chemical poisons in the environment.[27]

B. Initial Proposals for the Superfund Law

The Superfund Law was needed, in part, because the common law did not provide a liability mechanism for the past disposals or releases of hazardous substances. As different versions of the Superfund Law moved through Congress, liability was initially attributed to the "generator" of the waste.[28] The generator of the waste is a key player in the Resource Conservation and Recovery Act of 1976 (RCRA),[29] the regulatory program that governs hazardous waste activities. Thus, when Congress was debating the Superfund Law, the generator was already a familiar figure in environmental law and a likely candidate for liability. Generation of hazardous waste is defined in RCRA as "the act or process of producing hazardous waste."[30] Generation, therefore, implies ownership or control because one cannot produce something without at some time owning or controlling the thing

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22. *See, e.g.*, Luthringer v. Moore, 190 P.2d 1, 8 (Cal. 1948) (imposing strict liability on a fumigating contractor for fumes resulting from acid vapors); Susquehanna Fertilizer Co. v. Malone, 20 A. 900, 900–01 (Md. 1890) (citations omitted) (imposing strict liability on the operator of a fertilizer factory).

23. 3 L.R.E. & I. App. 330 (H.L. 1868) (citations omitted).

24. *Id.* at 339–41.

25. KEETON ET AL., *supra* note 14, § 78, at 552–53 (citations omitted).

26. *Id.* at 551 (citing RESTATEMENT OF TORTS §§ 519–20 (1938)) (noting that while the *Restatement of Torts* uses the phrase *ultrahazardous activities*, American courts have continued to stress "where the thing is done").

27. *See* Sen. Robert T. Stafford, *Why Superfund Was Needed*, EPA J., June 1981, at 8, 9.

28. *See* H.R. REP. NO. 96-1016, pt.1, at 29 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6116, 6132 ("Subsection (b) [of section 3041] defines the term 'responsible party' to mean any person who . . . generated or disposed of a substantial portion of the hazardous waste treated, stored, or disposed of at an inactive [hazardous waste] site.").

29. 42 U.S.C. §§ 6901–6992K (2000). For the section specifically addressing standards applicable to generators of hazardous waste, see 42 U.S.C. § 6922.

30. 42 U.S.C. § 6903(6) (2000).

produced. Generator liability means that one who creates waste has an obligation to make sure that the waste is disposed of properly and is liable if it is not.

Making the generator responsible is consistent with the remedial goals of the Superfund Law, which include (a) requiring private parties to remediate inactive hazardous waste sites;[31] (b) imposing liability on those who contributed to the presence of the waste;[32] and (c) imposing liability on those who benefited from the presence of the waste.[33] The generator contributes to the presence of the waste by creating it and benefits from the presence of the waste both by profiting from the industrial activity that created the waste and by saving the costs of proper handling and disposal.

A second congressional proposal based liability on causation.[34] Under this proposal, a person would be liable if that person caused or contributed to the contamination. The proposal appeared to be based mostly on tort concepts because it based liability on the defendant's actions, not the defendant's status. In addition, there is language in the legislative history of the Superfund Law that suggests courts should look to the common law of torts in interpreting this provision.[35]

When the Superfund Law was passed, neither the generator concept nor the caused or contributed language survived.[36] Instead, the enacted statute included the arranger concept.[37] Notably, the legislative history of the bill that became the Superfund Law does not provide any help in understanding the new arranger concept.[38] The generator concept may not have survived because the Superfund

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31. H.R. REP. NO. 96-1016, pt.1, at 17.

32. H.R. REP. NO. 96-1016, pt.1, at 68; *see* United States v. Ne. Pharm. & Chem. Co. (*NEPACCO*), 810 F.2d 726, 733–34 (8th Cir. 1986) (citations omitted) (discussing the legislative history of CERCLA and concluding that Congress intended to impose the cost on "those parties who created and profited from the sites"); *see also* United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1393 (D.N.H. 1985) (quoting United States v. Price, 523 F. Supp. 1055, 1073 (D.N.J 1981)) (noting that the legislative history of CERCLA indicates Congress intended for a broad definition of *contributing*); United States v. Conservation Chem. Co., 619 F. Supp. 162, 221–22 (W.D. Mo. 1985) (stating that strict liability for off-site generators is an important attribute of CERCLA); Keith M. Lyons, Comment, *Everyone Pays to Clean Up America: A Discussion of CERCLA Section 107(a)(3) and the Term "Arranged for Disposal,"* 28 WILLAMETTE L. REV. 589, 596–600 (1992) (citations omitted) (discussing the legislative history and goals of CERCLA).

33. *See* H.R. REP. NO. 96-1016, pt.1, at 68 (arguing that liability for "causation" could be more fair than liability for "generation" because mere generation does not necessarily cause a release).

34. *Compare* H.R. REP. NO. 96-1016, pt.1, at 14–15 (proposed text) and H.R. REP. NO. 96-1016, pt.1, at 33–34 (stating that the proposed text retains common law causation principles), *with* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-1016 § 107, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (2000)) (imposing liability regardless of causation).

35. H.R. REP. NO. 96-1016, pt.1, at 68 (discussing the relationship between the proposed bill and existing tort law).

36. *See* 42 U.S.C. § 9607(a) (2000).

37. *Id.* § 9607(a)(3).

38. There are references to this change in the legislative history, but none really help in understanding the concept. For example, Senator Randolph stated,

> The liability regime in this substitute contains some changes in language from that

Law, as passed, bases liability on the release or disposal of hazardous substances, not hazardous waste,[39] and the generator concept relates specifically to waste and not hazardous substances.

III. GENERATOR LIABILITY CASES

A. Generators Liable as Arrangers

If the statute replaced generator liability with arranger liability, many of the early court decisions missed that distinction, as they commonly referred to arranger liability as generator liability.[40] The rule that emerges from these cases in this first scenario is that the waste generator is liable as an arranger without regard to intent,[41] knowledge of the disposal site,[42] or other possible liable parties.[43] The arranger discussion in these cases reads as if the statute either defines the arranger as the generator or states that the generator of the waste is liable.

By emphasizing generator liability, these cases tended to eliminate the *owned or possessed by* requirement from the statute. If the statute substituted "generator" for "any person who . . . arranged for disposal or treatment,"[44] then there would be no need to parse the statutory language to determine whether a generator is one who arranged for disposal of waste owned or possessed by said party. This emphasis on generator liability was so influential that the *Violet v. Picillo*[45] decision, written less than six years after the passage of the Superfund Law, could cite many other cases for the proposition that arranger liability requires proof of four basic elements:

> (1) that the *generator* disposed of hazardous substances; (2) at a facility which contains at the time of discovery hazardous

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> in the bill reported by the Committee on Environment and Public Works. The changes were made in recognition of the difficulty in prescribing in statutory terms liability standards which will be applicable in individual cases. The changes do not reflect a rejection of the standards in the earlier bill.

126 CONG. REC. 23, 30932 (1980). Congressman Florio stated that "a strong liability scheme will insure that those responsible for releases of hazardous substances will be held strictly liable for costs of response." 126 CONG. REC. 24, 31964 (1980).

39. *See supra* notes 4–6 and accompanying text.

40. *See, e.g.*, United States v. Bliss, 667 F. Supp. 1298, 1306 (E.D. Mo. 1987) (imposing liability on parties for arranging for disposal of hazardous substances and finding that the arranger concept includes generators); United States v. Hardage, 761 F. Supp. 1501, 1511 (W.D. Okla. 1990) (citing 42 U.S.C. § 9607(a)(3)) (noting that generator liability is imposed on one who arranged for disposal of hazardous waste); Violet v. Picillo, 648 F. Supp. 1283, 1288 (D.R.I. 1986) (noting that generator liability is imposed on one who arranged for disposal, treatment, or transport to hazardous waste facility), *overruled on other grounds by* United States v. Davis, 794 F. Supp. 67, 71 (D.R.I. 1992).

41. *Bliss*, 667 F. Supp. at 1304 (citations omitted).

42. *Hardage*, 761 F. Supp. at 1511 (quoting United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1381 (8th Cir. 1989)).

43. *Bliss*, 667 F. Supp. at 1310.

44. 42 U.S.C. § 9607(a)(3) (2000).

45. 648 F. Supp. 1283 (D.R.I. 1986).

> substances of the kind the *generator* disposed; (3) there is a release or a threatened release of that or any hazardous substance; (4) which triggers the incurrence of response costs.[46]

What about the generator who did not take the time to make arrangements for disposal? Courts have held such generators liable. As the court in *United States v. Ward*[47] stated, to hold that such generators are not liable would permit generators to avoid liability "by closing their eyes to the method in which their hazardous wastes were disposed of."[48] Or, as the court in *United States v. Conservation Chemical Co.*[49] noted, to provide that a generator must make arrangements for disposal would lead to the "anomalous" conclusion that a generator who took care to designate the destination of the waste is liable, while one who did not is not liable.[50] Another explanation for courts consistently finding generators liable is that generators can do nothing with hazardous waste except dispose of it or treat it by minimizing the risks associated with it.[51] Therefore, if an entity generated hazardous waste but does not currently possess it, the entity must have arranged for its disposal or treatment.

The assumption underlying each of the above cases is that the generator of hazardous waste is always liable as an arranger. This assumption can be understood in one of two ways: either the courts have ignored the statute, or they have understood that the concept of arranger was meant to include more than just the generator. Because this Article is not prepared to propose that so many courts and commentators got it wrong, this Article will proceed with the second interpretation—the courts have assumed Congress's use of arranger was intended to include the generator and something in addition to the generator.

If arranger means "generator plus," then to understand the plus we need to examine what applies to the arranger concept that does not apply to the generator concept. The answer is the language *owned or possessed by*.[52] This language would be totally superfluous if arranger meant generator because one cannot create something without owning or possessing that creation. Thus, the cases finding generators liable as arrangers provide the first clue to understanding the presence of the *owned or possessed by* language in the statute by not addressing that language. The language *owned or possessed by* is necessary to inform courts that there can be arrangers who are not generators.

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46. *Id.* at 1228 (emphasis added) (citing United States v. Conservation Chem. Co., 619 F. Supp. 162, 190 (W.D. Mo. 1985); United States v. Wade, 577 F. Supp. 1326, 1333 (E.D. Pa. 1983); United States v. S.C. Recycling and Disposal, Inc., 653 F. Supp. 984, 991–92 (D.S.C. 1984)).

47. 618 F. Supp. 884 (E.D.N.C. 1985).

48. *Id.* at 895.

49. 619 F. Supp. 162.

50. *Id.* at 234.

51. *See infra* notes 74–76 and accompanying text.

52. *See* 42 U.S.C. § 9607(a)(3) (2000).

B. *Sale Cases: Sale of Products Containing Hazardous Substances as the Basis for Liability*

The second scenario in which arranger liability issues arise is where a defendant that was alleged to have arranged for the disposal or treatment of waste claimed it was not the generator of waste; instead, it was the seller of a product that contained hazardous substances which were later used by another party in a process that generated waste and said waste was disposed of or released by another party. If the generator cases involve waste that has been disposed of and focus on the defendant's *relationship* to the waste—whether the defendant is the generator—then the sale cases focus on the defendant's *actions*.

The sale cases also reveal another anomaly in the language of the statute. The statute is based on hazardous substances, not hazardous waste, and the generator concept is a waste-related concept; yet the arranger section speaks specifically about "disposal or treatment,"[53] both of which, as described by courts, are actions related to waste and not to useful substances.[54] Thus, while the distinction between the generation of hazardous waste—largely an RCRA concept—and hazardous substances—the basis of Superfund liability—is an important one, this distinction is blurred with regard to arranger liability because hazardous *waste*, and not hazardous substances, is disposed of or sent for treatment.

1. *Sale of Useful Hazardous Substances*

In *Freeman v. Glaxo Wellcome, Inc.*,[55] the Second Circuit provided an explanation for why sellers of useful hazardous substances are not subject to arranger liability.[56] Glaxo, upon closing a facility, sold chemical reactants used in its facility to Freeman Industries Incorporated (FII) for use in FII's business.[57] FII used some of the chemicals in its business, stored some of them, and sold some of them.[58] The stored chemicals became the source of a remedial action by the Environmental Protection Agency (EPA) at the FII facility.[59] FII commenced a third party action for contribution against Glaxo, claiming that Glaxo had arranged for disposal of its chemicals at the FII facility.[60] Glaxo's defense was that it merely sold

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53. 42 U.S.C. § 9607(a)(3). The statute imposes liability on "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." *Id.* (emphasis added).

54. *See* AM Int'l, Inc. v. Int'l Forging Equip. Corp., 982 F.2d 989, 999 (6th Cir. 1993) (quoting Prudential Ins. Co. v. U.S. Gypsum, 711 F. Supp. 1244, 1253, 1255 (D.N.J. 1989)).

55. 189 F.3d 160 (2d Cir. 1999) (citations omitted).

56. *Id.* at 164.

57. *Id.* at 162. Glaxo saved transportation costs by not taking the reactants to its new facility in North Carolina. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

the chemicals and did not arrange for their disposal.[61] After citing cases holding that one cannot circumvent the Superfund Law by characterizing disposal as a sale,[62] the court noted that Glaxo sold valuable products to FII for use or resale.[63] The court determined that these were virgin chemicals, not waste,[64] and liability for the arrangement for disposal requires the presence of waste.[65] Therefore, Glaxo did not arrange for disposal at the FII facility.[66]

In *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R.*,[67] the Fourth Circuit provided further analysis of how to determine whether a transaction is a sale or an arrangement for disposal.[68] 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.[69]

The transaction in *Pneumo* was for the sale of used bearings to be processed into new bearings.[70] 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.[71] Thus, the seller did not arrange for disposal.[72]

2. *Intent to Arrange for Disposal of Waste During the Sale of Useful Hazardous Substances*

The Sixth Circuit, in *United States v. Cello-Foil Products, Inc.*,[73] addressed a more complex transaction in which there were elements of both a sale of a useful product and the disposal of waste.[74] The court recognized that if the material at issue—the subject of the transaction—is waste, the transaction is an arrangement

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61. *Id.* at 163. Based on Glaxo's defense, the district court granted the defendant's motion for summary judgment. *Id.*

62. *Id.* at 164 (citing Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 775 (4th Cir. 1998); Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1381 (8th Cir. 1989)); *see also Glaxo*, 189 F.3d at 164 ("[A] waste generator's liability under CERCLA is not to be . . . faciley circumvented by its characterization of its arrangements as sales." (alteration in original) (quoting New York v. Gen. Elec. Co., 592 F. Supp. 291, 297 (N.D.N.Y. 1984)) (internal quotation marks omitted)).

63. *Glaxo*, 189 F.3d at 164.

64. *Id.* The court noted that FII used some of the chemicals and sold others. *Id.*

65. *Id.* The court stated that "[b]ecause the definition of 'disposal' refers to 'waste,' only transactions that involve 'waste' constitute arrangements for disposal . . . ." *Id.*

66. *Id.*

67. 142 F.3d 769 (4th Cir. 1998).

68. *Id.* at 775.

69. *Id.* If the intent is to buy and sell, the transaction is not an arrangement for disposal; if the product is useful, it is not waste. *Id.*

70. *Id.* at 772.

71. *Id.* at 775.

72. *Id.* at 775–76.

73. 100 F.3d 1227 (6th Cir. 1995).

74. *Id.* at 1230.

for disposal.[75] Conversely, if the material at issue is a useful product, the transaction is not an arrangement for disposal.[76]

In *Cello-Foil*, the defendants were purchasers of solvents.[77] The contract for sale provided that the seller, Thomas Solvent (Thomas), would deliver solvents in reusable drums.[78] The contract price included a deposit for each drum.[79] The purchasers used the solvents and returned the drums to Thomas who cleaned and reused the drums.[80] The government argued the contract was implicitly an arrangement for the disposal of waste because the returned drums contained some solvent residue which was the source of the contamination at the Thomas facility.[81] However, the district court found the defendants could not be liable because they lacked the intent to dispose of waste.[82]

The court began its analysis by noting that the legislation does not define the phrase *arrange for*.[83] The court noted the Seventh Circuit had defined *arrange for* to include an element of intent.[84] In *Amcast Industrial Corp. v. Detrex Corp.*,[85] Judge Posner reasoned the phrase *arrange for disposal* contemplates a case in which a person wants to get rid of something.[86] Thus, if the defendant did not intend to get rid of a hazardous substance, there has been no arrangement for disposal.[87] The *Cello-Foil* court expanded this concept, concluding that intent is a requirement because arrangement embraces concepts similar to contract and agreement.[88] To arrange means to "'make preparations' or 'plan'";[89] both are actions that require intent. Thus, the parties' intent can determine how the transaction will be characterized.

To determine the parties' intent, the courts looked to the totality of the circumstances, not to how the parties characterized their transaction.[90] Thus, in *Cello-Foil*, the court noted that by leaving solvents in the drums, which the defendants knew Thomas would take away and dispose of, one could infer that the defendants intended to dispose of those solvents.[91] In *Amcast*, on the other hand, the court found that when a seller of solvents contracts with a transporter for delivery to a user, not a disposal site, the seller has not arranged for the disposal of the

75. *Id.* at 1232 n.1 (citing AM Int'l v. Int'l Forging Equip. Corp., 982 F.2d 989, 999 (6th Cir. 1993)).
76. *Id.* at 1232 n.1 (citing *AM Int'l*, 982 F.2d at 999).
77. *Id.* at 1230.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 1231.
83. *Id.* (citing Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993)).
84. *Id.* at 1232 (citing *Amcast*, 2 F.3d at 751).
85. 2 F.3d 746.
86. *Id.* at 751.
87. *Id.*
88. 100 F.3d at 1231 (citations omitted).
89. *Id.* at 1232.
90. *Id.* at 1231.
91. *Id.* at 1233.

solvent.[92] The transaction was a sale of a useful product and did not include intent to dispose of anything.[93]

The key difference between *Cello-Foil* and *Amcast* is what was being transferred. In *Cello-Foil*, the defendant transferred waste, and based on that, the court found the transaction could be an arrangement for disposal if the defendant had the intent to dispose of the waste.[94] In *Amcast*, on the other hand, the material was not waste and, therefore, the agreement could not be an arrangement for disposal.[95] Thus, even though both the sale cases and the generator cases rarely discuss the *owned or possessed by* language, they are completely different from each other with regard to that language. The generator cases seldom discuss the *owned or possessed by* language, in part, because every generator owned or possessed the hazardous substances at the time of generation—the time the hazardous substances became hazardous waste. The sale cases seldom discuss the *owned or possessed by* language, but for a different reason: while the seller had ownership or possession at one time, the true seller had no ownership or possession at the time the hazardous substances became waste. Thus, to find a use for the language *owned or possessed by*, it is necessary to find a defendant that is neither a generator nor a seller.

C. Employees of Generators

The earliest arranger cases to directly address the owned or possessed by requirement were cases in which the EPA tried to impose liability on individuals who allegedly arranged for disposal in their capacity as officers or employees of corporations that were liable as generators.[96] In *United States v. Mottolo*,[97] for example, the court addressed the liability of Carl Sutera, the president and principal shareholder of defendant Lewis Chemical Corporation.[98] Sutera argued he did not arrange for disposal in part because he never owned or possessed the hazardous substances.[99] Rather, his employer Lewis Chemical, of which Sutera was the principal shareholder, owned and possessed the hazardous substances.[100] The court

92. Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993).
93. *Id.*
94. *Cello-Foil*, 100 F.3d at 1233–34.
95. *Amcast*, 2 F.3d at 751.
96. *See, e.g.*, United States v. Ne. Pharm. & Chem. Co. (*NEPACCO*), 810 F.2d 726, 745 (8th Cir. 1986) (extending liability to corporate officers); United States v. Mottolo, 629 F. Supp. 56, 60 (D.N.H. 1984) (citations omitted) (finding the corporate officer's liability to be a question for the jury).
97. 629 F. Supp. 56.
98. *Id.* at 58–60.
99. *Id.* at 58.
100. *Id.*

denied Sutera's motion to dismiss because factual issues existed regarding the extent of Sutera's involvement in the corporation's disposal practices.[101]

In discussing the issue of ownership or possession of the waste, the court found Sutera could be liable as an arranger without ownership or possession.[102] The court examined the full text of the provision:

> [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 owned or operated by another party or entity and containing such hazardous substances . . . shall be liable . . . .[103]

The court reasoned the language *owned or possessed by such person, by any other party or entity* meant the waste could be owned by any other party.[104] Instead of reading the passage as written, the court read the passage as if the word *or* was between the phrases *by such person* and *by any other party or entity*.

The passage is difficult to parse. Indeed, the Ninth Circuit has described this section of CERCLA as one that "does not make literal or grammatical sense."[105] Most courts, however, have read the phrase *by any other party or entity* as a continuation of the phrase *arranged for disposal*, resulting in the construction "one who arranges for disposal of waste . . . by any other party or entity."[106] This interpretation means it is important who owns the waste, not who disposes of the waste.[107]

The *Mottolo* court relied on the district court opinion in *United States v. Northeastern Pharmaceutical and Chemical Co, Inc. (NEPACCO)*.[108] The *NEPACCO* district court decision addressed the arranger liability of individual

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101. *Id.* at 63. The court noted that, in his deposition, Sutera stated that he made all decisions, including where waste was disposed of, and that a decision regarding disposal of a toxic chemical could not have been made by anyone but him. *Id.* at 59.

102. *Id.* at 60 (quoting 42 U.S.C. § 9703(a)(3) (1982)) (citing United States v. Ne. Pharm. Chem. Co. (*NEPACCO*), 579 F. Supp. 823, 847 (W.D. Mo. 1984)).

103. *Id.* at 58 (emphasis added) (quoting 42 U.S.C. § 9607(a)(3)) (internal quotation marks omitted).

104. *Id.* at 60 (citing *NEPACCO*, 579 F. Supp. at 847) ("The provision clearly states that the person who arranges for disposal or transport for disposal of hazardous substances need not own or possess the waste.").

105. 452 F.3d 1066, 1080 (9th Cir. 2006).

106. *See, e.g.*, *id.* at 1082 ("[T]he phrase *by any other party or entity* refers to ownership of the waste . . . .") (emphasis added) (internal quotation marks omitted); Am. Cyanamid Co. v. Capuano, 381 F.3d 6, 24 (1st Cir. 2004) (holding that the phrase *by any other party or entity* modifies the phrase *arranged for disposal*, imposing liability where the disposal or treatment was done by another party or entity).

107. This interpretation points out the difficulty in reading the statute; if this is the intended reading, one can be liable as an arranger only when arranging for another party or entity to dispose of the waste and not for disposing of the waste on one's own.

108. *Mottolo*, 629 F. Supp. at 60 (citing *NEPACCO*, 579 F. Supp. at 847).

officers and, like the *Mottolo* court, found that the defendant need not own or possess the waste to be liable as an arranger because the statute should be given a liberal construction to find liability.[109]

The Eighth Circuit's decision in *NEPACCO*, addressing the liability of the plant supervisor, was the first appellate decision to analyze the meaning of *owned or possessed by* for purposes of arranger liability.[110] The EPA argued, as it did successfully in *Mottolo*, that even though the statute provides for liability for any person who "arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person,"[111] ownership and possession were not required.[112] The court agreed, stating that "requiring proof of personal ownership or actual physical possession of hazardous substances . . . would be inconsistent with the broad remedial purposes of CERCLA."[113]

Unlike the *Mottolo* court, however, the Eighth Circuit did not use the statute's broad remedial purposes to eliminate the words *owned or possessed by* from the statute. Instead, the court interpreted *owned or possessed by* broadly to include anyone who had actual control over the waste.[114] Lee, the plant supervisor, owned or possessed the waste because he had "immediate supervision over, and was directly responsible for arranging for the transportation and disposal."[115] Thus, unlike *Mottolo*, which held that one could be liable without possession or ownership,[116] the *NEPACCO* court held that ownership and possession should be read broadly to include people with control of the waste.[117] The court further reasoned that because Lee made the arrangements for transport and disposal, he had sufficient control over the hazardous substances to be viewed as owning or possessing the substances.[118]

The problem with the *NEPACCO* court's reasoning is that, without overtly eliminating the owned or possessed by requirement from the statute, the court interpreted *owned or possessed by* in a manner that made the language almost superfluous. If having sufficient control over the waste implies ownership or possession, and anyone who makes the arrangements for disposal has sufficient control over the waste, then everyone who arranges for disposal owned or

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109. *NEPACCO*, 579 F. Supp. at 847–48.

110. United States v. Ne. Pharm. & Chem. Co. (*NEPACCO*), 810 F.2d 726, 743 (8th Cir. 1986).

111. 42 U.S.C. § 9607(a)(3) (1982).

112. *NEPACCO*, 810 F.2d at 743.

113. *Id.* at 743 (citing *Mottolo*, 629 F. Supp. 56).

114. *Id.* ("[T]o impose liability upon only the corporation and not the individual corporate officers and employees who are responsible for making corporate decisions about the handling and disposal of hazardous substances would open an enormous, and clearly unintended, loophole in the statutory scheme.").

115. *Id.*

116. 629 F. Supp. at 60.

117. *NEPACCO*, 810 F.2d at 743.

118. *Id.* (noting Lee's personal knowledge, supervision, and responsibility in arranging for disposal).

possessed the waste. If that is the case, then what is the role of the words *owned or possessed by* in imposing liability?

The *NEPACCO* court's reasoning has gone largely unchallenged, and nearly all courts have imposed arranger liability on anyone who had sufficient control of the waste to arrange for its disposal.[119] Analyzing the sale or disposal line of cases and *NEPACCO* together, the breadth of arranger liability becomes apparent. The sale or disposal line of cases[120] leads to the conclusion that if it was waste—something one wants to rid oneself of—then whatever is done with the waste can be viewed as an arrangement for disposal. *NEPACCO* stands for the proposition that if a party made the arrangements for disposal, then that party owned or possessed the waste. Thus, in search for a role for *owned or possessed by* in the statute, it is necessary to analyze cases in which the defendant is neither the generator of waste nor the seller of a useful substance, and the transaction does not overtly deal with waste. In such cases, courts have focused on the defendant's *relationship* to the waste—for example, whether the defendant owned or possessed it—in order to find arranger liability.[121]

IV. THE SUPPLIER OF RAW MATERIALS

A. United States v. Aceto Agricultural Chemicals Corp.

The line of cases finding arranger liability where the alleged arranger was neither the generator nor personally involved in the disposal of waste involves business relationships that, on their face, are completely removed from waste or disposal of hazardous substances. The court in *United States v. Aceto Agricultural Chemicals Corp.*,[122] for example, found that a supplier of raw materials who continued to own those raw materials while they were in the hands of the processor could be liable for waste generated and disposed of by the processor.[123]

The case arose out of contamination at a site owned and operated by Aidex Corporation (Aidex), a pesticide formulator.[124] The pesticide industry practice was for pesticide manufacturers to contract with formulators to mix the pesticide ingredients and produce commercial grade products for the manufacturer.[125] The pesticide manufacturers provided Aidex with ingredients and directions for

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119. *See* William B. Johnson, Annotation, *Arranger Liability of Nongenerators Pursuant to § 107(a)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.S. § 9607(a)(3))*, 132 A.L.R. FED. 77, 92–93 (1996).

120. *See* discussion *supra* Part III.B.

121. *See, e.g.*, Gen. Elec. Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 286 (2d. Cir. 1992) (finding that the "*obligation* to exercise control" over disposal makes a party liable as an arranger) (emphasis added); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1382 (8th Cir. 1989) (noting that defendant's ownership of the hazardous substance was enough to impose liability).

122. 872 F.2d 1373.

123. *Id.* at 1382.

124. *Id.* at 1375.

125. *Id.*

formulation; Aidex processed the ingredients and returned commercial grade products to the manufacturers.[126]

The EPA sought to hold six of the eight pesticide manufacturers named as defendants liable for arranging for disposal of hazardous substances at the Aidex site.[127] The EPA's theory alleged three facts: (1) the manufacturers owned the ingredients that contained the hazardous substances that were released or disposed of at Aidex;[128] (2) the manufacturers defined the formulation process for Aidex to follow;[129] and (3) the manufacturers knew the formulation process would result in the creation of hazardous waste.[130]

The court began its analysis with a review of the legislative history of Superfund, noting that "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs."[131] The court reasoned this goal would be thwarted if one could contract away their liability.[132]

The defendants argued they had no control over Aidex's operations and, therefore, could not have arranged for disposal of Aidex's waste.[133] The court addressed this by noting that each manufacturer maintained ownership of the chemicals, which meant they had the authority to control what happened with the chemicals.[134] Therefore, the defendants had responsibility for the disposal.[135]

The case may stand for the proposition that a business relationship that includes the ability to control waste disposal is sufficient to create arranger liability.[136] That proposition appears to align the decision with the *NEPACCO* line of cases where control of the waste was seen as a basis for arranger liability.[137]

The problem with that theory, however, is that the *Aceto* case is factually the inverse of the *NEPACCO* case. In *NEPACCO*, one of the individual defendants,

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126. *Id.*

127. *Id.*

128. *Id.* at 1378. Further, the manufacturers owned the materials during all phases of the project. *Id.*

129. *Id.* at 1381. Aidex worked on defendants' products at the defendants' direction. *Id.*

130. *Id.* at 1378. Defendants knew the waste was created "inherent[ly]" by the process and knew Aidex disposed of the waste. *Id.*

131. *Id.* at 1380 (quoting Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986), *vacated on other grounds*, 889 F.2d 1146, 1150 (1st Cir. 1989)). The court also noted that "a liberal judicial interpretation is consistent with CERCLA's 'overwhelmingly remedial' statutory scheme." *Id.* (quoting United States v. Ne. Pharm. & Chem. Co. (*NEPACCO*), 810 F.2d 726, 733 (8th Cir. 1986)).

132. *Id.* at 1380–81.

133. *Id.* at 1381–82 ("It is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme." (quoting *NEPACCO*, 810 F.2d at 743) (internal quotation marks omitted)).

134. *Id.* at 1382 (observing that the instant case's defendants' ownership made a stronger case for liability than the defendants' ownership in *NEPACCO*).

135. *Id.*

136. *See id.* at 1382 (noting that failing to impose liability under the circumstances would allow the defendants to turn a blind eye to the method of disposal of the waste).

137. *See supra* notes 96–118 and accompanying text.

Lee, actually made the arrangements for disposal.[138] The issue was whether Lee also owned or possessed the hazardous substances.[139] The court used the defendant's authority to control the hazardous substances to prove constructive possession.[140] In *Aceto*, however, the defendants made no explicit arrangements with Aidex for disposal.[141] Indeed, they probably never thought about waste disposal issues at all. They were, however, owners of hazardous substances who had some degree of control over the process creating waste that required disposal.[142] In *Aceto*, unlike *NEPACCO*, control does not imply ownership or possession; rather, ownership and possession plus control imply there is an arrangement for disposal.[143]

Thus, in *Aceto*, the court's concern was not that someone could avoid liability by not owning or possessing the waste, even if he or she contributed to the environmental problem by making arrangements for disposal of hazardous substances. Rather, the concern was that someone could own the waste and control the process that created the waste but avoid liability by setting up a contractual arrangement delegating responsibility for the waste—arranging for disposal—to someone else.[144]

B. General Electric Co. v. AAMCO Transmissions, Inc.

Courts were quick to limit the scope of *Aceto*, pointing out that not every business transaction in which one party transfers hazardous substances and maintains some element of control over those substances is an arrangement for disposal. In *General Electric Co. v. AAMCO Transmissions, Inc.*,[145] for example, the court held that oil companies who sell petroleum products to service stations and have some ability to control activities at the service stations have not arranged for disposal of waste generated at those service stations.[146] The court reasoned that, unlike *Aceto*, the oil company defendants in *AAMCO* did not control the manner in which the hazardous waste was generated.[147] According to the court, the oil

138. 810 F.2d at 743.

139. *Id.*

140. *Id.*

141. *Aceto*, 872 F.2d at 1379 (noting plaintiff's allegation that the generation and disposal of waste was *inherent* in defendants' arrangement).

142. *Id.* at 1381 (noting that Aidex performed a process at the direction of the defendants).

143. *Id.* at 1381–82 (citing *NEPACCO*, 810 F.2d at 743) (finding that while *NEPACCO* imposed liability on individuals who had the authority to control the disposal of hazardous substances, even if they did not own or process them, here the defendants both *owned* the substances and *controlled* the work in process); *see also* Gen. Elec. Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 287 (2d Cir. 1992) ("[O]wnership of hazardous substance, when combined with actual control over the process that generates the hazardous waste, supports arranger liability.").

144. *Aceto*, 872 F.2d at 1381.

145. 962 F.2d 281 (2d Cir. 1992).

146. *Id.* at 287 (citing Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1319 (11th Cir. 1990)) (declining to hold defendant liable as an arranger even where defendant could have used economic bargaining power to force customers to properly dispose of hazardous waste).

147. *Id.*

companies' bargaining power, through which they could have controlled the process, did not create an obligation to control that process.[148]

While rejecting the idea that "any entity that merely had the opportunity or ability to control a third party's waste disposal"[149] is liable, the *AAMCO* court recognized that one can be liable as an arranger without having "active involvement regarding the timing, manner, or location of disposal."[150] The key, the court stated, is the "nexus between the potentially responsible party and the disposal of the hazardous substance."[151]

To clarify what type of "nexus" is sufficient to impose liability, the court explained that Congress relied on "traditional notions of duty and obligation" in determining which parties would be liable under CERCLA.[152] Thus, it is the *obligation* to exercise control that is crucial, not merely the *power* to exercise control. What created that obligation in *Aceto* when there was no such obligation here? The *AAMCO* court examined two factors that were present in *Aceto* but were not present in *AAMCO*: (1) control of the process that generated the hazardous waste and (2) ownership of the hazardous substances.[153]

In *AAMCO*, the Second Circuit, by looking to traditional concepts of duty, moved its analysis closer to negligence. How could it do that and remain true to the "strict liability" elements of CERCLA? Some courts suggest it could not.[154] In

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148. *Id.* at 286 (distinguishing the obligation to control, which can be the basis of liability, from the mere opportunity to control).

149. *Id.*

150. *Id.* (quoting CPC Int'l v. Aerojet-Gen. Corp., 759 F. Supp. 1269, 1279 (W.D. Mich. 1991)) (internal quotation marks omitted); *see also Fla. Power & Light Co.*, 893 F.2d at 1318 (holding that a manufacturer who does not make "critical decisions" regarding disposal of hazardous material may still be liable only if there is evidence that the manufacturer was "the party responsible for 'otherwise arranging' for the disposal of the hazardous substance"); Missouri v. Indep. Petrochemical Corp., 610 F. Supp. 4, 5 (E.D. Mo. 1985) (imposing arranger liability under CERCLA even though defendant had arranged for waste to be disposed of at a site different from the site where the contamination actually took place); United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985) (holding that CERCLA does not require, as a prerequisite to liability, that a generator who arranges for disposal know where the disposal is to take place); New York v. Gen. Elec. Co., 592 F. Supp. 291, 297 (N.D.N.Y. 1984) (finding defendant who sold used transformer oil containing hazardous substances to a drag strip was liable under CERCLA despite defendant's contention that it had not arranged for disposal but had merely made a sale of goods).

151. *AAMCO*, 962 F.2d at 286. This nexus, the court stated, must be based on "the potentially liable party's conduct with respect to the disposal or transport of hazardous wastes." *Id.* (citing 42 U.S.C. § 9607(a) (1988)).

152. *Id.* (noting that it is the obligation to exercise control of waste disposal that triggers liability).

153. *Id.* at 287 ("Unlike the defendants in . . . *ACETO*, the oil companies did not own the hazardous substance, nor did they control the process by which waste motor oil was generated.").

154. *See, e.g.*, Cal. Dep't of Toxic Substances Control v. Alco Pacific, Inc., 217 F. Supp. 2d 1028, 1037 (C.D. Cal. 2002) (citing United States v. Alcan Aluminum Corp., 990 F.2d 711, 721 (2d Cir. 1993); United States v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985); United States v. Marisol, Inc., 725 F. Supp. 833, 838–40 (M.D. Pa. 1989)) (recognizing that CERCLA is a strict liability statute and negligence principles do not apply).

reality, however, the Second Circuit's opinion is entirely consistent with tort law principles of strict liability. The court is not saying that in order to be liable as an arranger, one has to be negligent. Rather, the court is saying that in order to be liable as an arranger, there has to be a sufficient nexus between the alleged arranger and the disposal.[155] If that nexus is such that the alleged arranger had a duty to control the disposal activity, then that nexus is sufficient to find liability as an arranger.[156]

By favorably citing *B.F. Goodrich Co. v. Murtha*[157] and *CPC International, Inc. v. Aerojet General Corp.*,[158] the *AAMCO* court made clear that although knowledge and duty can be sufficient to create liability, they were not necessary.[159] In both cases, the parties were arrangers because they made plans or arrangements for disposal, even though they did not know the disposed material contained hazardous substances.[160] In these types of cases, the defendant's knowledge of the presence of hazardous substances in the waste is irrelevant. The act of making arrangements for disposal is sufficient to create liability.

C. GenCorp, Inc. v. Olin Corp.

The *Aceto* analysis is further explained, and perhaps expanded, in *GenCorp, Inc. v. Olin Corp.*[161] The contamination at issue was the result of a joint venture, whereby Olin built a manufacturing facility on land owned by GenCorp, and GenCorp agreed to purchase half of the plant's output at cost.[162] GenCorp also agreed to pay up to half of the capital costs of the facility which would be credited toward GenCorp's eventual purchase of the plant.[163] Engineering specifications were subject to the approval of both companies, and a joint committee oversaw construction.[164] GenCorp supplied all of the hourly workers, and Olin supplied

155. *AAMCO*, 962 F.2d at 286.

156. *Id.*

157. 958 F.2d 1192 (2d Cir. 1992).

158. 759 F. Supp. 1269 (W.D. Mich. 1991).

159. *Id.* at 286 (citing *B.F. Goodrich*, 958 F.2d at 1199; *CPC*, 759 F. Supp. at 1278).

160. *See id.* at 286; *see also B.F. Goodrich*, 958 F.2d at 1201 (finding municipalities liable for disposal of hazardous substances despite defendants' argument that "municipal solid waste" was not defined as a hazardous substance under CERCLA); *CPC*, 759 F. Supp. at 1277–78 (concluding that the unchecked spread of contaminated groundwater qualifies as disposal, and that a party who neither created nor owned the contamination could still be liable if that party had assumed responsibility for determining the "disposition" of the contamination). In *CPC*, the defendants allegedly engaged in remedial activities but failed to correct an existing contamination problem that caused additional release or disposal of hazardous substances at the site. 759 F. Supp. at 1275. In *B.F. Goodrich*, the court held that a municipality could be liable for arranging for disposal of municipal solid waste even if it had no reason to know that the municipal solid waste contained hazardous substances. 958 F.2d at 1201.

161. 390 F.3d 433, 445–50 (6th Cir. 2004) (citations omitted).

162. *Id.* at 438.

163. *Id.*

164. *Id.* at 438–39.

many of the supervising employees.[165] Plant design contemplated that hazardous waste would be drummed and taken off-site.[166]

The EPA identified Olin as a potentially responsible party for the site where the hazardous waste from this joint venture facility was sent.[167] The issue for the court was whether GenCorp was responsible as an arranger as well.[168] The court began by noting that the legislation does not define *arrange* and looked to Webster's Dictionary which defines *arrange* as to "plan or prepare" for something.[169] The court then noted that to plan or prepare requires intent.[170] This intent requirement is not the intent to have the waste disposed of in a particular manner or at a particular place.[171] It is merely the intent to plan or prepare for disposing of the waste.[172] The court further stated that intent could be inferred from the circumstances.[173] GenCorp argued it could not be liable as an arranger because it did not "own or possess" the hazardous substances.[174] The court found that to own or possess never required holding title or having physical possession.[175] The court cited *NEPACCO* and a host of similar cases for the proposition that constructive possession shown by dominion or control could suffice.[176] The court observed that, like the defendants in *NEPACCO*, GenCorp managed activities specifically relating to the pollution.[177]

Thus, the court's reasoning suggests this case is analogous to *NEPACCO*, with GenCorp occupying the role of the individual manager who made the arrangements for disposal.[178] On the other hand, GenCorp's argument is that it should not be held liable because the case is factually similar to *Aceto* but without the element of

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165. *Id.* at 439.

166. *Id.* at 439–40.

167. *Id.* at 440.

168. *Id.* at 445.

169. *Id.* at 445 (quoting WEBSTER'S II NEW COLLEGE DICTIONARY 62 (2001)) ("While the legislation does not define what it means to 'arrange' for disposal of waste, traditional definitions of the word, its statutory context, and case law supply ample clues.").

170. *Id.* at 446.

171. *Id.*

172. *Id.* ("[O]ne may not become an arranger through inadvertence. The party must have some intent to make preparations for the disposal of hazardous waste . . . .").

173. *Id.* (citing United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1231 (6th Cir. 1996)).

174. *Id.*

175. *Id.* at 448–49.

176. *See id.* (citing United States v. Ne. Pharm. & Chem. Co. (*NEPACCO*), 810 F.2d 726, 743 (8th Cir. 1986) and thirteen additional cases for the proposition that dominion and control is enough to establish constructive possession).

177. *Id.* at 449. Among the factors listed were the following: (1) GenCorp had equal representation on the committee that oversaw the construction and operation of the facility, and (2) the committee approved design plans and budgets that contemplated off-site disposal of hazardous waste. *Id.*

178. *See id.* at 449; *see also NEPACCO*, 810 F.2d at 743 (imposing liability on plant supervisor who was "directly responsible" for the disposal of hazardous substances).

ownership.[179] To determine which case it is more akin to, we need to examine which element "control" is being used to establish. Is it a case in which control is being used to prove that the defendants arranged for disposal, as in *Aceto*, or is it a case in which control is being used to establish that the defendants owned or possessed the waste, as in *NEPACCO*? GenCorp characterized its situation as a contractual arrangement with the opportunity to control the waste disposal but without ownership of the hazardous substances.[180] This argument indicated that the EPA was trying to extend the *Aceto* line of reasoning to cases in which the defendant did not own the hazardous substances.[181] The court, on the other hand, concluded that GenCorp was more like the individual defendant in *NEPACCO*; GenCorp had control via active participation in the waste generation and disposal process which established the element of ownership or possession.[182]

V. THE FOUR SCENARIOS AND THE COMPLEX CASES

A. The Four Scenarios

Every arranger case fits into one of four scenarios. By identifying the kind of case, conclusions about liability become much clearer. The simplest case is the case in which the defendant is the generator of the waste.[183] In such cases, the defendant is clearly liable. There will be very little discussion about ownership or possession of the waste because the intent of the arranger liability provision was to provide for generator liability, and everyone who generates waste owns or possesses it at the time of generation.

The second scenario involves the sale of a useful substance. In such cases there is no liability because the seller did not arrange for disposal.[184] The issue of ownership or possession of the hazardous substances is also not relevant to these cases because, while the seller owned or possessed the item sold, the seller did not own or possess the hazardous substances at the time of disposal or at the time of generation of the hazardous waste.

The third scenario involves factual situations similar to the one in *NEPACCO*. In such cases, the defendant is neither the generator of the waste nor a seller of

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179. *See id.* at 447–48; *see also* United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1379 (8th Cir. 1989) (defendants arguing that they had no involvement in disposal decision or process).

180. *See GenCorp*, 390 F.3d at 447.

181. *See* discussion *supra* Part IV.B.

182. *GenCorp*, 390 F.3d at 449.

183. *See, e.g.*, United States v. Conservation Chem. Co., 619 F. Supp. 162, 190–91 (D.C. Mo. 1985) (finding generator of waste liable for off-site disposal done by third party); United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985) (finding generator of waste liable for illegal disposal by a third party).

184. *See, e.g.*, Prudential Ins. Co. v. U.S. Gypsum, 711 F. Supp. 1244, 1254–55 (D.N.J. 1989) (refusing to find sellers of asbestos products liable where there was no "affirmative act" of disposing of the product other than the sale); Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651, 656 (N.D. Ill. 1988) (refusing to impose liability on supplier of chemicals as a sale does not equate to arranging for disposal), *aff'd*, 861 F.2d 155 (7th Cir. 1988).

hazardous substances.[185] The defendant may argue that the defendant never owned or possessed the waste. If a court finds that the defendant's relationship to the waste was such that the defendant made arrangements or plans for disposal, the defendant is liable. The defendant does not need to have legal title or physical possession in order to own or possess the waste. Instead, ownership and possession can be inferred from control, and control can be inferred from making arrangements for disposal.[186]

The fourth scenario involves transactions in which the defendant owns the hazardous substances, has control over their use, and knows that the substances will be used in a process that will generate hazardous waste. In such cases, ownership of the substances is used to imply that the transaction is, or includes, an arrangement for disposal.[187] This is the only scenario in which owning or possessing the waste expands liability beyond the generator.

B. The Complex Cases

With these four scenarios in mind, this Article will next examine some of the more difficult arranger cases and demonstrate that placing the cases into one of the four discussed scenarios can resolve the difficulties. In *Morton International, Inc. v. A.E. Staley Manufacturing Co.*,[188] the Third Circuit examined the liability of a party whose contractual arrangement with the generator made it potentially liable.[189] The case arose out of contamination at a facility that produced inorganic mercury compounds.[190] Morton was the successor to the owner and the current operator of the facility.[191] Tennessee Gas Pipeline Company (Tenneco), one of the defendants, had a complex contractual relationship with Morton's predecessor, which Morton alleged included ownership of the raw materials during processing at the facility and purchase of the mercury compounds after processing at the facility.[192] Morton instituted an action against Tenneco alleging that the agreements between Tenneco and Morton's predecessor made Tenneco liable as an arranger.[193] Tenneco

185. *See, e.g.*, United States v. Ne. Pharm. & Chem. Co. (*NEPACCO*), 810 F.2d 726, 743 (8th Cir. 1988) (holding parties liable absent ownership or possession based on the control the party had over the waste); United States v. Bliss, 667 F. Supp. 1298, 1306 (E.D. Mo. 1987) (finding the plant supervisor liable because of his "ultimate authority for decisions regarding disposal" of the waste).

186. *See* discussion *supra* Part III.C.

187. *See, e.g.*, United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1380–82 (8th Cir. 1989) (citations omitted) (finding arranger liability where the defendant sent hazardous materials to the manufacturer for use in manufacturing the product for the defendant, the defendant owned the chemicals throughout the process, and the defendant knew the process created hazardous waste).

188. 343 F.3d 669 (3d Cir. 2003).

189. *Id.* at 675–79.

190. *Id.* at 673.

191. *Id.*

192. *Id.* at 673. There was some factual dispute as to the nature of the transactions and whether Tenneco shipped "dirty mercury" to the plant. *See id.*

193. *Id.* at 674.

described the transactions as straight sales and argued that as a purchaser of a product it was not an arranger with regard to waste generated at a facility unless it had had some control over the activities at the facility.[194]

The court began its discussion by noting that nearly all of its "sister circuit courts [had] adopted a standard for 'arranger liability,' but the standards adopted var[ied]."[195] The court noted that there were two areas in which the courts agreed, but that there was "not . . . much agreement among our sister circuits as to which factors must be considered."[196] The court then proceeded to list the areas of disagreement.[197] An examination of what the court viewed as areas of disagreement shows that, rather than real disagreement, proof of arranger liability differs depending on the type of case at issue. Within each scenario, however, there are very few areas of disagreement.

The first area of disagreement the *Morton* court identified concerned intent.[198] The court noted that the *Cello-Foil* and *Amcast* courts both required intentional action, whereas *Aceto* rejected the idea that arranger liability "requires proof that defendant intended to dispose of a waste."[199] Note that both *Cello-Foil* and *Amcast* are sales cases.[200]

It is important to understand that the role of intent addressed by these courts differs based on the scenario. In the sales cases, like *Cello-Foil* and *Amcast*, the key distinction is whether the transaction involves the sale of a useful product or the disposal of a waste. In these cases, the intent of the parties, specifically whether the parties intended to discard something, determines whether there has been an arrangement for disposal. In *Aceto*, on the other hand, the arrangement clearly involved the generation and disposal of waste.[201] In *Aceto*, whether the defendants intended to dispose of the waste or ignored the issue was not relevant.[202] The

194. *See id.* at 674.

195. *Id.* at 676–77 (citing Geraghty & Miller, Inc. v. Conoco Inc., 234 F.3d 917, 929 (5th Cir. 2001); Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160, 164 (2d Cir. 1999); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 775 (4th Cir. 1998); United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1231–32 (6th Cir. 1996); S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 407 (11th Cir. 1996); Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993); Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 973 F.2d 688, 695 (9th Cir. 1992); United States v. Aceto Agric. Chems. Corp., 872 F. 2d 1373, 1381–82 (8th Cir. 1989)).

196. *Id.* at 677. The areas of agreement were that (1) the inquiry regarding arranger liability is "fact-sensitive," and that (2) the courts should look beyond "defendant's characterization of the transaction." *Id.*

197. *Id.*

198. *Id.* (citing *Cello-Foil*, 100 F.3d at 1232; *Amcast*, 2 F.3d at 751; *Aceto*, 872 F.2d at 1380).

199. *Id.* Even the language quoted indicates a lack of parallel between the cases being contrasted. For example, the court quoted *Amcast* for the proposition that arranged for "impl[ies] intentional action," *id.* (alteration in original) (quoting *Amcast*, 2 F.3d at 751) (internal quotation marks omitted), while citing *Aceto* for the proposition that intent to dispose of waste is not required, *id.* (citing *Aceto*, 872 F.2d at 1380).

200. *See* discussion *supra* Part III.B.2.

201. *See Aceto*, 872 F.2d at 1375–76.

202. *See id.* at 1380–81.

defendants engaged in intentional action they knew would produce waste.[203] This is similar to the intent required by the courts in sales cases. In both sets of cases, courts do not require proof of intent in addition to proof of arranging for disposal; both agree the intent that was not required in *Aceto* is not required in a sales case. However, intent becomes a means of proving an arrangement for disposal because an act of arrangement does not occur accidentally. Thus, arranging for disposal requires some intentional action, but there is not a separate requirement that the parties intend to dispose of waste.

The *Morton* court next noted the disagreement regarding the importance of ownership or control,[204] citing *United States v. Hercules Inc.*[205] and *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*[206] for the proposition that control is not necessary,[207] and *United States v. Shell Oil Co.*[208] for the opposite proposition that control is the "crucial element."[209]

Again, observation of the differences in the fact patterns reveals no real dispute among the cases. Both the *Hercules* and *Jones-Hamilton* courts noted that where there is ownership of the waste, there is no need to show control.[210] The *Shell* case, on the other hand, was an attempt to impose arranger liability on the U.S. government based on the level of *control* the government exercised over activities at the facility during World War II.[211] The case is similar to *Aceto*, but without the element of ownership. There is, therefore, no liability. The ability to control, the court noted, is important, but not sufficient.[212]

The *Shell* court went further to distinguish ability to control from actual control.[213] It viewed *NEPACCO* as based on actual control because the defendant controlled the waste disposal decisions, which can be a basis of liability, and

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203. *Id.* at 1381.

204. 343 F.3d at 677.

205. 247 F.3d 706, 720 (8th Cir. 2001). The *Hercules* court made the important distinction between *NEPACCO*, in which there was no ownership and thus control was essential to liability, and *Aceto*, in which ownership was clear and thus control was not necessary to impose liability. *Id.* (citing *Aceto*, 872 F.2d at 1381–82; United States v. Ne. Pharm. & Chem. Co. (*NEPACCO*), 810 F.2d 726, 743 (8th Cir. 1986)). Thus, the court concluded that "[c]ontrol, therefore, is not a necessary factor in every case of arranger liability." *Id.*

206. 973 F.2d 688, 695 (9th Cir. 1992). The *Jones-Hamilton* case followed *Aceto* in holding that where the defendant retains ownership of the hazardous substances and enters into an agreement that clearly contemplates the disposal of some of those substances as waste, arranger liability exists even without a showing of control. *Id.* (citing *Aceto*, 872 F.2d at 1380–81).

207. *See supra* notes 206–07 and accompanying text.

208. 294 F.3d 1045, 1055 (9th Cir. 2002).

209. *Id.*

210. *See Hercules*, 247 F.3d at 720; *Jones-Hamilton*, 973 F.2d at 695 (citing *Aceto*, 872 F.2d at 1380–81). This is consistent with the discussion above that control is used to create constructive possession which satisfies the owned or possessed by requirement. *See supra* notes 110–18 and accompanying text.

211. *Shell*, 294 F.3d at 1055.

212. *Id.* at 1057.

213. *Id.* at 1057 (citing United States v. Ne. Pharm. Chem. Co. (*NEPACCO*), 810 F.2d 726 (8th Cir. 1986)).

reasoned the *Shell* case was more like *AAMCO*, where there was authority but no actual control.[214] The *Shell* court quoted the decision in *United States v. Iron Mountain Mines, Inc.*[215] which made the distinction that if a party was the source of pollution or actively managed it—for example, if the defendant was a waste generator or actively managed waste disposal as the *NEPACCO* defendants did[216]—there can be liability without actually owning or possessing the waste.[217] However, if a party is not the source of the waste and did not actively manage its disposal, control cannot create liability[218] unless the defendant also owns the hazardous substances as in *Aceto*.[219]

The *Morton* court, after its analysis of the other decisions, stated that arranger liability "should focus on" the three factors: (1) ownership or possession of the hazardous substance, and either (2) the defendant's knowledge that the processing will result in the generation of hazardous waste or (3) control of the production process.[220] Proof of ownership or possession of the material would be required, and then the plaintiff would have to show either knowledge or control of the process to succeed.[221]

In assessing these factors, the *Morton* court found that there were disputed issues as to whether Tenneco owned the hazardous materials during the processing.[222] Tenneco did, however, have enough experience with similar processes to know that hazardous waste would result.[223] Regarding control, the court was faced with disputed facts.[224] To some extent, the *Morton* court was looking at a case that could have been analogous to *AAMCO* where no ownership would result in no liability,[225] or to *NEPACCO*, in which case there would be liability.[226] A trier of fact was needed to determine whether defendants had sufficient ownership and control over the waste disposal issues to meet the owned or possessed by requirement and create liability.[227] In other words, a trier of fact was needed to determine which type of case the court was dealing with.

The first case to attempt to apply the *Morton* factors was *Agere Systems, Inc. v. Advanced Environmental Technology Corporation*.[228] The court addressed a claim against a contractor, AETC, who had agreed to remove and dispose of waste from several sites and had contracted with another party for the disposal of waste

214. *Id.*; *see supra* notes 148–53 and accompanying text.
215. 881 F. Supp. 1432 (E.D. Cal. 1995).
216. 810 F.2d 726 (8th Cir. 1986).
217. *Shell*, 294 F.3d at 1058 (quoting *Iron Mountain*, 881 F. Supp. at 1451).
218. *Id.*
219. *See supra* notes 122–35 and accompanying text.
220. Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 677–78 (3d Cir. 2003).
221. *Id.*
222. *Id.* at 681.
223. *Id.* at 682.
224. *Id.* at 683.
225. *See supra* notes 145–48 and accompanying text.
226. *See supra* notes 110–17 and accompanying text.
227. *Morton*, 343 F.3d at 683.
228. No. 02-3830, 2006 WL 3366167, at *3–8 (E.D. Pa. Nov. 20, 2006).

that was sent to the sites.[229] The court began its discussion by noting that "the plain language of the statute" requires a plaintiff "to show ownership or possession of the waste."[230] The court observed that the *Morton* court had also required ownership or possession.[231] The *Agere* court stated that ownership or possession, however, could be proved by constructive ownership or possession.[232] In this case, AETC exercised control because it had a contractual obligation to arrange for disposal of the waste and in fact contracted with another party to fulfill that obligation.[233] The court concluded, therefore, this case was like *NEPACCO* with regard to ownership or control.[234]

The defense argued that the case was analogous to *Aceto* without ownership.[235] The ownership or possession element was allegedly missing because the waste was taken to a site different from the site requested by the defendant.[236] The defendant argued this demonstrated its lack of control.[237] The court rejected that argument, reasoning that one with control over the waste disposal decision should not be able to escape liability by transferring the waste to a third party it does not control.[238]

The next factor required by *Morton* was either control of the production process or knowledge that the process would result in disposal of hazardous waste.[239] One factor or the other is required in cases such as *Aceto* and *Morton*, but neither is necessary in generator cases. Indeed, this factor does not make sense in a case in which there is no process to control. The court recognized this, but nevertheless concluded that *Morton* intended its rule to apply to all arranger cases.[240] The court then analyzed AETC's knowledge and determined that because AETC made waste disposal decisions, it had to know that waste disposal would result.[241]

The court discussed the relationship between control as a means of proving constructive possession and control of the disposal process as a means of showing

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229. *Id.* at *2. The court noted that when the defendant contracted to remove the waste and transport it for delivery, it could have performed the work itself or hired an outside company. *Id.* at *1. Had the company performed the work itself, it would only be a transporter of the waste. However, it exposed itself to arranger liability when it "independently contracted with Manfred DeRewal . . . to perform the removal, transportation, and disposal." *Id.*

230. *Id.* at *3.

231. *Id.* (citing *Morton*, 343 F.3d at 678).

232. *Id.* at *3 (citing United States v. Ne. Pharm. & Chem. Co. (*NEPACCO*), 810 F.2d 726, 743 (8th Cir. 1986)).

233. *Id.* at *4. ("AETC exercised control over the waste when it agreed by contract to dispose of the waste and independently hired DeRewal to perform the removal and disposal.").

234. *Id.* at *3 (citing *NEPACCO*, 810 F.2d at 743).

235. *Id.* at *5.

236. *Id.*

237. *Id.*

238. *Id.* at *6.

239. *Id.*

240. *Id.* at *3 (citing Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 679 (3d Cir. 2003)).

241. *Id.* at *8. The court rejected the defendant's argument that liability should be premised on the ability to make decisions as to the actual manner and location of the disposal, not just the ability to make waste disposal decisions in general. *Id.* at *6–7.

that the defendant arranged for the disposal; thus, the court apparently recognized that in different fact patterns, control can play different roles.[242] However, because the court believed the *Morton* rule was intended to apply to all arranger cases, it addressed whether there were in fact fewer factors relevant to arranger liability, with control being the key to both the owned or possessed by requirement and the control of the process requirement.[243]

By attempting to apply the *Morton* rule,[244] the court made a fairly simple case difficult. The court should have noted that control plays a different role in different types of cases. In cases like *NEPACCO*, control of the disposal process is used to prove constructive possession, and once one controls the disposal process, one is an arranger. No other element of control is necessary. In cases like *Aceto*, on the other hand, control of the process that creates the waste and knowledge that waste is being created are relevant, but only because the defendant did not make waste related decisions. In such a case, control and knowledge are necessary to show that there was an arrangement for disposal. Thus, the court took a simple case in which the defendant was liable because it undisputedly made the arrangements for disposal, a case like *NEPACCO*, and made it more complex by unnecessarily searching for other elements of control.

VI. CONCLUSION

The role of ownership or possession in arranger liability has been a source of considerable controversy. This controversy stems from the fact that ownership or possession plays a different role depending on the fact pattern. Within each type of fact pattern, however, there is a great deal of consistency. When the defendant is the generator of the waste or the seller of a useful substance, ownership or possession of the waste is not a critical element. Every generator owns or possesses the waste at the time of generation, and the seller clearly has no ownership or possession at the time of generation of the waste. In cases like *NEPACCO*, making decisions regarding waste disposal satisfies the ownership or possession requirement, and the defendant will be held liable. In cases like *Aceto*, where the contractual arrangement does not overtly address waste generation and disposal, ownership of the hazardous substances establishes the control necessary to impose a duty on the defendant to assure proper disposal of the waste. Once one understands the four possible fact patterns, the role of ownership or possession in arranger liability becomes clear. The variety of approaches taken by the courts is not evidence of "disagreement" on the issue; instead, the variety of approaches

242. *Id.* at *6.

243. *Id.* at *7. The court noted that the *Morton* court had recognized that these factors were related and that, in some cases, proof of control could be sufficient for arranger liability. *See id.* (citing *Morton*, 343 F.3d at 679).

244. The court recognized the rule could not be applied literally because there was no process to control. *Id.* Control of the process makes sense as a factor only in cases like *Aceto* where there is a process to control.

reflects the four distinct scenarios that give rise to arranger liability, and the role of ownership or possession differs depending on the scenario.