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BROADENING ARRANGER LIABILITY UNDER ALASKA STATE LAW: THE NINTH CIRCUIT'S INTERPRETATION OF *BERG v. POPHAM*

I. INTRODUCTION

The prospect of defining "arranger liability" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] has haunted courts since CERCLA's enactment in 1980.[2] Congress passed CERCLA during the closing days of the Carter Administration in a "sweeping" effort to clean up hazardous waste sites.[3] CERCLA authorized the creation of a superfund to pay for cleanup efforts, financed by a combination of taxes, appropriations and legal judgments against offending parties.[4] CERCLA also authorized a strict liability cause of action against a potentially responsible party (PRP), compelling PRPs to contribute to their share of the cleanup.[5] Parties found to have "arranged for" hazardous

1. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (2000) [hereinafter CERCLA].

2. *See, e.g.*, Roger K. Ferland & Marilyn D. Cage, *Using RCRA to Interpret CERCLA Liability: What is "Arranging for Disposal"?*, 23 ARIZ. ST. L.J. 445, 445-46 (1991) (noting difficulty federal courts have had in defining "arranger liability" under CERCLA); Gregory A. Robins, Note, Catellus Development Corporation v. United States: *A "Solid" Approach to CERCLA "Arranger" Liability, or a "Waste" of Natural Resources?*, 47 HASTINGS L.J. 189, 189-90 (1995) (noting "inscrutability" of statute).

Arranger status is one of four classifications of liability under CERCLA section 9607(a). The other theories of liability include current owner or operator, former owner or operator, or transporters of a hazardous substance. *See* 42 U.S.C. § 9607(a)(1), (2), (4). For a more in-depth discussion of CERCLA's liability scheme in general, see *infra* notes 62-71 and accompanying text.

3. *See* Berg v. Popham, 113 P.3d 604, 608 (Alaska 2005) (*Berg I*) (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion), *rev'd on other grounds*; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)) (noting Supreme Court's and federal courts' acknowledgement of congressional intent for CERCLA's broad remedial authority).

4. *See* David W. Lannetti, Note, *"Arranger Liability" Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Judicial Retreat from Legislative Intent*, 40 WM. & MARY L. REV. 279, 282, 282 n.10 (1998) (noting CERCLA's two-fold purpose). Lannetti notes: "CERCLA authorized EPA to clean up hazardous waste sites and created a 'Superfund' with which to fund its activities." *See id.* at 283.

5. *See* Martina E. Cartwright, *CERCLA at 25: A Retrospective, Introspective, and Prospective Look at the Comprehensive Environmental Response, Compensation and Liability Act on Its 25th Anniversary*, 18 TUL. ENVTL. L.J. 299, 306 (2005) (noting standard of liability).

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waste disposal are subject to arranger liability under CERCLA and its state statutory counterparts.[6]

Commentators continually note that judicial interpretation of arranger liability has been inconsistent at best, as CERCLA's legislative history and CERCLA itself, offer limited guidance.[7] Statutory interpretation is especially difficult when a state's version of CERCLA is drafted with minute differences, forcing state and federal courts to rely not only on porous federal precedent, but state legislative intent as well.[8] Regardless, a court's broad interpretation of a state's CERCLA provisions, in accordance with legislative intent, is a positive step in cost recovery, especially in light of the seemingly dark fate of CERCLA's taxing power and America's dubious future as a global environmental leader.[9]

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6. *See* 42 U.S.C. § 9607(a)(3) (assigning arranger liability). This section of CERCLA holds liable:

> 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.

See id. See also ALASKA STAT. § 46.03.822(a)(4) (2004) (assigning arranger liability). Alaska's CERCLA counterpart dictates:

> 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 the person, other than domestic sewage, *or by any other party or entity*, at any facility or vessel owned or operated by another party or entity and containing hazardous substances, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance

is liable for costs of "response, containment, removal or remedial action . . . resulting from an unpermitted release of a hazardous substance . . . ." *See id.* (emphasis supplied).

7. *See* Ferland & Cage, *supra* note 2, at 445-46 (noting vagueness of language); Robins, *supra* note 2, at 189-90 (highlighting Congress's failure to define "arrange"). *See also* Anna Marple Buboise, Comment, *Expanding the Scope of Arranger Liability Under CERCLA*, 43 U. KAN. L. REV. 469, 469 (1995) (discussing CERCLA's vagueness and ambiguity).

8. *See, e.g.*, Berg v. Popham, 412 F.3d 1122, 1126 (9th Cir. 2005) (*Berg II*) (explaining difference in statutory construction between CERCLA and Alaska counterpart); *Berg I*, 113 P.3d at 609 & nn.25-26 (looking to Alaska legislative intent).

Throughout this Note, *Berg II* will refer to the Ninth Circuit's most recent opinion of this case, while *Berg I* will refer to the Alaska Supreme Court's decision, on which the Ninth Circuit relied in its ruling.

9. *See* Cartwright, *supra* note 5, at 300 & n.5 (citation omitted) (explaining CERCLA's taxing authority expired in 1995 and Superfund trust "ran out of money" in 2003); *id.* at 322 (noting failed attempts in Congress to reauthorize CERCLA's taxing ability); Felicity Barringer, *United States Ranks 28th on Environment, a New Study Says*, N.Y. TIMES, Jan. 23, 2006, at A3 (discussing pilot study ranking 133 nations on environmental management). *See also* Daniel C. Esty, *Stepping Up to the Global Environmental Challenge*, 8 FORDHAM ENVTL. L.J. 103 *passim* (1996)

For example, in June 2005, the Ninth Circuit affirmed the Alaska Supreme Court's interpretation of Alaska's arranger liability provision, which is broader than CERCLA's.[10] In *Berg v. Popham* (*Berg II*),[11] the Ninth Circuit ruled that when an entity manufactures or sells a useful product, although designed or installed properly but still releases a hazardous substance, that entity can become a PRP under Alaska's arranger liability provision.[12] In *Berg II*, the Maytag Corporation's predecessor in interest (Norge) designed and installed a water separator system for the Berg family's small dry-cleaning business.[13] Even when used properly, the system allegedly released a hazardous substance into the sewer system.[14] The Ninth Circuit ruled these allegations were sufficient to state a claim for arranger liability under Alaska's CERCLA counterpart (Alaska Statute).[15] This interpretation is broader than previous Ninth Circuit applications of arranger liability under CERCLA, and it is based in part on the Alaska Statute's syntactic construction as well as the Alaska Legislature's intent.[16]

This Note explores the implications of the Ninth Circuit's acceptance of a broad reading of Alaska's arranger liability provision at this moment in the doctrine's unsettled history. Part II sets forth the pertinent facts of the *Berg II* opinion.[17] Part III considers CERCLA's legislative and case history and highlights the issues surrounding arranger liability generally.[18] Part IV offers a narrative analysis of the Ninth Circuit's *Berg II* opinion, and Part V critically analyzes that decision.[19] Part VI questions the impact this broader

(calling for creation of "international regime" to promote global environmental sustainability).

10. *See Berg II*, 412 F.3d at 1130 (accepting Alaska Supreme Court's interpretation of arranger liability in that state).

11. 412 F.3d 1122 (9th Cir. 2005).

12. *See id.* at 1130 (providing holding of case). For relevant Alaska statutory language, see *supra* note 6.

13. *See id.* at 1124-25 (explaining background facts).

14. *See id.* (explaining background facts).

15. *See id.* at 1130 (stating holding of case).

16. *See Berg II*, 412 F.3d at 1125-28 (quoting *Berg I*, 113 P.3d 604, 608-09 (Alaska 2005)) (discussing differences between CERCLA and Alaska Statute's arranger liability provisions). *Compare* 42 U.S.C § 9607(a) (2000) (outlining four classifications of liability) *with* ALASKA STAT. § 46.03.822(a) (2004) (offering five classifications of liability).

17. For a full discussion of the facts, see *infra* notes 23-48 and accompanying text (providing facts of *Berg I* and *Berg II*).

18. For a full background discussion, see *infra* notes 49-196 and accompanying text (discussing background on CERCLA and relevant federal and state case law).

19. For a narrative analysis of *Berg II*, see *infra* notes 197-269 and accompanying text (presenting narrative analysis of Ninth Circuit's opinion in *Berg II*). For a

interpretation may have on other state and federal decisions, especially considering a persuasive case source for the *Berg II* decision has since been overturned.[20]

Finally, this Note encourages states to adopt a broad standard for arranger liability for two reasons. First, CERCLA's taxing authority expired in 1995, and it is unlikely to be revived in the foreseeable future.[21] Second, to maintain its position as a global leader, the United States should provide emerging economies with a positive model for environmental management.[22]

II. FACTS

In *Berg I*, David and Marge Berg owned and operated a dry-cleaning business (Boni-Park) in Anchorage, Alaska from 1972 to 1978 and again from 1980 to 1983.[23] Boni-Park was a franchise operation of the Norge Corporation, defendant Maytag's predecessor in interest.[24] The Bergs purchased dry-cleaning equipment from Norge prior to 1972, and Norge suggested the Bergs use percholoroethylene (PCE) in the dry-cleaning process.[25] Also known as tetrachloroethylene, PCE is a synthetic cleaning agent used by eighty-five percent of dry cleaners in the United States.[26]

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critical analysis of *Berg II*, see *infra* notes 270-309 and accompanying text (providing critical analysis of Ninth Circuit's opinion in *Berg II*).

20. For a discussion of the impact of *Berg II*, see *infra* notes 310-26 and accompanying text (considering impact of *Berg II*). *See also* R.R. Street & Co., Inc. v. Pilgrim Enters., Inc., 81 S.W.3d 276 (Tex. App. 2001) (*Street I*), *rev'd*, 166 S.W.3d 232, 255 (Tex. 2005) (*Street II*).

21. *See* Cartwright, *supra* note 5, at 300 (noting questionable fate of CERCLA's taxing provision). Cartwright also notes the trust funding clean up was depleted in 2003. *See id.*

22. *See, e.g.*, Andrew Rice & Terrence L. Bracy, *International Development*, COALITION FOR AMERICAN LEADERSHIP ABROAD, Aug. 6, 2002, http://www.colead.org/WP%20Section%203.html (noting America's role in international environmental development and management) (on file with author).

23. *See Berg I*, 113 P.3d 604, 605-06 (Alaska 2005) (providing background facts). In 1978, the Bergs sold the business to the Pophams, then reacquired Boni-Park from the Pophams in 1980. *See id.* The Bergs then sold Boni-Park for a second time, to the Jaegers, in 1983. *See id.* at 606.

24. *See id.* (introducing background facts); *Berg II*, 412 F.3d 1122, 1125 n.2 (9th Cir. 2005) (specifying claims of PRP Maytag). The opinion explains: "Maytag denies that it is Norge's corporate successor and reserves the right to litigate this issue at trial." *See id.* For "purposes of reviewing the merits of its motion to dismiss and motion for judgment on the pleadings, Maytag does not dispute it is Norge's successor in interest." *See id.*

25. *See Berg II*, 412 F.3d at 1124-25 (providing background facts).

26. *See* TODD CAMPBELL & LORI LOW, COALITION FOR CLEAN AIR, HUNG OUT TO DRY: HOW THE USE OF PERCHLOROETHYLENE IN DRY CLEANING ENDANGERS YOU AND YOUR FAMILY'S HEALTH 2 (Oct. 2002), http://www.coalitionforcleanair.org/

PCE is a carcinogen that causes skin irritation and respiratory complications.[27]

Norge designed and installed the Bergs' dry-cleaning equipment.[28] Norge also installed a separator system to separate water from the PCE.[29] During the dry-cleaning process, water and PCE were mixed.[30] Ultimately, the separator system recaptured the PCE, and the remaining water flowed into the sewer.[31] According to the Bergs' second amended complaint, this system "'facilitated spillage, leakage, and direction of [PCE] into the city sewer system.'"[32] Periodically, the Bergs also used a vaporization process to remove any oil or dirt from the system that may have gathered during the PCE separation process.[33] The vaporization process produced a sludge contaminated with PCE, which was also directed into the sewer.[34]

In 1991, Alaska highway construction workers detected traces of PCE in the soil near Boni-Park.[35] Pursuant to the Alaska Statute, the state issued liens on the Bergs' assets to help create a pool of funds for cleaning up the PCE.[36] The Bergs were subject to strict liability under the Alaska Statute, which permits the state to seek damages from a party responsible for "'an unpermitted release of a hazardous substance.'"[37] The Alaska Statute also permits a liable

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pdf/reports/cca-reports-hung-out-to-dry.pdf (citation omitted) (discussing hazards of PCE).

27. *See id.* at 5 (noting hazards of PCE). Exposure to PCE also causes "drying or cracking of the skin; irritation of the skin, eyes, nose, mouth, throat and lungs; burns, headaches, dizziness, lightheadedness, nausea, vomiting, fainting, coughing, fluid build up in the lungs; damage to the central nervous system, kidneys, liver and reproductive system." *See id.* Greenpeace reported in 2001 that "[PCE] is found in more than 50 percent of the Superfund sites in the country and 70 percent of all [PCE] used ends up in the environment." *See id.* at 6 (citation omitted).

28. *See Berg II*, 412 F.3d at 1125 (providing background facts).

29. *See Berg I*, 113 P.3d at 606 (providing background facts).

30. *See id.* (explaining dry-cleaning process and separator system).

31. *See id.* (explaining separator system).

32. *See id.* (quoting Bergs' second amended complaint).

33. *See id.* (elaborating vaporization and disposal processes).

34. *See Berg I*, 113 P.3d at 606 (explaining vaporization process).

35. *See Berg II*, 412 F.3d at 1125 (noting state's discovery of PCE). There is a factual discrepancy between *Berg I* and *Berg II*. *Berg I* states Alaska discovered PCE in soil near Boni-Park in 1987 or 1988. *Berg I*, 113 P.3d at 606.

36. *See Berg II*, 412 F.3d at 1125 (describing Alaska's initiation of decontamination efforts). *See also Berg I*, 113 P.3d at 606-07 (explaining procedural background of case); *infra* notes 37-39 and accompanying text (discussing Alaska Statute's recovery provisions).

37. *See Berg II*, 412 F.3d at 1125 (citing ALASKA STAT. § 46.03.822(a) (2004)) (discussing liability).

party to seek contribution from any other liable party.[38] The Bergs allegedly paid over one million dollars for cleanup, and they eventually sought contribution from Maytag as a PRP.[39]

Seeking contribution, the Bergs filed suit against Maytag under the theory of arranger liability as promulgated by both CERCLA and the Alaska Statute.[40] Maytag removed the case to federal district court, which granted in part Maytag's motion to dismiss, holding the CERCLA and Alaska Statute arranger liability provisions inapplicable.[41] The Bergs appealed to the Ninth Circuit, not contesting CERCLA's inapplicability, but rather arguing the district court incorrectly interpreted the Alaska Statute's arranger liability provision.[42]

Unable to find controlling Alaska precedent on the state's interpretation of arranger liability, the Ninth Circuit certified two questions to the Alaska Supreme Court.[43] The two questions were: first, does the inclusion of the disjunctive "or" before the phrase "by any other party or entity" in the Alaska Statute, which is absent in CERCLA, require ownership or possession of a hazardous substance, authority to control or a duty to dispose of the released hazardous substance, before an entity can be subject to arranger liability as it would under CERCLA?[44] Second, if not, may an entity be subject to arranger liability under Alaska law if that entity "manufactures, sells, and installs a useful product that, when used as designed," releases a hazardous substance into the sewer?[45] The Alaska Supreme Court answered the first question negatively and the second question affirmatively.[46] Specifically, the court held an entity need not own or possess a hazardous substance to be subject to arranger liability in Alaska, provided that the entity was "actually

38. *See id.* (citing ALASKA STAT. § 46.03.822(j)) (discussing contribution).

39. *See Berg I*, 113 P.3d at 607 (providing background facts).

40. *See id.* (providing background facts); 42 U.S.C. § 9607(a)(3) (2000) (assigning arranger liability under federal legislation); ALASKA STAT. § 46.03.822(a)(4) (assigning arranger liability under state legislation). For a discussion of Norge and Maytag's legal relationship, see *supra* note 24 and accompanying text.

41. *See Berg I*, 113 P.3d at 607 (explaining procedural posture of case).

42. *See id.* (providing background facts).

43. *See id.* (presenting procedural posture). For a discussion of certified questions, see *infra* notes 194-96 and accompanying text.

44. *See id.* at 605 (reciting first certified question sent from Ninth Circuit). See also *supra* note 6.

45. *See id.* (citation omitted) (reciting second certified question sent from Ninth Circuit).

46. *See Berg I*, 113 P.3d at 605 (finding Alaska legislature intended for Alaska Statute to be more inclusive than CERCLA).

involved" in the resulting hazardous spillage.[47] Ultimately, the Ninth Circuit held that the Bergs alleged facts sufficient to support their claim for arranger liability under the Alaska Statute.[48]

III. BACKGROUND

A. CERCLA: Background, Contribution and Liability

This section provides background on CERCLA generally, followed by a brief discussion of the 1986 contribution amendment under the Superfund Amendments and Reauthorization Act (SARA).[49] Then, a discussion of general liability under CERCLA section 9607 addresses in detail the federal circuits' differing approaches to arranger liability.

1. CERCLA Generally

Congress passed CERCLA in 1980 in response to the discovery of hazardous waste sites and the ineffectiveness of then-existing legislation to manage their cleanup.[50] Congress, focusing on air and water pollutants, enacted the Resource Conservation and Recovery Act (RCRA)[51] in 1976, which inadequately provided remedial support to the newly-discovered problem of abandoned hazardous waste sites.[52]

Enacted after little debate, CERCLA granted the federal government greater power to recover cleanup costs from offending

47. *See Berg II*, 412 F.3d 1122, 1129 (9th Cir. 2005) (noting actual involvement approach used by Alaska Supreme Court in *Berg I*); *Berg I*, 113 P.3d at 610 (employing actual involvement approach).

48. *See Berg II*, 412 F.3d at 1129 (allowing claim to stand under actual involvement approach used by Alaska Supreme Court). The Ninth Circuit also upheld the district court's ruling that the Bergs had no cause of action under the state law theories of contribution, equitable apportionment or indemnity. *See id.* These theories failed because the Bergs neglected to make the required allegations in their complaints and also did not follow Alaska Rules of Civil Procedure with regard to these claims. *See id.* at 1129-30.

49. *See* 42 U.S.C. § 9613(f)(1) (2000) (authorizing right to contribution).

50. *See* Cartwright, *supra* note 5, at 301-05 (citations omitted) (providing background for CERCLA's enactment). Love Canal was a small residential community in upstate New York that was originally used in the 1940s as a toxic waste dump site. *See id.* at 301. The discovery of Love Canal and similar sites around the country induced Congress to take remedial action. *See id.* at 302 & n.17. *See* H.R. REP. No. 96-1016(I), at 17-21 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-23 [hereinafter *House Report I*] (summarizing purpose of CERCLA and describing characteristics common to abandoned hazardous waste sites).

51. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-87 (1976), *amended by* Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 [hereinafter RCRA].

52. *See House Report I*, *supra* note 50, at 17-18, 22 (noting inadequacies of RCRA in providing remedial support).

parties; this power is authorized by the Act's liability provisions and taxing mechanisms.[53] CERCLA provided the government with a strict liability cause of action against those parties potentially responsible for contributing to hazardous waste sites.[54] Lawmakers thought this provision would induce offenders to clean up inactive waste sites voluntarily.[55] CERCLA also established a Superfund to finance the cleanup of hazardous waste sites.[56] This congressionally-mandated trust fund provides for emergency cleanup by taxing crude oil, certain chemicals and inorganic substances in the event a PRP refused to pay.[57] While the taxing mechanism that fed Superfund has expired, the government's ability to recover from PRPs remains.[58]

2. *Contribution Under SARA*

Congress amended CERCLA in 1986 with SARA, which supplemented CERCLA by authorizing a private cause of action for contribution against liable or potentially liable third parties.[59] Under

53. *See* Cartwright, *supra* note 5, at 305 (noting dual nature of funding).

54. *See id.* (citing James J. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980s*, 3 YALE J. ON REG. 351, 355-57 (1986)) (citations omitted). Mr. Florio noted that:

> CERCLA established liability for the private parties who generated the wastes found at a dump site, those who transported such wastes, and those who owned and operated the dump. These liability provisions held such parties strictly, jointly and severally liable for the costs of cleaning up the site and permitted the federal government both to recover the funds expended by the federal fund and to issue orders compelling private responsible parties to conduct such cleanups on their own.

See Florio, *supra*, at 356.

55. *See House Report I*, *supra* note 50, at 17 (providing purpose and summary of CERCLA).

56. *See* Cartwright, *supra* note 5, at 305 n.39 (citing Florio, *supra* note 54, at 355-57). Mr. Florio noted: "the law established a $1.6 billion trust fund, to be funded over a period of five years primarily by taxes on the domestic production and import of chemical 'feedstocks' — the basic chemical building blocks that are used to manufacture most other chemical products." Florio, *supra* note 54, at 355-56. Any emergency cleanup authorized by the EPA was funded by the trust. *See* Cartwright, *supra* note 5, at 307-08. *See also* 42 U.S.C. § 9604(a)(1) (2000) (providing presidential authority to order cleanup).

57. *See* Cartwright, *supra* note 5, at 308 (describing taxing scheme to finance trust).

58. *See id.* at 315 (noting Superfund taxing authority expired on December 31, 1995 and has since remained inactive); 42 U.S.C. § 9607 (2000) (setting forth PRP liability).

59. *See* 42 U.S.C. § 9613(f)(1) (2000) (outlining contribution scheme) [hereinafter SARA]; Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 343 F.3d 669, 675 (3d Cir. 2003) (discussing history of CERCLA and SARA); H.R. REP. No. 99-253(I), at 79 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 2835, 2861 [hereinafter *House Report II*]. This section "clarifies and confirms the right of a person held jointly and sevenrally [sic] liable under CERCLA to seek contribution from other potentially liable par-

SARA, a party liable for cleanup can seek contribution from any other liable party or PRP defined by CERCLA section 9607.[60] Thus, SARA permits private cost recovery in addition to the initial public cost recovery scheme originally set forth in CERCLA.[61]

3. *General Liability under CERCLA section 9607*

CERCLA classifies four types of PRPs under section 9607: (1) the current owner and operator of a vessel or a facility;[62] (2) the former owner or operator of a facility or vessel where a hazardous substance was disposed;[63] (3) *one who arranged for disposal*;[64] and (4) transporters of a hazardous substance to a site of release or threatened release.[65] Those found liable under one of these four categories are strictly liable and, if the damage is indivisible, subject to joint and several liability.[66]

CERCLA's hurried passage contributed in part to its vague language and "sparse" legislative history, making it difficult for courts to interpret many parts of CERCLA.[67] A notably difficult provision to interpret is CERCLA's assignment of liability.[68] The language used in assigning arranger liability is especially vague, and few definitions are available for internal cross-referencing.[69] The imprecision with which this section was written has forced courts to decipher for themselves the meaning of arranger liability under CERCLA, resulting in numerous interpretations that have been

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ties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances." *See id. See also* Cartwright, *supra* note 5, at 306 (noting prior to SARA, courts "recognized [the right to contribution] as implied") (citations omitted).

60. *See* 42 U.S.C. § 9613(f)(1) (noting scope of contribution).

61. *See, e.g., Morton Int'l*, 343 F.3d at 675-76 (noting combined effects of CERCLA and SARA).

62. *See* 42 U.S.C. § 9607(a)(1) (assigning liability to current owner or operator).

63. *See id.* § 9607(a)(2) (assigning liability to former owner or operator).

64. *See id.* § 9607(a)(3) (assigning liability to arrangers).

65. *See id.* § 9607(a)(4) (assigning liability to transporters).

66. *See* Robins, *supra* note 2, at 195 (citing *United States v. Monsanto*, 858 F.2d 160, 167 (4th Cir. 1988)); *id.* (citing *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983)) (discussing PRP liability).

67. *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982) (noting hurried passage of CERCLA); Ferland & Cage, *supra* note 2, at 445-46 (noting judicial frustration in discerning CERCLA's language).

68. *See* Ferland & Cage, *supra* note 2, at 446 (noting "inscrutability" of liability provisions).

69. *See id.* at 447 (noting only three terms in section 9607(a)(3) are explicitly defined).

"both inconsistent and confusing."[70] The existence of a "useful product exception," which exempts some sellers from arranger liability, further muddies the field.[71]

a. The Various Approaches to Interpreting Arranger Liability

Federal and state courts have taken a variety of approaches when contemplating arranger liability under CERCLA and its state statutory counterparts.[72] When assigning arranger liability, courts have generally taken two broad approaches: the first is based on a PRP's level of intent, and the second is based on a PRP's control over the hazardous substance or degree of actual involvement in disposal.[73] More specific categorical approaches include: strict liability;[74] specific intent;[75] totality of the circumstances;[76] obligation to control;[77] and actual involvement.[78] This section will examine in depth each of these categorical approaches.

1) Level of Intent

During the 1980s and 1990s, federal courts considering arranger liability often discussed whether PRPs met each jurisdic-

70. *See id.* (noting general judicial independence in defining "arranger liability").

71. *See Berg I*, 113 P.3d 604, 610 (Alaska 2005). The useful product doctrine exempts manufacturers from arranger liability when they do no more than sell a useful, but hazardous, substance to end users. *See id.* (citations omitted). See also *infra* notes 167-84 and accompanying text.

72. *See, e.g.*, Lannetti, *supra* note 4, at 291 (noting three general approaches adopted by modern courts in assigning arranger liability: strict liability; specific intent; and totality of circumstances). For a discussion of these and other approaches, see *infra* notes 73-166 and accompanying text.

73. *See Berg I*, 113 P.3d at 608 & n.20 (noting differences between circuits). The Texas Supreme Court in *Street II* noted that most courts agree there must be a "nexus" between disposal and a PRP's conduct. *See Street II*, 166 S.W.3d at 242.

74. *See, e.g.*, United States v. Aceto Agric. Chems. Co., 872 F.2d 1373 (8th Cir. 1989) (holding PRPs strictly liable).

75. *See, e.g.*, Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993) (noting critical issue was meaning of "arranged for" in statute).

76. *See, e.g.*, S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402 (11th Cir. 1996); United States v. Cello-Foil Prods., Inc., 100 F.3d 1227 (6th Cir. 1996) (using totality of circumstances approach to arranger liability).

77. *See, e.g.*, United States v. Shell Oil Co., 294 F.3d 1045, 1055 (9th Cir. 2002); Gen. Elec. Co. v. AAMCO Transmissions, Inc., 962 F.2d 281 (2d Cir. 1992); United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1451 (E.D. Cal. 1995) (using "obligation to control" approach to arranger liability).

78. *See, e.g., Berg II*, 412 F.3d 1122, 1127 (9th Cir. 2005); *Berg I*, 113 P.3d 604, 609 (Alaska 2005); *Street I*, 81 S.W.3d 276, 293 (Tex. App. 2001) (noting "actual involvement" is factor in determining arranger liability).

tion's required level of intent before assigning liability.[79] The circuits differ, however, in which standard they apply.[80] Specifically, the Eighth Circuit imposes strict liability; the Seventh Circuit requires specific intent, while the Eleventh and Sixth Circuits take a totality of circumstances approach.[81]

i. Strict Liability in the Eighth Circuit

In the Eighth Circuit, little intent is required to trigger arranger liability.[82] Under the "*Aceto* Doctrine," strict liability is imposed on a PRP that maintains ownership over a substance even without an intent to dispose.[83] Specifically, in *United States v. Aceto Agricultural Chemicals Co.* (*Aceto*),[84] the Eighth Circuit held a PRP's intention to dispose of a hazardous substance is not a prerequisite to assigning arranger liability.[85] To require such intent would "frustrate" CERCLA's goal of compelling those responsible to bear the cost of cleanup.[86]

In *Aceto*, after cleaning up a pesticide formulation company's (Aidex) contaminated site, the United States and the state of Iowa sought recovery costs from the manufacturing companies who hired Aidex to transform their pesticide product from technical to consumer grade.[87] The EPA and Iowa alleged the manufacturers were subject to arranger liability under CERCLA and RCRA because the manufacturers maintained ownership over the pesticides during the entire process and because the process inherently resulted in the production of hazardous waste.[88] The Eighth Circuit

79. *See* Lannetti, *supra* note 4, at 280 (recounting history of intent standards used by federal courts).

80. *See infra* notes 81-120 and accompanying text.

81. *See id.* (noting circuits take different approaches).

82. *See United States v. Aceto Agric. Chems. Co.*, 872 F.2d 1373 (8th Cir. 1989). More recently the Eighth Circuit has indicated it will determine arranger liability based on a totality of circumstances test. *See United States v. Hercules, Inc.*, 247 F.3d 706, 721 (8th Cir. 2001) (noting court will not look to "bright-line rules," rather it will look to facts of each case in "deciding questions of arranger liability"). Still, the Eighth Circuit maintains that "control . . . is not a necessary factor in every case of arranger liability," particularly when a party's ownership of the hazardous substance is established. *See id.* at 720.

83. *See Aceto*, 872 F.2d at 1384 (holding an arranger need not intend to dispose of hazardous substance).

84. 872 F.2d 1373 (8th Cir. 1989).

85. *See id.* at 1380 (noting court of appeals rejected defendant's narrow interpretation of "arranger"). *See also* Lannetti, *supra* note 4, at 294-95 (noting effect of *Aceto* decision on Ninth and Eleventh Circuits).

86. *See Aceto*, 872 F.2d at 1380-81 (noting CERCLA's primary goals). *See also* Lannetti, *supra* note 4, at 295 (discussing *Aceto*).

87. *See Aceto*, 872 F.2d at 1375 (providing facts of case).

88. *See id.* at 1376 (noting allegations).

held that arranging for disposal does not require intent to dispose of a hazardous substance and concluded the governments' allegations were sufficient to subject the manufacturers to arranger liability.[89]

The Eighth Circuit distinguished *Aceto* from "useful product" cases, where a manufacturer sells a hazardous substance to another party who integrates the hazardous substance into the final product.[90] Unlike the useful product cases, where liability does not attach, a transfer of ownership never occurred in *Aceto*.[91] The manufacturers in *Aceto* owned the pesticides while Aidex formulated them.[92]

ii. Specific Intent in the Seventh Circuit

At the other end of the spectrum, the Seventh Circuit requires a PRP specifically intend to dispose of a hazardous substance before assigning arranger liability.[93] In *Amcast Industrial Corp. v. Detrex Corp.* (*Amcast*),[94] the Seventh Circuit held that carriers who spill chemicals are liable under CERCLA, but the entity that ships the chemicals are not.[95] In *Amcast*, a manufacturer (Elkhart) sought contribution from one of its trichloroethylene (TCE) suppliers (Detrex), after Elkhart had to clean up chemicals Detrex and its hired carrier (Transport Services) spilled while delivering TCE to Elkhart.[96] Writing for the court, Judge Posner reasoned that Detrex hired Transport Services to move the TCE, not to spill it.[97] In other words, Detrex did not specifically intend for Transport Services to spill the TCE and therefore was not responsible for the spillage from Transport Services's trucks.[98]

Before the Seventh Circuit articulated its standard of specific intent in *Amcast*, an Illinois district court held that chemical sellers

89. *See id.* at 1384 (providing holding of case). The Eighth Circuit held intent is not required for liability to attach. *See id.* at 1380.

90. *See id.* at 1381 (noting distinctions between *Aceto* and useful product cases). For a discussion of useful product cases, see *infra* notes 167-84 and accompanying text.

91. *See Aceto*, 872 F.2d at 1381 (citing *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 1988 U.S. Dist. LEXIS 4707 (D. Fla. 1988) and *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651 (N.D. Ill. 1988)).

92. *See id.* (applying reasoning to facts).

93. *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (requiring intent to dispose).

94. *See id.* (highlighting that no transfer of ownership occurred).

95. *See id.* at 747 (providing holding of case).

96. *See id.* at 747-48 (providing facts of case).

97. *See id.* at 751 (providing reasoning of case).

98. *See Amcast*, 2 F.3d at 751 (applying reasoning).

were not subject to arranger liability when they sold chemicals solely for another's wood treatment and not to dispose of the substances.[99] In *Edward Hines Lumber Co. v. Vulcan Materials Co.* (*Edward Hines*),[100] one of the sellers, Osmose, designed and installed the chemical treatment apparatus in a client's plant.[101] The court reasoned that even though Osmose may have known the treatment run-off was being held in a reserve pond on the client's site, CERCLA liability was inappropriate.[102]

Despite possibly knowing about the run-off pond at the treatment plant site, the sale of treatment chemicals without more did not trigger arranger liability.[103] In *Edward Hines*, the court did not assign arranger liability because Osmose's sale of chemicals was for wood treatment and not disposal.[104] Furthermore, Osmose did not decide the chemicals' fate after treatment.[105]

iii. Totality of Circumstances: Eleventh and Sixth Circuits

Between the extremes of strict liability and specific intent, the Eleventh and Sixth Circuits employ a totality of circumstances formula when considering arranger liability.[106] In *South Florida Water Management District v. Montalvo* (*Montalvo*),[107] the Eleventh Circuit took a totality of circumstances approach to determine the existence of arranger liability.[108] There, a pesticide-formulating and aerial spraying services company (Montalvo) asserted the landowners, to whom it provided service, arranged for disposal by virtue

99. *See Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 656 (N.D. Ill. 1988) (providing holding of case).

100. 685 F. Supp. 651 (N.D. Ill. 1988).

101. *See id.* at 653 (providing facts of case).

102. *See id.* at 655 n.3 (noting "[t]he crucial inquiry" in determining arranger liability is reason for transaction for hazardous substance).

103. *See id.* at 656 (applying facts to reasoning).

104. *See id.* at 656-57 (applying facts to reasoning).

105. *See Edward Hines*, 685 F. Supp. at 656-57 (applying facts to reasoning).

106. *See* Lannetti, *supra* note 4, at 280 (noting that after *Aceto* and *Amcast*, "federal courts located in jurisdictions that previously had not ruled on the issue of CERCLA arranger liability discovered two disparate approaches when consulting appellate case law. This eventually led to the genesis of a third, middle-ground approach involving a 'totality of the circumstances' assessment of each individual case").

107. 84 F.3d 402 (11th Cir. 1996).

108. *See id.* at 407 (citations omitted) (taking totality of circumstances approach). The Eleventh Circuit emphasized "that whether or not a party has 'arranged for' the disposal of a hazardous substance depends on the particular facts of each case." *See id.* at 409.

of their contractual relationship.[109] The court ruled the landowners were not arrangers because they neither took any affirmative action beyond the contracted-for service, nor was there an implicit agreement for disposal.[110]

The court noted the different factors courts generally consider when assigning arranger liability.[111] These considerations include whether there exists: the sale of a useful product; an intended disposal of a hazardous substance; or a "crucial decision" where to locate the hazardous materials.[112] Even under a totality of circumstances approach, however, the court ruled that to be subject to arranger liability the PRP must have had an affirmative role in the disposal of the hazardous waste, which the landowners in *Montalvo* did not.[113]

The Sixth Circuit also uses a totality of circumstances test, with a specific emphasis on a PRP's intent to dispose of a hazardous substance. In *United States v. Cello-Foil Products, Inc.* (*Cello-Foil*),[114] the court held that the proper inquiry when assessing arranger liability is "whether the [PRP] intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances," and the court can infer the PRP's intent based on the totality of circumstances.[115] In *Cello-Foil*, the government sought cleanup costs from companies that purchased solvents from the Thomas Solvent Company.[116] Thomas Solvent sold its product in large drums so that purchasers, such as Cello-Foil, could return empty or nearly empty drums to Thomas Solvent for a return deposit.[117] Thomas Solvent sometimes dumped the remaining solvents or the solution used to wash returned drums on the ground, resulting in ground-water contamination.[118]

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109. *See id.* at 404, 406-07 (providing facts of case).

110. *See id.* at 407-08 (distinguishing *Aceto*). The Eleventh Circuit distinguished *Montalvo* from *Aceto* based on the nature of the contracted for services. *See id.* at 408-09. The "[l]andowners contracted to have pesticides applied to their property. They did not agree to have pesticides and contaminated rinse water spilled onto" the contaminated site. *See id.* at 407.

111. *See id.* at 406-07 (noting factors courts consider).

112. *See Montalvo*, 84 F.3d at 406-07 (listing factors courts consider).

113. *See id.* at 407 (citation omitted) (noting arranger must take affirmative action in disposal).

114. 100 F.3d 1227 (6th Cir. 1996) (deciding proper test for determining arranger liability).

115. *See id.* at 1231 (providing framework for inquiry).

116. *See id.* at 1230 (providing facts of case).

117. *See id.* (discussing process of returning empty or nearly empty drums).

118. *See id.* (noting Thomas Solvent's method for emptying drums).

In determining whether defendant purchasers "otherwise arranged for disposal," the Sixth Circuit considered whether the purchasers took any affirmative actions to dispose of the solvents, which the court reasoned was in line with the Seventh Circuit's *Amcast* decision.[119] Ultimately, the court remanded the case because genuine issues of material fact remained regarding whether the defendant purchasers returned the drums to Thomas Solvent with the additional purpose of disposal.[120]

2) Level of Control or Involvement

Another general approach courts have taken is based on a PRP's level of control over, or involvement in, the disposal of the hazardous substance.[121] Again, courts have formulated different lines of inquiry within the broad category of control.[122] Specifically, the Second Circuit looks for a PRP's obligation to control the hazardous waste disposal, and the Ninth Circuit must find a PRP's ownership over or obligation to control the hazardous substance.[123] Finally, the Alaska Supreme Court and an appeals court in Texas have articulated an "actual involvement" standard.[124] It should be noted, however, that the Texas case has been overturned by the state's supreme court.[125]

i. Obligation to Control: Second and Ninth Circuits

Before assigning arranger liability, the Second Circuit requires that a PRP have an obligation to control the disposal of the hazardous substance at issue.[126] In *General Electric Co. v. AAMCO Transmissions, Inc. (AAMCO)*,[127] General Electric Company (G.E.) sought contribution for waste oil cleanup from thirty service stations, as well as the oil companies who owned the service stations.[128] G.E. argued the oil companies had the opportunity to direct the service

119. *See Cello-Foil*, 100 F.3d at 1232 (providing reasoning behind inquiry).

120. *See id.* at 1233-34 (discussing genuine issues of material fact).

121. *See infra* notes 126-66 and accompanying text.

122. *See infra* notes 126-66 and accompanying text.

123. *See infra* notes 126-52 and accompanying text.

124. *See infra* notes 153-66 and accompanying text.

125. *See infra* note 160 and accompanying text.

126. *See Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (noting PRP must have obligation to control disposal of hazardous substance as opposed to "mere ability or opportunity").

127. 962 F.2d 281 (2d Cir. 1992) (noting need for nexus in finding liability).

128. *See id.* at 282-83 (providing facts of case). G.E. sought contribution after it settled a previous case, agreeing to pay over $1.6 million in cleanup costs around an upstate New York hazardous waste dump site. *See id.* at 282.

stations on how to dispose of the oil waste, thus "otherwise arranging" for disposal.[129]

The district court and the Second Circuit disagreed with G.E., finding the oil companies had neither ownership over the hazardous substances nor control of the process by which the oil waste was generated.[130] The Second Circuit held that arranger liability under CERCLA depends not on the ability or opportunity to control the disposal of the hazardous substance; rather, the PRP must have an "*obligation* to exercise control over [the] hazardous waste disposal."[131] The oil companies' mere ownership of the individual service stations did not create such an obligation.[132]

The Second Circuit further noted that when courts have assigned arranger liability to parties that were not actually involved in the disposal, those courts have still found the obligatory nexus between the PRP and the disposal.[133] The court in *AAMCO* concluded such a sufficient nexus between the service stations' disposal and the oil companies was lacking.[134]

Following *AAMCO*, a federal district court in California in *United States v. Iron Mountain Mines, Inc.* (*Iron Mountain*)[135] noted that no court had ever imposed arranger liability on an entity that "never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue."[136] In *Iron Mountain*, the United States and California sought cleanup costs from a northern California mine (Mine), and the Mine's owners asserted counterclaims and third party claims against the United States and California for contribution.[137] The Mine alleged that the United States's damming of two waterways caused a build-up of the hazardous substance that otherwise would have been diluted and also alleged California was involved in managing the dam projects.[138]

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129. *See id.* at 286 (dismissing G.E.'s interpretation of arranger liability as too broad).

130. *See id.* at 287-88 (providing holding).

131. *See AAMCO*, 962 F.2d at 286 (emphasis in original) (noting nexus requirement).

132. *See id.* at 287 (discussing relationship between oil companies and service stations).

133. *See id.* at 286 (citations omitted) (discussing consistent nexus requirement).

134. *See id.* at 287-88 (providing holding of case).

135. 881 F. Supp. 1432 (E.D. Cal. 1995).

136. *See id.* at 1451 (citing *AAMCO*, 962 F.2d at 286) (noting plaintiff did not allege the United States or California "owned or possessed" hazardous waste).

137. *See id.* at 1431 (discussing facts of case).

138. *See id.* at 1435, 1436 (discussing facts of case).

According to the court, the Mine did not allege facts sufficient to find the United States or California subject to arranger liability.[139] The court distinguished cases where a party did not have literal control or possession of the hazardous waste at the time of the disposal but was still subject to arranger liability.[140] In those cases, parties subject to arranger liability were either the "source of the pollution or managed its disposal by the arranger."[141] The court found the Mine's allegations insufficient to subject the United States to arranger liability because the Mine did not aver the federal government operated the Mine.[142] Finally, neither the United States nor California owned or possessed the mine waste, so the court dismissed the arranger claims for failure to state a claim upon which relief could be granted.[143]

Seven years later, in *United States v. Shell Oil Co.* (*Shell Oil*),[144] the Ninth Circuit followed the reasoning of *Iron Mountain.*[145] In *Shell Oil,* the Ninth Circuit had to decide whether the United States was subject to arranger liability after it encouraged the production and purchased increased amounts of aviation gas during World War II. This gas created excessive hazardous waste, which was consequently dumped.[146] The United States brought suit against four oil companies to recover costs incurred while cleaning up a Los Angeles dump site.[147] Pursuant to a cross motion for summary judgment, the district court followed the *Aceto* ownership test and held the United States liable as an arranger.[148] The Ninth Circuit reversed, holding the United States was not an arranger under CERCLA section 9607(a)(3).[149]

The Ninth Circuit distinguished *Shell Oil* from *Aceto,* concluding the United States in *Shell Oil* acted more like a purchaser than a

139. *See id.* At 1451-52 (dismissing arranger claims).

140. *See Iron Mountain,* 881 F. Supp. at 1451 (noting instances when courts found arranger liability).

141. *See id.* (citing *Cadillac Fairview/California, Inc. v. United States,* 41 F.3d 562 (9th Cir. 1994); *Catellus Dev. Corp. v. United States,* 34 F.3d 748 (9th Cir. 1994); *Jones-Hamilton v. Beazer Materials & Servs.,* 973 F.2d 688 (9th Cir. 1992); *United States v. Aceto Agric. Chem. Corp.,* 872 F.2d 1373 (8th Cir. 1989); *United States v. Ne. Pharm. & Chem. Co.,* 810 F.2d 726 (8th Cir. 1986)) (distinguishing facts of *Iron Mountain* from facts of these cases).

142. *See id.* at 1451 (noting insufficiency of complaint).

143. *See id.* at 1451-52 (dismissing arranger claims).

144. 294 F.3d 1045 (9th Cir. 2002).

145. *See id.* at 1058 (following *Iron Mountain*).

146. *See id.* at 1049-52 (discussing background facts).

147. *See id.* at 1048 (providing background facts).

148. *See id.* at 1055-56 (explaining district court's analysis).

149. *See Shell Oil,* 294 F.3d at 1062 (providing holding of case).

manufacturer, having never owned the raw materials that were later dumped.[150] In *Shell Oil*, the Ninth Circuit emphasized control as a "crucial element" in determining arranger liability.[151] According to the Ninth Circuit, the United States did not exercise sufficient control over the waste to warrant arranger liability.[152]

ii. "Actual Involvement" Approach: Alaska and Texas State Courts

At least two state courts have articulated and adopted an "actual involvement" approach to arranger liability; however, one of those decisions has been overruled.[153] In *R.R. Street & Co. Inc. v. Pilgrim Enterprises, Inc.* (*Street I*),[154] the Court of Appeals of Texas, First District, ruled that under the Texas Solid Waste Disposal Act (TSWDA),[155] a supplier was subject to arranger liability when he rendered technical advice to his client.[156] There, a dry-cleaning company (Pilgrim) relied on the advice of its equipment supplier (Street) when disposing of PCE.[157] The court reasoned that Street's instruction to Pilgrim to "dispose of the separator water in [a hazardous] manner, [showed Street] had some actual involvement in the decision to dispose of the waste, and gave such advice for the purpose of disposing of the waste."[158] The Alaska Supreme Court adopted this approach in *Berg I*.[159]

The Supreme Court of Texas, however, overturned *Street I* on appeal.[160] In *R.R. Street & Co. v. Pilgrim Enterprises, Inc.* (*Street II*),[161] the Supreme Court of Texas held that an equipment and chemical supplier who gave advice to its client concerning waste disposal was not an arranger under the TSWDA.[162] The court cited *Edward*

150. *See id.* at 1056 (distinguishing facts of *Aceto* from *Shell Oil*).

151. *See id.* at 1055 (emphasizing control as an important factor).

152. *See id.* at 1057. The United States was responsible, however, for 100% of the clean up costs for the benzol waste. *See id.* at 1061-62.

153. *See Berg I*, 113 P.3d 604, 610 (Alaska 2005) (adopting *Street I* approach); *R.R. Street & Co., Inc. v. Pilgrim Enters., Inc.*, 81 S.W.3d 276 (Tex. App. 2001) (*Street I*), *rev'd*, 166 S.W.3d 232, 255 (Tex. 2005) (*Street II*).

154. 81 S.W.3d 276 (Tex. App. 2001).

155. TEX. HEALTH & SAFETY CODE ANN. § 361.001 et seq. (Vernon 2001). The TSWDA is the Texas counterpart to RCRA and CERCLA. *See Street II*, 166 S.W.3d at 238 (providing background).

156. *See Street I*, 81 S.W.3d at 294-95 (stating holding of case).

157. *See id.* at 284-85 (discussing facts of case).

158. *See id.* at 295 (offering reasoning behind holding).

159. *See Berg I*, 113 P.3d 604, 611 (Alaska 2005) (adopting *Street I* approach).

160. *See Street II*, 166 S.W.3d at 255 (providing conclusion of case).

161. 166 S.W.3d 232 (Tex. 2005).

162. *See id.* at 235 (stating holding of case).

Hines as a case with similar facts.[163] The court emphasized it was significant that Street did not have actual control over the manner in which Pilgrim disposed of the PCE.[164] While "presence of authority to make disposal decisions is not necessarily a prerequisite for arranger status," it is vital when arranger liability turns on "mere advice regarding disposal that another party is free to ignore."[165] Thus, the court ruled that Street was no longer subject to potential arranger liability, but remanded the case on other grounds.[166]

b. Useful Product Exception

Federal courts hesitate to assign arranger liability to persons who sell a useful, but nonetheless hazardous product, to an end user pursuant to the useful product exception.[167] Following this doctrine in *Florida Power & Light Co. v. Allis Chalmers Co.* (*Florida Power*),[168] the Eleventh Circuit held the mere sale of a hazardous substance by a manufacturer, without further evidence of arranging disposal, does not give rise to arranger liability under CERCLA section 9607.[169]

In *Florida Power*, manufacturers of electrical transformers containing a hazardous substance were not subject to arranger liability when they sold the transformers to Florida Power & Light Company, which in turn sold them to a scrap yard.[170] The Eleventh Circuit did not impose arranger liability on the manufacturers because Florida Power and the scrap yard did not present evidence that the manufacturers intended to dispose of the hazardous waste as part of the sale.[171] Thus, while a manufacturer *can* be subject to

163. *See id.* at 245 (noting factual similarities between *Edward Hines* and *Street* cases).

164. *See id.* at 246 (providing rationale behind holding).

165. *See id.* (explaining importance of authority in determining arranger liability).

166. *See Street II*, 166 S.W.3d at 255 (reiterating court's final determination).

167. *See Berg I*, 113 P.3d 604, 611 (Alaska 2005) (explaining useful product exception as applied to arranger liability).

168. 893 F.2d 1313 (11th Cir. 1990).

169. *See id.* at 1317-18 (discussing responsibility for cleanup of hazardous waste). The court noted that to impose liability on a manufacturer who "does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed . . . the evidence must indicate that the manufacturer is the party responsible for 'otherwise arranging' for the disposal of the hazardous substance." *See id.* at 1318.

170. *See id.* at 1315 (providing facts of case).

171. *See id.* at 1319 (noting insufficient evidence as basis for decision).

arranger liability, to be so it must do more than merely sell a product containing a hazardous substance to an end user.[172]

A California district court followed the *Florida Power* reasoning in *City of Merced v. Fields* (*City of Merced*).[173] There, the City of Merced discovered PCE in the groundwater, which was later traced back to dry-cleaning facilities.[174] The defendant sought contribution from the PCE manufacturers, but the court did not find enough evidence to rule either way on the manufacturers' involvement in the PCE disposal.[175] Instead, the court inferred that the mere sale of PCE, without more, would not subject the manufacturers to arranger liability under CERCLA.[176]

Courts often consider intent when determining whether to grant the useful product exception to arranger liability.[177] For example, in *New York v. Solvent Chemical Company, Co.* (*Solvent Chemical*),[178] a federal district court in New York held useful products are not waste and therefore are not subject to arranger liability under CERCLA.[179] The court noted a party's intent to "get rid of" a product was a major factor in determining whether to classify the product as useful.[180]

In *Solvent Chemical*, the State of New York sought from the defendant (Solvent) recovery of cleanup costs from Solvent's chemical manufacturing plant.[181] Solvent then sought third party contribution under CERCLA section 9607(a) from those who sold Solvent the zinc wastes at issue.[182] The court determined that the manufacturers' sale of zinc was useful to Solvent based on Solvent's repeated purchase of the material, as well as zinc's marketability, consumer demand and functionality as a raw material in Solvent's

172. *See id.* at 1318 (noting CERCLA's "broad remedial nature").

173. 997 F. Supp. 1326 (E.D. Cal. 1998) (following *Fla. Power*).

174. *See id.* at 1329 (providing facts of case).

175. *See id.* at 1332 (noting insufficient discovery rendered issue irresolvable on motion to dismiss).

176. *See id.* The Ninth Circuit and others have "held that a manufacturer who does nothing more than sell a useful, albeit hazardous product to an end user has neither generated, transported, nor arranged for the disposal of hazardous waste for the purposes of 42 U.S.C. [section] 9607(a)." *See id.*

177. *See Berg I*, 113 P.3d 604, 611 (Alaska 2005) (discussing "standards" of useful product exception). The court noted "[t]he key inquiry is often whether the alleged arranger's intent was to dispose of waste or sell a product." *See id.* (citing *New York v. Solvent Chem. Co.*, 225 F. Supp. 2d 270, 281-82 (W.D.N.Y. 2002); *Fla. Power & Light Co. v. Allis Chalmers Co.*, 893 F.2d 1313, 1319 (11th Cir. 1990)).

178. 225 F. Supp. 2d 270 (W.D.N.Y. 2002).

179. *See id.* at 281 (citation omitted) (noting useful product is not waste).

180. *See id.* at 282 (explaining aspect of useful product defense).

181. *See id.* at 272-73 (providing facts of case).

182. *See id.* at 273 (describing procedural posture of case).

production process.[183] The court concluded zinc was a useful product, deflecting any arranger liability away from the manufacturers.[184]

In sum, courts have taken two broad approaches to arranger liability based on a PRP's intentions for, or control over or involvement in disposal.[185] Within these broad approaches, courts have engaged in five more specific lines of inquiry, including: strict liability; specific intent; totality of circumstances; obligation to control; and actual involvement.[186] Finally, the useful product exception shields manufacturers who sell a useful, but harmful, substance to an end user.[187]

B. Alaska Statute

While the Alaska Statute is similar to CERCLA, arranger liability is broader under the former.[188] The Alaska State Legislature generally based its arranger liability statute on CERCLA.[189] The Alaska Statute, however, contains additional text, resulting in nearly, but not totally, identical arranger liability provisions.[190]

The Alaska Statute does not define the term "arrange for;" however, it is evident that in the wake of the 1989 Exxon Valdez oil spill, the Alaska Legislature sought to expand state arranger liability beyond CERCLA's standards.[191] This expanded liability has the potential to attach to persons "merely responsible for managing or handling a hazardous substance . . . even after the substance has left

183. *See Solvent Chem.*, 225 F. Supp. 2d at 282-83 (noting factors court considered in determining applicability of useful product exception).

184. *See id.* at 291 (providing holding of case).

185. *See supra* notes 72-166 and accompanying text.

186. *See supra* notes 167-84 and accompanying text.

187. *See supra* notes 167-84 and accompanying text.

188. *See infra* notes 189-93, 223-35 and accompanying text.

189. *See Berg I*, 113 P.3d 604, 607 (Alaska 2005) (discussing background of Alaska Statute). While it was the Alaska Legislature's intent for CERCLA to act as a framework for interpreting the Alaska Statute, federal law does not control a state's interpretation of its own laws. *See id.* at 608 (citing Bill Review Letter from Douglas B. Baily, Attorney General, to Governor Steve Cowper on H.B. 68 (May 11, 1989), in Alaska State Archives, Series 1185, Record Group 91, Box No. 7892, File No. 883-89-0039) [hereinafter *Bill Review Letter*] (finding support for fact that federal law does not control decision interpreting state statute).

190. *See Berg I*, 113 P.3d at 607-08 (noting Alaska Statute includes "or" before "by any other party or entity"). For a discussion of the Alaska Statute's language, see *supra* note 6.

191. *See Berg I*, 113 P.3d at 609 (citing *Bill Review Letter*, *supra* note 189).

their control."[192] Thus, arranger liability under the Alaska Statute has a broader reach than it does under CERCLA.[193]

C. Certified Questions

Under Alaska Rules of Appellate Procedure, the Supreme Court of Alaska is permitted to answer certified questions from the United States Supreme Court, as well as federal district, appellate or bankruptcy courts.[194] The Alaska Supreme Court must "stand in the shoes of the certifying court" but employ its own judgment in determining the law.[195] Thus, the Alaska Supreme Court must rely on "precedent, reason, and policy" in answering certified questions.[196]

IV. NARRATIVE ANALYSIS

The Ninth Circuit's task in *Berg II* was to determine whether defendant Maytag was subject to arranger liability under Alaska law.[197] The court held that it was, which broadened Alaska's standard of arranger liability beyond CERCLA.[198] To make this determination, the Ninth Circuit relied on answers to two certified

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192. *See id.* (citing *Testimony on H.B. 68: Hearing on H.B. 68 Before the S. Comm. on the Judiciary*, 16th Leg., (May 2, 1989)) (statement of Dennis Kelso, Commissioner of Department of Environmental Conservation) [hereinafter *Testimony*].

193. *See Berg I*, 113 P.3d at 608 (noting broader standard of arranger liability in Alaska).

194. *See* ALASKA R. APP. P. 407(a) (stating rule of certification to state supreme court). The rule dictates:

> The supreme court may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, a United States district court, a United States bankruptcy court or United States bankruptcy appellate panel, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

See id.

195. *See Berg I*, 113 P.3d at 607 (quoting *FDIC v. Laidlaw Transit, Inc.*, 21 P.3d 344, 346 (Alaska 2001)) (noting Alaska procedure for answering certified questions).

196. *See id.* (citing *Kallstrom v. United States*, 43 P.3d 162, 165 (Alaska 2002)) (giving court's approach to answering certified questions).

197. *See Berg II*, 412 F.3d 1122, 1124 (9th Cir. 2005) (noting novelty of issue whether entity is subject to liability under Alaska Statute when it manufactures or sells useful product that, when installed by manufacturer and properly used, releases hazardous substances).

198. *See id.* at 1130 (stating holding of case); *id.* at 1127 (quoting *Berg I*, 113 P.3d at 609) (noting broadening of Alaska Statute after Exxon Valdez oil spill).

questions from the Alaska Supreme Court, and quoted heavily from the Alaska Supreme Court's certification decision.[199]

The Ninth Circuit initiated its opinion by outlining the procedural posture of the case.[200] The court then noted Alaska Statute sections 46.03.822(a) and (j) impose strict liability on responsible parties and enable those responsible to seek contribution from third parties who may also be responsible for cleanup costs.[201] The court compared the language of Alaska Statute section 46.03.822(a)(4) to the language of CERCLA section 9607(a)(3), as both address arranger liability.[202] The distinction between the two provisions is that the Alaska Statute includes the word "or" before the phrase "by any other party or entity."[203] This broadens the state legislation beyond its federal counterpart by creating an additional class of arrangers.[204]

In their second amended complaint, the Bergs alleged that Norge installed the dry-cleaning equipment and water separation system that, even while used as directed, spilled PCE into the nearby sewer system.[205] The Bergs further maintained that these facts sufficiently stated a claim for arranger liability under the Alaska Statute.[206]

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199. *See id.* at 1123-29 (relying on Alaska Supreme Court's interpretation and reasoning). For a discussion of the procedural posture, see *infra* note 200.

200. *See id.* at 1123 (providing procedural background). The Bergs first filed suit in Alaska state court under both CERCLA and Alaska state law, and Maytag removed to federal district court pursuant to Title 28 United States Code section 1331 (federal question jurisdiction) and section 1332(a) (diversity jurisdiction). *See Berg I*, 113 P.3d at 607; *Berg II*, 412 F.3d at 1124 n.1. The district court could not determine whether the parties were diverse, but concluded it had jurisdiction due to the Bergs' federal question. *See Berg II*, 412 F.3d at 1124 n.1. In district court, Maytag moved to dismiss the Bergs' second amended complaint for failure to state a claim upon which relief could be granted, under Federal Rule of Civil Procedure 12(b)(6), and the district court did so, dismissing both the federal CERCLA and Alaska state claims. *See id.*; *Berg I*, 113 P.3d at 607. The Bergs then appealed to the Ninth Circuit, challenging the district court's dismissal of the Alaska state claim. *See Berg I*, 113 P.3d at 607. Because there was no ruling precedent on Alaska's definition of "arranger liability," the Ninth Circuit sent two certified questions to the Alaska Supreme Court for clarification of state law. *See Berg II*, 412 F.3d at 1126.

201. *See* ALASKA STAT. § 46.03.822(a)(4) (2004) (stating law regarding strict liability standard for release of hazardous substances); *id.* § 46.03.822(j) (containing contribution provision).

202. *See Berg II*, 412 F.3d at 1126 (contrasting parallel Alaska and CERCLA provisions). For the text of these statutes, see *supra* note 6.

203. *See Berg II*, 412 F.3d at 1126 (noting CERCLA omits "or" in its construction); *id.* at 1127 (quoting *Berg I*, 113 P.3d at 609) (noting broadening of Alaska Statute after Exxon Valdez oil spill). See *supra* note 6.

204. *See id.* at 1126-27 (noting expanded liability).

205. *See id.* at 1126 (referring to Bergs' second amended complaint).

206. *See id.* (discussing Bergs' argument).

The Ninth Circuit noted it had never imposed arranger liability on an entity that did not own or possess or have "'authority to control or duty to dispose of'" the relevant hazardous material.[207] Maytag asserted that because the Bergs did not allege Maytag owned or possessed the hazardous substance, it could not be held liable as an arranger.[208] The Ninth Circuit acknowledged that there was no controlling precedent defining "arranger" under Alaska state law, and thus certified two questions to the Alaska Supreme Court for review.[209]

A. Alaska Supreme Court's Analysis

In *Berg I*, the Alaska Supreme Court accepted the Ninth Circuit's two certified questions and answered them in turn.[210] In answering the first certified question, the Alaska Supreme Court adopted an actual involvement approach to arranger liability, which broadened Alaska's arranger liability standard.[211] The court then declined to apply the useful product exception to the facts in *Berg I*.[212]

1. No Requirement of Possession

The first certified question posed by the Ninth Circuit was whether, under Alaska law, an entity must "own, possess, 'have authority to control,' or 'have a duty to dispose of'" the released hazardous substance before being subject to arranger liability, as it would be under CERCLA.[213] The Alaska Supreme Court relied on the statutory construction of both CERCLA and the Alaska Statute, Alaska's legislative intent, and persuasive out-of-state case law in answering the first certified question negatively.[214]

The Bergs argued the inclusion of the word "or" in the state provision broadened the scope of Alaska's arranger liability by ad-

207. *See id.* (quoting *United States v. Shell Oil Co.*, 294 F.3d 1045, 1058 (9th Cir. 2002)) (referencing prior holdings).

208. *See Berg II*, 412 F.3d at 1126 (noting Maytag's contention that it was not liable as arranger).

209. *See id.* (describing why Ninth Circuit certified two questions to Alaska Supreme Court).

210. *See Berg I*, 113 P.3d 604, 605 (Alaska 2005) (introducing certified questions sent from Ninth Circuit).

211. *See id.* at 610 (applying broadened standard).

212. *See id.* at 612 (recognizing but declining to apply useful product exception).

213. *See Berg II*, 412 F.3d at 1126 (presenting certified questions).

214. *See id.* at 1127-28 (citing *Berg I*, 113 P.3d at 608-12) (noting Alaska Supreme Court's analytical steps).

ding another class of arrangers.[215] By contrast, Maytag argued the inclusion of the word "or" was a result of "sloppy drafting."[216] The court understood Maytag's argument as an implication that the court should interpret the state law as consistent with CERCLA.[217] Because CERCLA was the intended framework for interpreting the Alaska Statute, the Alaska Supreme Court looked to federal caselaw for initial guidance.[218]

The Alaska Supreme Court noted that federal courts have outlined general rules for interpreting arranger liability.[219] These rules encourage courts to interpret CERCLA broadly and to consider the specific facts of each individual case.[220] The Alaska Supreme Court, however, noted that relevant federal cases lacked fact patterns analogous to *Berg I*.[221] Finding no strong support from federal caselaw, the Alaska Supreme Court turned to the text and legislative history of the Alaska Statute and CERCLA.[222]

Citing Alaska's legislative history, the Alaska Supreme Court noted that CERCLA is a general framework for interpreting the Alaska Statute.[223] The Alaska Supreme Court also noted differences between the two pieces of legislation.[224] Most notably, CERCLA contains four classes of PRPs whereas the Alaska Statute contains five.[225] More specifically, while both CERCLA and the Alaska Statute indicate arrangers of hazardous waste disposal can be liable, the state legislation *also* considers those who own or have

215. *See Berg I*, 113 P.3d at 608 (noting Bergs' contended interpretation).

216. *See id.* (describing Maytag's contentions).

217. *See id.* (explaining each side's argument).

218. *See id.* (citing *Bill Review Letter*, *supra* note 189) (noting next step in analysis).

219. *See id.* at 608 (citations omitted) (explaining liberal interpretation of arranger liability in federal courts).

220. *See Berg I*, 113 P.3d at 608 (noting general rules of interpretation).

221. *See id.* at 608-09 & nn.20-21 (citing *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002); *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227 (6th Cir. 1996); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993); *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992); *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432 (E.D. Cal. 1995); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651 (N.D. Ill. 1988)) (noting dissimilarity between facts of *Berg I* and federal cases). For a discussion of these cases and others, see *supra* notes 82-152 and accompanying text.

222. *See id.* at 609 (paying special attention to Alaska Statute and its legislative history).

223. *See Berg II*, 412 F.3d 1122, 1127 (9th Cir. 2005) (referring to *Bill Review Letter*, *supra* note 189, noting initial framework for analysis).

224. *See Berg I*, 113 P.3d at 607 (noting differences between Alaska Statute and CERCLA).

225. *See Berg II*, 412 F.3d at 1127 (citing *Berg I*, 113 P.3d at 608) (noting differences between Alaska Statute and CERCLA).

control over a substance at the time it is released PRPs.[226] In other words, the Alaska Statute differentiates between those who *arrange for the disposal* of a hazardous substance and those who *own or control* a hazardous substance when it is released.

Principles of Alaska statutory construction prevented the court from rendering this fifth class of PRPs superfluous.[227] The Alaska Supreme Court noted prior precedent prohibited it from "'interpreting a statute in a manner that render[ed] other provisions meaningless,'" thus giving weight to all sub-clauses in the Alaska Statute.[228] The court emphasized the importance of the fifth class of PRPs to show how the Alaska Legislature intended its law to reach beyond CERCLA.[229]

The Alaska Supreme Court found support for its reading of the statute in the provision's legislative history.[230] The Alaska Statute was based on CERCLA generally, but following the Exxon Valdez oil spill, the State Legislature revised section 822, broadening it beyond its federal counterpart.[231] Realizing the fragility of the state's environment, Alaska legislators sought greater contribution from parties responsible for hazardous spills.[232]

Based on its reading of the state statute and the relevant legislative intent, the Alaska Supreme Court endorsed a standard of arranger liability that was broader than the Ninth Circuit's.[233] The court held, in agreement with most courts that have considered and assigned arranger liability, that the party arranging for disposal must have some "'actual involvement in the decision to dispose of waste.'"[234] The court further held that actual involvement in disposal may include deciding how to dispose of waste, which can consist

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226. *See Berg I*, 113 P.3d at 609 (noting broader scope of Alaska Statute); *see also* 42 U.S.C. § 9607(a) (2000) (explaining liability features); ALASKA STAT. § 46.03. 822(a)(1) (2004) (describing strict liability). See *supra* notes 62-65 and accompanying text.

227. *See Berg I*, 113 P.3d at 609 (noting Alaska statutory construction principles).

228. *See id.* (citation omitted) (noting inability to disregard sub-clauses as redundant).

229. *See id.* (discussing fifth class of PRPs).

230. *See Berg I*, 113 P.3d at 609 (citing *Testimony, supra* note 192) (noting desire to collect from responsible parties).

231. *See id.* (describing reasons for expansion).

232. *See Testimony, supra* note 192.

233. *See Berg I*, 113 P.3d at 609 (noting broadened liability).

234. *See id.* at 610 (quoting *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992)) (noting requirement of actual involvement in disposal).

of "actions such as designing, installing, or connecting a system that disposes of waste on behalf of a third party."[235]

The Alaska Supreme Court found support for this interpretation in *Street I*, the Texas state case with a similar fact pattern.[236] The Alaska Supreme Court analogized the facts of *Street I* to *Berg I* and applied the Texas appellate court's actual involvement standard because that standard was consistent with Alaska's legislative intent in broadening the state's arranger liability provision.[237] The court then addressed the second certified question.[238]

2. Useful Product Exception

Berg I was the first case where the Alaska Supreme Court considered the useful product exception, noting that federal courts apply the doctrine mostly "to shield suppliers of tangible physical goods put to further productive use by their recipients."[239] The court's consideration of the useful product exception was prompted by the second certified question, which asked whether one who lacks "ownership, possession, authority, or a duty to dispose can be liable for making, selling, or installing a useful product that purposely directs hazardous substances into the environment."[240] To answer the second certified question, the Alaska Supreme Court discussed cases construing the useful product exception, which exempts the seller of a useful, but hazardous, product to an end user from arranger liability under CERCLA.[241] For the useful product exception to apply, a seller's intent is key; the court must determine whether the transaction is a sale or a disposal tactic.[242]

The Alaska Supreme Court noted both new and used hazardous substances can be exempted as useful products, provided they

235. *See id.* (clarifying holding).

236. *See id.* (noting similar fact pattern); *see also Street I*, 81 S.W.3d 276, 293 (Tex. App. 2001) (adopting actual involvement approach). See *supra* notes 153-66 and accompanying text.

237. *See Berg I*, 113 P.3d at 612 (providing reasoning behind standard). For a discussion of the facts of *Street I*, see *supra* notes 153-58 and accompanying text.

238. *See Berg I*, 113 P.3d at 610.

239. *See id.* at 611-12 & n.45 (citations omitted) (offering reasoning behind useful product exception).

240. *See id.* at 610 (addressing second certified question).

241. *See Berg II*, 412 F.3d 1122, 1128 (9th Cir. 2005) (quoting and citing *Berg I*, 113 P.3d at 611) (noting consistency with which federal courts have held that manufacturers who only sell useful product to end users have not arranged for hazardous substance disposal).

242. *See Berg I*, 113 P.3d at 611 & n.41 (citations omitted) (noting factors courts consider when granting useful product exception).

are incorporated into other "downstream products" or "sold for reuse."[243] Referring to *City of Merced*, the court noted even the "distribution" of a chemical that later harms the environment is different from arranging for that substance's disposal.[244]

Stating it had never before considered the useful product exception, the Alaska Supreme Court again looked to legislative intent.[245] Based on its reading of legislative testimony and a floor memorandum, the court determined that Alaska intended to include a useful product exception into its legislation to keep insurance costs reasonable and not to deter commerce, especially from hard to reach rural areas.[246]

In its defense, Maytag cited several federal cases applying the useful product exception.[247] The court reasoned, however, that these federal cases were inapposite to *Berg I* because the machine Norge installed was used for disposal purposes and did not put a useful, but hazardous, substance to further productive use.[248] In other words, courts have not extended the useful product exception to entities whose "products or services were known to facilitate another party's disposal" of hazardous substances, as Norge did in *Berg I*.[249] The court declined to apply the useful product exception in *Berg I* because the PCE-separator machine's primary function was to facilitate the release of hazardous substances into the environment.[250]

Furthermore, the Alaska Supreme Court noted the state's useful product exception is narrower than CERCLA's.[251] Legislative history shows that the Alaska Legislature sought to treat all "harmful substances" the same, while CERCLA implicitly distinguished be-

243. *See id.* at 611 (describing useful products).

244. *See id.* & n.37 (citing *City of Merced v. Fields*, 997 F. Supp. 1326, 1332 (E.D. Cal. 1998)) (noting mere sale of PCE was not enough to trigger arranger liability).

245. *See id.* at 611 (noting novelty of consideration).

246. *See id.* (citing *Testimony, supra* note 192). The Alaska Supreme Court also cited a Floor Memo discussing the then-pending arranger liability provisions. *See* Floor Memorandum from Alaska S. Judiciary Comm. on H.B. 68 (undated) (on file with author and Alaska State Archives, Box No. 17568) [hereinafter *Floor Memo*] (examining Alaska legislature's intent).

247. *See Berg I*, 113 P.3d at 611-12 & n.45 (citing *Fla. Power & Light, Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990); *City of Merced v. Fields*, 997 F. Supp. 1326 (E.D. Cal. 1998); *United States v. Consol. Rail Corp.*, 729 F. Supp. 1461 (D. Del. 1990)) (noting disposal as part of machines and services' "essential function[s]").

248. *See id.* at 611-12 (noting differences between federal cases and *Berg I*).

249. *See id.* at 611 (declining to extend useful product exception).

250. *See id.* at 612 (noting essential function of machines).

251. *See id.* (citing *Floor Memo*, supra note 246) (discussing reasoning behind useful product exception and Alaska's narrowed exception).

tween wastes and useful substances.[252] Based on the Alaska Statute's legislative history and unpersuasive federal case law, the court concluded that the Alaska Statute will not protect a manufacturer, seller or installer of a useful product that intentionally directs a hazardous substance into a public sewer.[253]

B. Ninth Circuit's Application of Alaska Supreme Court's Interpretation

In *Berg II*, the Ninth Circuit applied Alaska law pursuant to the Alaska Supreme Court's answers to the two certified questions.[254] The Ninth Circuit essentially recapitulated and affirmed the Alaska Supreme Court's analysis and holdings in *Berg I*, thus vacating the district court's holding that the Bergs' allegations insufficiently supported a claim for arranger liability under Alaska law.[255]

Before reaching its holding, the Ninth Circuit reviewed the Alaska Supreme Court's reasoning.[256] The Ninth Circuit first summarized the Alaska Supreme Court's reliance on legislative intent, noting the Alaska Legislature intended CERCLA to be used as an initial framework for interpretation.[257] The Ninth Circuit emphasized, however, that the Alaska Supreme Court interpreted the Alaska Statute to contain five classes of PRPs, as opposed to CERCLA's four.[258] The Ninth Circuit then quoted the Alaska Supreme Court's *Berg I* opinion, remarking the Alaska Legislature intended to expand arranger liability under the Alaska Statute after the Exxon Valdez oil spill.[259] The Ninth Circuit then summarized the Alaska Supreme Court's discussion of and reliance on *Street I*, remarking an entity's direct advice on disposal tactics sufficed as actual involvement in arranging for disposal.[260]

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252. *See Berg I*, 113 P.3d at 612 (noting differences between CERCLA and Alaska Statute). *See also Floor Memo, supra* note 246 (noting that "[w]hile CERCLA was a useful model in conceptualizing the distinction between hazardous wastes and useful hazardous substances, it went too far for [the Alaska Legislature's] purposes").

253. *See id.* (declining to extend useful product exception).

254. *See Berg II*, 412 F.3d 1122, 1124 (9th Cir. 2005) (introducing case and issues to be resolved).

255. *See id.* at 1130 (providing holding and issuing orders).

256. *See id.* at 1127 (noting lack of controlling precedent prompted court to certify two questions to Alaska Supreme Court).

257. *See id.* (reviewing Alaska Supreme Court's reasoning).

258. *See id.* (noting statutory construction).

259. *See Berg II*, 412 F.3d at 1127 (noting expanded liability).

260. *See id.* at 1128 (discussing applicability of *Street I*).

Next, the Ninth Circuit turned to the second certified question.[261] The Ninth Circuit first addressed the Alaska Supreme Court's discussion and rejection of the useful product exception in *Berg I*, noting the "'alleged arranger's intent'" is a key inquiry.[262] The Ninth Circuit noted the Alaska Legislature's intent to include a useful product exception to its CERCLA provision, but not when the product or service at issue was specifically used to "facilitate another party's disposal of hazardous materials."[263] The Ninth Circuit then applied to the facts the Alaska Supreme Court's answers to the certified questions.[264]

Applying the Alaska Supreme Court's interpretation of the Alaska Statute, the Ninth Circuit concluded that the Bergs alleged facts sufficient to support a claim of arranger liability against Maytag under the Alaska Statute.[265] In their second amended complaint, the Bergs alleged that Norge recommended they use PCE, that Norge designed and installed the dry-cleaning equipment and that Norge installed the water-PCE separator system which directed PCE into the public sewer.[266] The court accepted these allegations as true and in the light most favorable to the Bergs.[267] Finally, the Ninth Circuit found it was not beyond doubt that the Bergs could "prove no set of facts in support of their claim that would entitle them to relief."[268] Thus, the Ninth Circuit ruled that under the actual involvement approach adopted by the Alaska Supreme Court (as articulated in *Street I*), the Bergs alleged sufficient facts to state a claim against Maytag as a PRP under Alaska's arranger liability provision.[269]

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261. *See id.* at 1128-29 (noting each phase of Alaska Supreme Court's analysis).

262. *See id.* at 1128 (citations omitted) (discussing useful product exception).

263. *See id.* (noting rejection of exemption).

264. *See Berg II*, 412 F.3d at 1129 (applying law to facts of case).

265. *See id.* (giving holding of case).

266. *See id.* (summarizing Bergs' allegations).

267. *See id.* (noting court accepted allegations).

268. *See id.* (providing holding of case).

269. *See Berg II*, 412 F.3d at 1129 (providing holding of case). The Ninth Circuit did not disrupt the district court's findings on the issues of contribution, equitable apportionment, indemnity or sanctions against the Bergs' attorney. *See id.* at 1129-30.

V. CRITICAL ANALYSIS

A. Was the Alaska Supreme Court Correct in Its Holding?

The Alaska Supreme Court correctly interpreted the Alaska Statute as broader than CERCLA.[270] Based on the Alaska Statute's legislative history and the specific facts of *Berg I*, the Alaska Supreme Court reasonably adopted the actual involvement approach to arranger liability.[271]

1. Non-Requirement of Possession

In *Berg I*, the Alaska Supreme Court relied on state and federal case law, statutory interpretation and legislative intent in holding that one need not own, possess, have authority to control, or have a duty to dispose of a hazardous substance to be potentially liable under Alaska state law.[272] Due to the limited guidance of federal caselaw, the court first compared the text of the Alaska Statute to its federal counterpart, CERCLA, and then considered that text in light of the provision's legislative history.[273] This analysis resulted in a reading of the Alaska Statute that is broader than CERCLA.[274]

The Alaska Supreme Court correctly found that the federal cases Maytag cited in its defense were insufficiently analogous to the facts in *Berg I* and did not shield Maytag from potential liability.[275] The cases Maytag offered differ from *Berg I* and *Berg II* because in those federal cases, the alleged arranger was not actually involved in the disposal process.[276] For example, in *Iron Mountain*, the United States and California were not arrangers for constructing and managing the dams that caused the back up of pollutants because the United States did not operate the dam, and neither the United States nor California owned or possessed the mine waste.[277]

270. *See infra* notes 271-309 and accompanying text.

271. *See Berg I*, 113 P.3d 604, 610 (Alaska 2005) (applying actual involvement standard articulated in *Street I*).

272. *See id.* at 612 (summarizing answers to certified questions posed by Ninth Circuit).

273. *See id.* at 608 (noting "statutory schemes" of CERCLA and Alaska Statute). While "federal case law interpreting a federal statute does not control [the court's] decision in interpreting a state statute, the Alaska legislature intended that CERCLA be used as a framework for interpreting section .822" of the Alaska Statute. *See id.* at 609.

274. *See id.* at 609 (relying on legislative intent).

275. *See id.* at 608-09 & n.21 (discussing relevant prior cases).

276. *See Berg I*, 113 P.3d at 608-09 & n.21 (noting factual differences between federal cases and *Berg*).

277. *See United States v. Iron Mountain Mines*, 881 F. Supp. 1432, 1451-52 (E.D. Cal. 1995) (declining to attach arranger liability for insufficient showing of ownership or possession of waste).

In *AAMCO*, the oil companies were not arrangers because they did not have sufficient ownership over the waste oil or control over the waste oil process.[278] Finally, in *Edward Hines*, a chemical treatment equipment designer and installer was not an arranger when it did not decide how the hazardous run off was to be disposed.[279] Therefore, the Alaska Supreme Court correctly differentiated the federal cases Maytag offered in its defense and did not shield Maytag from liability.[280]

Current federal case law lacks a fact pattern analogous to *Berg I*, which compelled the Alaska Supreme Court to examine the textual constructions of the Alaska Statute and CERCLA, as well as the Alaska Statute's legislative background.[281] The Alaska Supreme Court correctly noted that the word "or" in the Alaska Statute should not be disregarded.[282] The Alaska Supreme Court's reading of the state's arranger liability provision is consistent with the state's legislative intent, which called for a reading of the Alaska Statute that is broader than CERCLA.[283] Alaska's natural resources are vast, and the state's unspoiled landscape is important to its citizens and legislature.[284] Hence, it was correct for the Alaska Supreme Court to interpret its arranger liability statute with these considerations in mind.[285]

While the Alaska Supreme Court adopted a broader standard of arranger liability than the Ninth Circuit, Alaska did follow a majority of courts by mandating that an arranger have some involvement in the disposal decision.[286] In Alaska, this involvement can consist of deciding how to dispose of waste, which may include designing, installing or connecting a disposal system on behalf of a third party.[287]

278. *See Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (noting arranger liability requires obligation to control waste).

279. *See Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 656 (N.D. Ill. 1988) (noting mere sale of waste was insufficient for arranger liability to attach).

280. *See Berg I*, 113 P.3d at 609-10 (noting differences between cases).

281. *See id.* at 609 (departing from case analysis).

282. *See id.* (noting each statutory section must be addressed).

283. *See id.* at 609 & n.25 (citing *Bill Review letter, supra* note 189) (noting Alaska intended its liability provisions to be more expansive than CERCLA after Exxon Valdez oil spill).

284. *See, e.g.*, Alaska Department of Natural Resources, http://www.dnr.state.ak.us/ (last visited Jan. 5, 2006) (noting department's mission is to "develop, conserve and enhance natural resources for present and future Alaskans").

285. *See Berg I*, 113 P.3d at 609 (noting legislative intent).

286. *See id.* at 609-10 (citation omitted) (noting importance of PRP's actual involvement in determining arranger liability).

287. *See id.* (explaining broadened rule).

Finding support in *Street I*, the Alaska Supreme Court reasoned that actual involvement was an appropriate standard for arranger liability, in light of the State Legislature's intent.[288] In *Street I*, Street advised Pilgrim to flush the PCE-treated water into the sewer, just as Norge "visited and inspected [Boni-Park] and provided service and technical advice."[289] In both cases, the purchaser relied on its supplier's disposal advice or services, resulting in a hazardous waste spill.[290] Therefore, the Alaska Supreme Court appropriately analogized the facts of *Berg I* to *Street I*.[291]

Although *Street I*, the most on-point case relied upon by the Alaska Supreme Court in *Berg I*, has been overturned, *Berg II* is still good law.[292] The Texas Supreme Court in *Street II* overturned the lower court's decision in part because it believed arranger liability stemming from a chemical manufacturer providing technical service and advice would discourage those sellers from providing any information at all to their clients.[293] The Alaska Supreme Court, however, noted that the Alaska Legislature intended a broader reading of arranger liability than CERCLA, while by contrast, the Texas Supreme Court interpreted the TSWDA (on which arranger liability is based in Texas) according to CERCLA and other federal cases.[294] Specifically, while the *Street II* court's interpretation of the TSWDA and CERCLA rendered Street not liable under arranger theory, Alaska's broader reading is consistent with Alaska state law.[295]

2. *Useful Product Exception*

Federal courts have found an entity can avoid arranger liability when it merely sells a useful product to an end user.[296] Parties

288. *See id.* at 610 (adopting actual involvement approach).

289. *See Street I*, 81 S.W.3d 276, 284-95 (Tex. App. 2001) (providing facts of case); *Berg I*, 113 P.3d at 606 (providing facts of case).

290. *See Street I*, 81 S.W.3d at 284, 295 (providing facts of case); *Berg I*, 113 P.3d at 606 (providing facts of case).

291. *See Berg I*, 113 P.3d at 610 (finding reasoning of *Street I* persuasive).

292. *See Street II*, 166 S.W.3d 232, 255 (Tex. 2005) (overturning *Street I*).

293. *See id.* at 246 (noting argument chemical companies made in amicus briefs).

294. *See id.* at 238-44 (noting how to interpret TSWDA). *See also* Eileen L. McPhee, Comment, *A Dirty Business: Arranger Liability Under the Texas Solid Waste Disposal Act As It Relates to Dry Cleaning Chemicals*, 7 TEX. TECH ADMIN. L.J. 391, 398, 404 (2006) (explaining Texas courts often look to federal courts' interpretation of RCRA and CERCLA when interpreting TSWDA).

295. *See Berg II*, 412 F.3d 1122, 1129 (9th Cir. 2005) (applying Alaska Supreme Court's reasoning).

296. *See, e.g., Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990); *New York v. Solvent Chem. Co.*, 225 F. Supp. 2d 270 (W.D.N.Y. 2002); *City*

avoiding liability in the useful product area usually sell a useful, but hazardous, product to another entity, which in turn makes "further productive use" of that product.[297] In *Berg I*, however, Norge provided equipment and services "specifically designed to release hazardous substances as part of their essential function."[298] This case differs from *Florida Power, City of Merced* and *Solvent Chemical* because in those cases, either the seller did not intend to dispose of the substances as part of the sale, or the sale was a mere economic transaction.[299]

In *Berg I*, the essential functions of the machines and services Norge provided the Bergs were dispositive.[300] In other words, the Alaska Supreme Court correctly declined to apply the useful product exception to Maytag because the separator system's primary function was to direct PCE-contaminated water into the sewer system, not to place the PCE back into a productive stream of commerce.[301]

Furthermore, legislative history indicates that Alaska's useful product exception is narrower than CERCLA's.[302] While CERCLA focuses only on "wastes," the Alaska Statute considers "'all harmful substances the same.'"[303] Thus, the Alaska Supreme Court properly did not apply the useful product exception to Norge's equipment and services.[304]

B. Did the Ninth Circuit Properly Apply Alaska Law?

The Ninth Circuit correctly applied Alaska law in *Berg II*.[305] The Ninth Circuit certified two questions to the Alaska Supreme Court because the matters of state law presented to the federal court were novel.[306] When reviewing the answers to certified questions, a federal court is to rely on the state court's interpretation of

of Merced v. R.A. Fields, 997 F. Supp. 1326 (E.D. Cal. 1998)) (applying useful product exception).

297. *See Berg I*, 113 P.3d at 611-12 (noting categories within useful product exception).

298. *See id.* at 612 (declining to apply useful product exception).

299. For a discussion of these cases, see *supra* notes 168-84 and accompanying text.

300. *See Berg I*, 113 P.3d at 612 (noting narrowness of useful product exception in Alaska).

301. *See id.* (discussing machines' essential disposal function).

302. *See id.* at 612 & nn.46-47 (citing legislative history).

303. *See id.* at 612 (distinguishing CERCLA from Alaska Statute).

304. *See id.* (declining to apply useful product exception).

305. *See Berg II*, 412 F.3d 1122, 1129 (9th Cir. 2005) (applying Alaska law).

306. *See id.* at 1124 (noting why Ninth Circuit certified two questions to Alaska Supreme Court).

state law.[307] Relying on Alaska's interpretation of its arranger liability provision, the Ninth Circuit found the Bergs' allegations were sufficient to state a claim upon which relief could be granted.[308] Thus, the Ninth Circuit properly applied Alaska state law to the state law questions.[309]

VI. IMPACT

Berg I and *Berg II* expand arranger liability in Alaska under the state's version of CERCLA.[310] When faced with a similar question of whether an entity is subject to arranger liability when it manufactures or sells a useful product that when used as designed and installed by the manufacturer, releases hazardous substances, an Alaska state court must adhere to this reading of the state's arranger liability provisions.[311] Although a case the Alaska Supreme Court used as a persuasive source has been overturned, *Berg II* remains good law.[312]

Interpreting arranger liability provisions has plagued both state and federal courts for the past twenty-five years.[313] Without any definitive guidance from the United States Supreme Court, federal courts may continue to diverge from each other in terms of which arranger liability test to apply.[314] While not on the immediate horizon, it is time for the Supreme Court to make a final determination on the precise requirements for "arranger liability" under CERCLA.[315] Doing so will benefit the environmental and business

307. *See, e.g.*, Reinkemeyer v. SAFECO Ins. Co. of Am., 166 F.3d 982, 984 (9th Cir. 1999) (declining to disregard Nevada Supreme Court's answer to certified question of Nevada law). The Ninth Circuit notes it is "bound by the answers of state supreme courts to certified questions just as [it is] bound by state supreme court interpretations of state law in other contexts." *See id.* (citations omitted).

308. *See Berg II*, 412 F.3d at 1129 (providing holding of case).

309. *See id.* (applying Alaska law to facts).

310. *See Berg I*, 113 P.3d at 609-10 (noting broadened reading of Alaska's arranger liability).

311. *See Berg II*, 412 F.3d at 1124 (presenting question for Ninth Circuit's consideration). Although the Ninth Circuit issued a ruling, the question presented was a matter of state law. *See id.*

312. At the time this Note went to press, *Berg II* had not been overruled.

313. *See, e.g.*, Robins, *supra* note 2, at 189-90 (noting extensive litigation).

314. For a discussion of the various approaches courts take to arranger liability, see *supra* notes 72-166 and accompanying text.

315. *See, e.g.*, Lannetti, *supra* note 4, at 321 (suggesting Supreme Court determine scope of arranger liability). Some commentators suggest legislative clarification of arranger liability is necessary to avoid judicially active assignment of liability "when none should exist." *See* Buboise, *supra* note 7, at 487 (arguing against "judicial expansion of arranger liability").

communities by, among other things, establishing a consistent standard by which liability is measured.[316]

In the meantime, state lawmakers should be encouraged to enact legislation inducing parties to preemptively reduce any inclination to dispose of hazardous wastes in an imprudent manner.[317] This is especially true considering CERCLA's taxing provision expired in 1995, and it does not seem as though the Bush Administration has its resuscitation high on the agenda.[318] *Berg I* and *Berg II* are important cases because they stand for a broadening of environmental liability.[319]

Detractors cite reduced information sharing as a negative result of broader liability standards.[320] In cases such as *Berg* and *Street*, where businesses relied on a supplier's disposal advice, critics claim suppliers will withhold information altogether from their buyers to avoid liability.[321] Industry efforts to recognize the companies taking initiatives to provide safe and environmentally sound alternatives can overcome this short-sighted response.[322]

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316. *See* Lannetti, *supra* note 4, at 321. Lannetti notes: "A unified judicial interpretation is necessary to assist those affected by CERCLA in taking prophylactic measures to ensure compliance with the statute." *See id.*

317. *See, e.g.*, Donald A. Brown, *Thinking Globally and Acting Locally: The Emergence of Global Environmental Problems and the Critical Need to Develop Sustainable Development Programs at State and Local Levels In the United States*, 5 DICK. J. ENVTL. L & POL'Y, 175, 203-13 (1996) (noting legislative and regulatory roles state and local governments should play in implementing sustainability initiatives). *See also* Ved P. Nanda, *Agriculture and the Polluter Pays Principle*, 54 AM. J. COMP. L. 317, 323 (2006) (noting in addition to state CERCLA provisions, some state legislatures have enacted "polluter pays" legislation).

318. *See* Cartwright, *supra* note 5, at 315-18 (noting expiration of taxing mechanism and George W. Bush administration's announcement it would not seek reauthorization). For a summary of early Bush administration environmental policies, see Douglas Jehl, *On Environmental Rules, Bush Sees a Balance, Critics a Threat*, N.Y. TIMES, Feb. 23, 2003, at A1 (noting 2003 status of air, water, land, energy and global climate policies).

319. *See Berg II*, 412 F.3d 1124, 1129 (9th Cir. 2005) (recognizing claim for arranger liability under Alaska law).

320. *See, e.g., Street II*, 166 S.W. 3d 323, 246 (Tex. 2005) (providing reasons to narrow liability).

321. *See id.* (discussing chilling effect broad arranger liability would have on giving advice).

322. *See, e.g.*, David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379 *passim* (2005) (arguing for mandatory informational disclosure in corporate environmental realm); Sidney A. Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN. L. REV. 97 *passim* (2000) (using economic model to analyze whether incentives induce voluntary regulatory compliance and under which circumstances). *See also* Claudia H. Deutsch, *The New Black: Companies and Critics Try Collaboration*, N.Y. TIMES, May 17, 2006, at G1 (noting trend towards cooperation between environmentalists and corporations).

There are also larger implications of stricter environmental standards, affecting our international economy.[323] While the United States has shifted from an industrial to a service and information-based economy, nations such as China are currently experiencing their own industrial booms.[324] The United States can maintain its global leadership position only by providing responsible environmental models for others to follow.[325] On both micro and macro levels, broadened liability may increase costs in the short-run, but the failure to pay now will only injure global players in the future.[326]

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323. *See, e.g.*, Thomas L. Friedman, *Go West, Old Men*, N.Y. TIMES, Apr. 26, 2006, at A19 (arguing China has much to learn from California's "strong energy standards and supportive government policies to nurture the widespread deployment of clean technologies"). *See also* Meixian Li, Comment, *China's Compliance With WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China*, 18 TEMP. INT'L & COMP. L.J. 155, 163 (2004) (arguing accession into WTO and current legal transformation will enhance China's ability to protect environment).

324. *See* Lester R. Brown, *Lions, Tigers and Bears: China's Emerging Economy*, WEST BY NORTHWEST.ORG, Feb. 16, 2005, http://westbynorthwest.org/artman/publish/article_1020.shtml (noting China's surging consumption).

The World Bank has also invested resources in supporting environmental management in China. *See* World Bank Group, Supporting Environmental Management in China, http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/0,,pagePK:180619~theSitePK:136917,00.html (follow "East Asia and the Pacific" hyperlink; then select "Environment" under "Select a Topic" scroll; then follow "China Environment" hyperlink) (last visited Jan. 2, 2006) (providing information and resources on China's economy and its environmental impacts).

325. *See* Rice & Bracy, *supra* note 22 (emphasizing importance of U.S. environmental leadership). Rice and Bracey note: "The United States has a vital interest in leading international efforts to secure a sustainable global environment and protect the United States and its citizens from the effects of environmental degradation." *See id. See also* Norbert Walter, *An American Abdication*, N.Y. TIMES, Aug. 28, 2002, at A19. Walter notes: "at this very moment the most powerful country in the world stands to forfeit much political capital, moral authority and international good will by dragging its feet on the next great global issue: the environment." *See id.*

326. *See, e.g.*, Walter, *supra* note 325, at A19 (noting failure to act now puts United States at risk of losing "moral and intellectual authority" as well as "strategic advantages" it now holds).