CHAPTERS

WHAT A LONG, STRANGE TRIP IT'S BEEN: BROADER ARRANGER LIABILITY IN THE NINTH CIRCUIT AND RETHINKING THE USEFUL PRODUCT DOCTRINE

BY

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The Ninth Circuit recently refined its conception of "arranger liability" under CERCLA to include transactions that contemplate disposal as a part of the transaction, and this "broader" arranger liability is constrained by the "useful products doctrine." This chapter examines the court's current analysis and critiques the application of the analysis to the sale of secondary materials, i.e., by-products. After outlining the current state of the law through examination of the Ninth Circuit's prior opinions, the chapter argues that the court made a wrong turn in earlier cases by failing to distinguish between virgin and secondary products and looking to RCRA regulations to supply the meaning of key terms left undefined in CERCLA. The chapter then presents a proposed analysis focusing on the disposal transaction rather than the materials subject to disposal and concludes that the sale of secondary materials is virtually always an arrangement for disposal that leaves manufacturers subject to liability under CERCLA for downstream contamination arising from their sale of secondary products.

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I. INTRODUCTION

Arranger liability under section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] encompasses the furthest reaches of the statute, and the Ninth Circuit's current understanding of "broader" arranger liability represents the most expansive scope accepted by any federal court of appeals. The circuit recently expanded on this conception through two significant decisions: *United States v. Burlington Northern & Santa Fe Railway Company* (*Burlington*)[2] and *California Department of Toxic Substances Control v. Alco Pacific, Inc.*[3] Both decisions attempted to clarify the reach of liability under section 107(a)(3) and the "useful product doctrine" (UPD), which serves as the primary restriction of arranger liability, and, although the two decisions dealt with vastly different sorts of products, neither embraced this distinction.

The *Burlington* court, in its examination of multiple sales of a hazardous virgin material, extended the scope of "broader" arranger liability into its outermost frontiers and, in doing so, cast a shadow of liability over sales of hazardous secondary materials.[4] This specter had risen to prominence in *Alco Pacific*, where the court's analysis of broader arranger liability as applied to sales of secondary materials veered erratically between the broad standard set in *Burlington* and the fluctuating UPD template cast in its prior decisions.[5] Although the court failed to distinguish between virgin and secondary materials, it readily employed a different UPD analysis than the *Burlington* court and considered the state of the product instead of the transaction. Ultimately, in reaching a decision seemingly based on equity as much as precedent, the *Alco Pacific* court clung to the idea that, for one to "arrange for disposal," the material must be "waste." Although the court

1 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2000). Section 107(a)(3) is at 42 U.S.C. § 9607(a)(3) (2000).

2 520 F.3d 918 (9th Cir. 2008).

3 508 F.3d 930 (9th Cir. 2007).

4 *See* discussion *infra* Parts II.C.1, III.C.

5 *See* discussion *infra* Part II.C.2.

sought to refine its UPD analysis, its decision did little more than infuse additional process in favor of lucidity.

This chapter begins with a brief overview of arranger liability under CERCLA and a short summary of *Burlington* and *Alco Pacific*. The chapter then distinguishes virgin products from secondary materials in preparation for the subsequent analysis of "broader" arranger liability and the UPD, found in section III. Section IV, through an assessment of the Ninth Circuit's prior decisions, examines the process and reasoning behind the current implementation of the UPD in relation to secondary materials. Section V argues that the current analysis is faulty and proposes an alternative analysis based upon a transaction-centric approach. Section VI applies the Ninth Circuit's current conception of broader arranger liability and the proposed UPD analysis to secondary materials, leading to the ultimate conclusion that the sale of secondary materials is an arrangement for disposal.

II. ARRANGER LIABILITY UNDER CERCLA AND THE NINTH CIRCUIT'S RECENT EXPANSION OF "BROADER" ARRANGER LIABILITY

A. A Brief Introduction to CERCLA Liability

In 1980, Congress passed CERCLA to provide for effective, expedient responses to releases of hazardous substances and to eliminate the health and environmental threats arising from actual or potential releases.[6] CERCLA is meant to ensure, to the greatest extent possible, that the cost of responding to releases and remediating the resulting harm is borne by the party responsible for and/or benefiting from the harm.[7] To effectuate this policy, Congress fashioned CERCLA as a broad, strict liability statute.[8]

For CERCLA jurisdiction to attach, there must be: 1) a "release" or "substantial threat" of a release,[9] 2) of a "hazardous substance,"[10] 3) from a "facility."[11] "Release" is an expansive term, encompassing active forms of release such as spilling, pouring, emitting, and discharging, as well as

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[6] *See Burlington*, 520 F.3d at 33; Carson Harbor Vill., Ltd. v. Unocal Corp. (*Carson Harbor*), 270 F.3d 863, 880 (9th Cir. 2001). *See also* 42 U.S.C. § 9604(a) (2000) (authorizing the President to act in response to any "release or substantial threat of release" of any hazardous substance or "contaminant which may present an imminent and substantial danger to the public health or welfare"); *id.* § 9606(a) (2000) (authorizing the President to take action to abate any "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release").

[7] *See Burlington*, 520 F.3d at 33; *Carson Harbor*, 270 F.3d at 880. *See also* Gen. Elec. Co. v. Aamco Transmissions, Inc., 962 F.2d 281, 285 (2d Cir. 1992) (citing S. REP. NO. 96-848 (1980)) (Congress enacted CERCLA to ensure "that those responsible for any damage, environmental harm, or injury from [hazardous substances] bear the costs of their actions"). *See generally* 42 U.S.C. § 9607(a) (2000) (imposing liability on a vast swath of parties bearing at least some relation to the release).

[8] *Burlington*, 520 F.3d at 933.

[9] 42 U.S.C. §§ 9604(a)(1), 9606(a) (2000).

[10] *Id.* §§ 9604(a)(1), 9606(a), 9607(a)(1)–(4).

[11] *Id.* §§ 9606(a), 9607(a)(1)–(4).

passive releases, including leaching and abandonment.[12] "Hazardous substance" is also broadly defined and includes both hazardous substances designated pursuant to CERCLA,[13] as well as substances considered hazardous under the Resource Conservation and Recovery Act of 1976 (RCRA),[14] the Clean Water Act (CWA),[15] the Clean Air Act (CAA),[16] and the Toxic Substances Control Act (TSCA).[17] Finally, a "facility" includes "any site or area where a hazardous substance has . . . come to be located . . . ."[18]

As virtually any contaminated area meets these elements, liability generally hinges upon whether a party falls under one or more of the "potentially responsible party" (PRP) classifications enumerated in section 107(a).[19] PRP classifications include: 1) current owners and operators of the facility; 2) owners and operators at the time of disposal of hazardous substances; 3) persons who "arranged for disposal or treatment" of hazardous substances; and 4) persons who accepted hazardous substances for transport to a treatment or disposal facility.[20] This chapter focuses upon the third PRP liability classification: arranger liability.

B. Arranger Liability Under Section 107(a)(3)

Section 107(a)(3) of CERCLA imposes liability upon any person who "arranged for disposal or treatment . . . of hazardous substances."[21] "Arranged for" is undefined in the statute, but as discussed *infra*, is broadly interpreted. "Disposal" is defined by reference to the term's definition in RCRA,[22] which includes "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste" in such a manner that the "waste" may enter the environment.[23] Inclusion of the passive term "leaking" indicates that disposal need not be intentional.[24]

The Ninth Circuit recognizes two categories of arranger liability: "direct" arranger liability and "broader" arranger liability. "Direct" arranger liability applies to "transactions in which the central purpose of the transaction is disposing of hazardous wastes."[25] Because a person may circumvent this narrow construction by making disposal a secondary

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12 *Id.* § 9601(22).

13 *Id.* § 9602.

14 42 U.S.C. §§ 6901–6992k (2000) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992).

15 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

16 42 U.S.C. §§ 7401–7671q (2000).

17 15 U.S.C. §§ 2601–2692 (2000). *See* 42 U.S.C. § 9601(14), incorporating by reference hazardous substances designated under 33 U.S.C. §§ 1321(b)(2)(A), 1317(a), and 42 U.S.C. §§ 6921, 7412.

18 42 U.S.C. § 9601(9) (2000).

19 *See id.* § 9607(a).

20 *Id.* § 9607(a)(1)–(4).

21 *Id.* § 9607(a)(3).

22 *Id.* § 9601(29).

23 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6903(3) (2000).

24 *Burlington*, 520 F.3d 918, 949 (9th Cir. 2008).

25 *Id.* at 948; *see also* United States v. Shell Oil Co., 294 F.3d 1045, 1055–56 (9th Cir. 2002).

purpose of a transaction, thereby thwarting CERCLA's goal of allocating remediation costs to the party responsible for the contamination, the Ninth Circuit also recognizes "broader" arranger liability. Briefly, "broader" arranger liability "involves transactions that contemplate disposal as a *part* of, but not the focus of, the transaction . . . ."[26] Broader arranger liability is discussed in detail in Section III.

C. Recent Ninth Circuit Decisions Examining "Broader" Arranger Liability

The Ninth Circuit recently issued two decisions applying broader arranger liability. In *Burlington*, the court assigned liability to a seller of an agricultural chemical for its role in spillage and leakage of the chemical upon the purchaser's property.[27] In *Alco Pacific*, the court reversed the district court's grant of summary judgment to defendants and remanded the case to determine whether the sale of industrial by-products with some commercial value constituted an arrangement for disposal.[28] These two cases represent the current analysis of arranger liability as to manufacturers of hazardous products and producers of hazardous by-products.

*1.*United States v. Burlington Northern & Santa Fe Railway. Co.

From the 1960s to the early 1980s, Shell Oil Company (Shell) sold "D-D," a soil fumigant, to Brown & Bryant (B&B), a defunct distributor of agricultural chemicals.[29] Shell encouraged bulk sales of D-D, distributed a manual including safe handling instructions, required an inspection of B&B's bulk storage facilities by a qualified engineer, and provided a rebate for improvements in handling and safety.[30] Shell hired a common carrier to deliver D-D to B&B via tanker truck and provided the carrier with delivery instructions designed to minimize spillage during transfer and mitigate any incidental spills.[31] Despite these instructions, the district court determined, based upon testimony of employees both of B&B and the common carrier, that spills occurred during every delivery.[32] Further, the court noted that Shell's insistence on bulk sales necessitated bulk storage in steel tanks, and D-D eventually corroded these tanks, leading to leakage.[33] Although it noted B&B was a "sloppy operator,"[34] the district court concluded Shell was a PRP under CERCLA and liable as an arranger for contamination at the site.[35]

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[26] *Burlington*, 520 F.3d at 948 (emphasis in original).

[27] *Id.* at 952.

[28] *Alco Pacific*, 508 F.3d 930, 941 (9th Cir. 2007).

[29] *Burlington*, 520 F.3d at 930–31.

[30] *Id.* at 931, 950–51.

[31] Shell did not physically participate in the transfer process. Employees of the carrier and B&B performed the actions constituting delivery and transfer. *Id.*

[32] United States v. Atchison, Topeka & Santa Fe Ry. Co., Nos. CV-F-92-5068, CV-F-96-6226, CV-F-96-6228, 2003 U.S. Dist. LEXIS 23130, at *20–21 (E.D. Cal. July 15, 2003).

[33] *Id.* at *17–18.

[34] *Id.* at *26.

[35] *Id.* at *70.

The Ninth Circuit affirmed Shell's liability under its conception of "broader" arranger liability.[36] Noting that disposal need not be intentional, the court determined that "[a]rranging for a transaction in which there necessarily would be leakage or some other form of disposal of hazardous substances is sufficient" for liability to attach.[37] The court then considered the "useful product doctrine," a limitation on arranger liability whereby the court "[has] refused to hold manufacturers liable as arrangers for selling a useful product containing or generating hazardous substances that *later* were disposed of[;]"[38] however, the court noted the doctrine is inapplicable where the sale "necessarily and immediately results in the leakage of hazardous substances" because "the leaked portions . . . are *never* used for their intended purpose."[39] Here, "leakage of some of [the] product *before* B&B could use it was . . . inherent in the transfer process arranged by Shell[,]" and "[d]isposal . . . was thus a necessary part of the sale . . . ."[40] As such, the useful product doctrine does not apply to the "leaked chemicals" that "never made it to the fields for its intended use but [were] disposed of prior to use."[41]

The Ninth Circuit then considered the applicability of control and ownership to the liability analysis. Although in prior decisions the Ninth Circuit had stated that ownership at the time of disposal is "an important factor" and control is a "crucial element,"[42] in *Burlington*, the court declared that neither is an essential condition for liability.[43] The court determined that "Shell here owned the chemicals at the time the sale was entered into[,]" and "the statute requires nothing more in terms of ownership."[44] Further, Shell's control over and knowledge of the transfer process were sufficient to find liability.[45]

2. California Department of Toxic Substances Control v. Alco Pacific, Inc.

From 1950 to 1990, Alco Pacific, Inc. (Alco) operated a lead processing facility where it reprocessed slag and dross, by-products of smelting operations that contained a minority percentage of reclaimable lead.[46] The defendants, companies that transferred slag and dross to Alco, sold the slag and dross at a price linked to the market price of lead and the percentage of

36 *Burlington*, 520 F.3d at 951.

37 *Id.* at 949.

38 *Id.*

39 *Id.* at 950.

40 *Id.* As support for this conclusion, the court noted that "Shell arranged for delivery . . . ; was aware of, and to some degree dictated, the transfer arrangements; knew that some leakage was likely in the transfer process; and provided advice and supervision concerning safe transfer and storage." *Id.*

41 *Id.*

42 *Id.* at 951 (quoting United States v. Shell Oil Co., 294 F.3d 1045, 1055 (9th Cir. 2002) and citing Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 973 F.2d 688, 695 (9th Cir. 1992)).

43 *Id.*

44 *Id.*

45 *Id.*

46 *Alco Pacific*, 508 F.3d 930, 932 (9th Cir. 2007).

recoverable material.[47] Alco spilled some of the dross and slag at the site, causing lead contamination, and California cleaned the site and sought cost recovery from the defendants.[48] The district court granted summary judgment to the defendants on the basis that slag and dross are useful products, thus insulating them from arranger liability.[49]

The Ninth Circuit employed a slightly different analysis in *Alco Pacific*. First, it referred to the *Burlington* court's general conception of broader arranger liability; namely that arranger liability attaches to "transactions that contemplate disposal as a *part* of, but not the focus of, the transaction."[50] The court then veered from the *Burlington* court's analysis when considering the useful product doctrine. The useful product doctrine, according the *Alco Pacific* court, is a function of the definition of "disposal."[51] CERCLA incorporates RCRA's definition of "disposal," which refers to disposal of "any solid *waste* or hazardous *waste*".[52] Thus, a party is an arranger "only if the material in question constitutes 'waste.'"[53] The court then traced its prior decisions involving the useful product doctrine and enumerated three nonexclusive factors used to determine, under a totality of the circumstances analysis, whether a sale involves a useful product or is a disposal of hazardous waste: 1) "the 'commercial reality' and value of the product," 2) the intent of the transaction, and 3) whether the material is a principal product or a by-product.[54] After finding that questions of fact precluded the summary judgment, the Circuit remanded the case for further proceedings.[55]

Although the case was remanded, the *Alco Pacific* court rejected several important arguments proffered by California. First, it declined California's request to determine as a matter of law that the useful product doctrine does not apply in this case.[56] California argued, citing *Burlington*, that spillage and leakage were inherent in the smelting process and that a significant portion of the dross and slag was unusable for any purpose and required eventual disposal.[57] The court summarily rejected these arguments by pointing to the commercial value of the slag and dross.[58] The court further declined to limit the useful product doctrine to new products and determined that classification as a nonprincipal product or as a by-product is not dispositive.[59]

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47 *Id.*

48 *Id.* at 933.

49 *Id.* at 932 (referring to the district court decision in Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., No. CV-01-9294 (C.D. Cal. Feb. 6, 2004)).

50 *Id.* at 934 (citing United States v. Burlington N. & Santa Fe Ry. Co., 479 F.3d 1113, 1139 (9th Cir. 2007)).

51 *Id.* at 934.

52 *Id.* (emphasis added) (citing 42 U.S.C. § 9601(29)).

53 *Id.*

54 *Id.* at 938.

55 *Id.* at 941.

56 *Id.* at 939.

57 *Id.*

58 *Id.*

59 *Id.* at 940 (citing Catellus Dev. Corp. v. United States, 34 F.3d 748, 751 (9th Cir. 1994)).

III. THE DISTINCTION BETWEEN VIRGIN AND SECONDARY MATERIALS, BROADER ARRANGER LIABILITY, AND THE USEFUL PRODUCT DOCTRINE

Burlington and *Alco Pacific* represent the current amorphous state of arranger liability in the Ninth Circuit, and the present analysis—a muddied comparative process that seems to turn more on the "correct" decision than the similarities and dissimilarities of prior cases—prohibits any definitive conclusion that an activity is or is not an arrangement for disposal under CERCLA. Producers of useful products may unwittingly dispose of wastes, and generators of waste may become producers of a useful product by infusing a willing purchaser. The only guarantee at this point is that these issues will not be decided on summary judgment.

Prior to any attempt to synthesize these prior cases into a comprehensive approach to arranger liability, the court should take a few steps back and consider exactly what it is examining. As discussed below, the first step in the arranger liability analysis should be to distinguish between virgin and secondary materials. Once this distinction is made, the analysis clears up a bit.

This section first discusses why the distinction between virgin and secondary materials is critical to the analysis. Next, the Ninth Circuit's current conception of broader arranger liability is examined. The primary constraint on arranger liability—the useful product doctrine—is then discussed briefly with relation to virgin products, and a detailed examination of the useful product doctrine as applied to secondary materials follows.

A. Virgin Materials Must Be Distinguished From Secondary Materials

Virgin materials consist of those products manufactured for use in their current state. Secondary materials are those spent products or by-products of operations unusable for their intended purpose in their current state and require reprocessing or reclamation prior to utilization. For example, a solvent sold to an industrial operation is a virgin product, but the spent solvent from that same industrial operation, if sold by the operator, is a secondary material.

There are three categories of secondary materials arising from prior Ninth Circuit cases: 1) products otherwise requiring disposal that are sold for use in the same form;[60] 2) products contaminated with a minority percentage of hazardous substances that must be removed prior to use as intended;[61] and 3) products otherwise requiring disposal but containing a minority percentage of reclaimable constituents.[62] Categories two and three are noteworthy

[60] *See* La. Pac. Corp. v. ASARCO Inc., 24 F.3d 1565, 1570–71 (9th Cir. 1994) (noting slag, a by-product from smelting operations, was sold to a log yard for use as ballast, causing contamination).

[61] *See* Cadillac Fairview/Cal., Inc. v. United States (*Cadillac Fairview*), 41 F.3d 562, 564 (9th Cir. 1994) (rubber companies transferred spent styrene to manufacturer for removal of contaminants and return of clean styrene to rubber companies).

[62] *See Alco Pacific*, 508 F.3d at 932 (noting slag and dross, by-products from smelting operations containing less than 30 % lead, were sold to smelter for reclamation of lead).

because, after reprocessing, the secondary material may yield both a virgin product and a hazardous substance that requires disposal.[63]

The distinction between virgin and secondary materials is proper because these are fundamentally different kinds of products. First, virgin products are an intentional result of the manufacturing process. Secondary products are an unwanted consequence of the process. Further, while an excess of virgin products may require reduction or cessation of the manufacture of *those* products, an excess of secondary materials may require reduction or cessation of the manufacture of *other* products.[64] Finally, virgin products derive value from their present form and may be used in their present form. Secondary materials, on the other hand, commonly derive value from constituent portions only after isolation of undesirable portions and require further processing or reclamation before use (unless the use itself constitutes disposal). Essentially, the distinction boils down to the common sense understanding of the products themselves. Virgin products are created for a purpose, while secondary materials are the inevitable consequence of the creation of other products and find future purpose only after further processing.

Good policy also dictates that manufacturers of virgin products should not be held to the same standard as producers of secondary materials. Manufacturers of virgin products are placing a beneficial material into the market, while producers of secondary products are oftentimes simply attempting to offload their waste. Further, the overarching policy of CERCLA is that the parties responsible for contamination should be responsible for remediation. A secondary material contains both reclaimable and waste materials, and waste requires disposal. Assuming contamination arises from mishandling of a virgin product and a secondary material, the producer of the secondary material is, at least to some degree, more responsible because it sold its waste (rather than properly disposed of it) while the manufacturer sold a product. In sum, the contrasts between virgin and secondary materials are such that distinction between the two is a proper prerequisite to a correct liability analysis.

B. The Current Ninth Circuit Analysis of Broader Arranger Liability

The Ninth Circuit's conception of arranger liability under CERCLA eschews a bright-line test in favor of a fact specific inquiry.[65] In making this inquiry, courts must "look[] beyond defendants' characterizations" of the

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[63] *Id.*; *Cadillac Fairview*, 41 F.3d at 564. Raw materials, such as unprocessed ore, are similar to secondary materials in many ways; however, unprocessed raw materials are beyond the scope of this chapter, and the author does not intend to imply raw materials should be subjected to the same analysis as secondary materials.

[64] For example, an overstock of a virgin product may lead a chemical manufacturer to begin producing a different product on the same line. On the other hand, a smelter may produce a quantity of slag, a secondary material, beyond its disposal capacity, and this excess by-product can result in a shutdown of the primary production operation. *See ASARCO*, 24 F.3d at 1575 n.6.

[65] *Shell Oil*, 294 F.3d 1045, 1055–56 (9th Cir. 2002).

transaction to determine if there is an arrangement for disposal.[66] Although several factors are relevant to the analysis, variations between decisions have created a regime where no single factor is essential, and the analysis rests on a collage of considerations delivered piecemeal via statements from opinions proffered by the Ninth Circuit or adopted from other circuit and district court opinions.[67] While there is no limitation in the factors a court may look to in its arranger liability analysis, many decisions consider some combination of intent and/or knowledge of the parties and ownership of and/or control over the hazardous substances.

Intent and knowledge involve highly subjective analyses into the actions of the alleged arranger and circumstances surrounding the transaction to determine whether the transaction is an arrangement for disposal, and these two factors are used somewhat interchangeably.[68] Relevant considerations of intent include the party's prior means of dealing with the hazardous substances,[69] the purpose and consequences of the transaction,[70] and any other consideration that speaks to intent. Where a clear intent to dispose of the substance is present, intent should be dispositive; however, it is not a necessary element to liability.[71] For example, "leaking," a passive action requiring no intent, is disposal under the statute.[72] Therefore, "an entity can be an arranger even if it did not intend to dispose of the [hazardous substance]."[73]

In the absence of intent to dispose, knowledge provides strong evidence of an arrangement for disposal. Actual knowledge arises from a variety of sources such as contracts allowing for spillage[74] or transactions designed for removal of hazardous constituents from a material so the material may be

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66 *Burlington*, 520 F.3d 918, 951 (9th Cir. 2008) (citing United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989)).

67 *Id.*; *Shell Oil*, 294 F.3d at 1055–56.

68 An intention to dispose of a substance indicates the actor possesses knowledge of the disposal, yet only intent, and not knowledge, may be present in certain circumstances. For example, a generator who pays a third party to take a hazardous by-product without knowledge of whether the party will dispose or use the by-product demonstrates intent to dispose of the hazardous substance but is lacking in knowledge of disposal. Likewise, a party, such as Shell in *Burlington*, may have some knowledge of disposal yet possess no intent to dispose of the product (in fact, Shell's intent appeared to be to avoid any spillage). Despite these circumstances where intent and knowledge are separate, it is more likely that an arranger for disposal possesses both intent to dispose and knowledge of disposal.

69 *ASARCO*, 24 F.3d at 1575 (prior to selling slag to log yard as ballast, smelter dumped slag in nearby water body).

70 *Cadillac Fairview*, 41 F.3d 562, 566 (9th Cir. 1994) (transfer of styrene to manufacturer for removal of contaminants and return to user evidences intent to dispose of contaminants).

71 *Burlington*, 520 F.3d at 949. *See also Carson Harbor*, 270 F.3d 863, 881 (9th Cir. 2001) (noting that contamination resulting from an owner's conduct *and* passive migration, e.g., abandoned storage tanks, "is one of the problems Congress sought to address when enacting CERCLA"); Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1078 n.18 (9th Cir. 2006) ("CERCLA is a strict liability statute, and liability can attach even where the generator has no idea how its waste came to be located at the facility from which there is a release.").

72 *Burlington*, 520 F.3d at 949.

73 *Id.*

74 Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 973 F.2d 688, 695 (9th Cir. 1992).

reused.[75] In the absence of actual knowledge, presumed or constructive knowledge may be imputed,[76] e.g., if a process normally results in the release of a hazardous substance a person is presumed to have knowledge of actual releases. On the other hand, just as with intent, inclusion of "leaking" as a part of disposal indicates knowledge is not a necessary element.

Ownership and control involve a more objective analysis, and one or the other must be present for arranger liability to attach.[77] Ownership of a substance during the waste generating process (along with some form of knowledge of disposal) is sufficient for liability even in the absence of any control over the process;[78] however, ownership at the time of disposal is not required if a party at least partially owned the hazardous substance prior to its disposal.[79] Control may substitute for current or prior ownership, and control over disposal indicates an arrangement for disposal; however, when some ownership is present, control is not a necessary element.[80] Further, authority to control is insufficient.[81]

In sum, the current test requires some degree of intent or knowledge and some form of ownership or control. Intent may be inferred from the circumstances, and if the intent is to dispose of a substance, this factor should control. If intent is not present, knowledge will suffice. Some form of constructive knowledge should be present when liability is based upon disposal that is inherent in the transaction. Ownership prior to or concurrent with the generation of hazardous substances is mandatory; however, control, but not authority to control, can substitute for the ownership requirement. This is a fairly easy test to meet and the primary limitation on liability rests in the useful product doctrine.

C. The Impact of Burlington *on the Ninth Circuit's Arranger Liability Analysis*

The impact of the *Burlington* decision should not be understated. *Burlington* took substantial steps that, for better or for worse, redefined the contours of the Ninth Circuit's analysis and set the course for future decisions. The most important aspect of this decision is its refusal to require

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[75] *See Cadillac Fairview*, 41 F.3d at 566.

[76] *See* Morton Int'l v. A.E. Staley Mfg. Co., 343 F.3d 669, 678 (3d Cir. 2003).

[77] *See Shell Oil*, 294 F.3d 1045, 1058 (9th Cir. 2002) ("No court has imposed arranger liability on a party who never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue.").

[78] *See Jones-Hamilton*, 973 F.2d at 695 (stating that an owner of raw materials who contracted with third party formulator for waste generating formulation process, where the contract contemplated spillage, is an arranger despite complete control given to the formulator).

[79] *See* Catellus Dev. Corp. v. United States (*Catellus*), 34 F.3d 748, 752 (9th Cir. 1994) (holding that a seller of used batteries to cracking plant was liable for contamination caused by dumping of leftover battery casings after lead reclamation); *Burlington*, 520 F.3d 918, 951 (9th Cir. 2008) ("Shell here owned the chemicals at the time the sale was entered into. The statute requires nothing else in terms of ownership.").

[80] *See Jones-Hamilton*, 973 F.2d at 695.

[81] *See Shell Oil*, 294 F.3d at 1057.

actual control, a new direction that, while entirely proper, was not adequately constrained.

The *Burlington* decision vastly altered the importance of the control element from prior Ninth Circuit opinions. In *United States v. Shell Oil Co.*,[82] the court lauded control as "a crucial element of the determination"[83] and, in the absence of ownership, indicated that "actual control" is necessary.[84] The *Burlington* court dismissed the actual control requirement by asserting that *Shell Oil* did not hold that ownership or control is the key element of arranger liability, but rather indicated that they were simply "useful indices or clues" in the analysis.[85] Later, the *Burlington* court amended its opinion to clarify the evidence that established Shell's control.[86] It noted that Shell "determined and arranged for the means and methods of delivery[,]" "detailed loading and unloading procedures[,]" and "the trucking companies with which Shell contracted for delivery did the transfers . . . ."[87] Judge Bea vigorously dissented from the Ninth Circuit's denial of Shell's petition for rehearing en banc, arguing that the evidence "falls far short of the *actual control*" required by *Shell Oil*.[88] Bea also chastised the court's "imposition of arranger liability on a mere seller, which relinquished control over its products upon delivery and before spillage occurred,"[89] based solely upon evidence that "at best establishes Shell's *influence* over the transfer process . . . ."[90] This dissent was joined by seven other judges, which suggests that future decisions from a different panel of judges could limit *Burlington* and reassert a requirement for actual control by the arranger.[91] For now actual control is not a prerequisite to imposition of arranger liability.

The *Burlington* court's alteration of the control element sets the stage for its arranger liability analysis. The court replaces actual control with a combination of prior ownership and "influence" with a temporal element. In making this alteration, contrary to Judge Bea's view, the court took two steps in the right direction, albeit one step too far.

Prior to denouncing the necessity of actual control, the *Burlington* court determined that liability could attach where the sale of a virgin product "necessarily and immediately results in [disposal] of hazardous substances."[92] "Immediately" introduces a temporal element into the analysis that is best understood as "contemporaneously" with the transaction arranged for by the seller. This temporal constraint is essential to the correct analysis because it extends liability to those acts involving disposal in which a manufacturer could play a role while insulating the manufacturer from

82 294 F.3d 1045 (9th Cir. 2002).
83 *Id.* at 1055.
84 *Id.* at 1057–58.
85 *Burlington*, 520 F.3d 918, 951 (9th Cir. 2008).
86 *Id.* at 926.
87 *Id.* at 931 n.5.
88 *Id.* at 962 (Bea, J., dissenting).
89 *Id.* at 954 (Bea, J., dissenting).
90 *Id.* at 962 (Bea, J., dissenting).
91 *Id.* at 952.
92 *Id.* at 950. This language is an exclusion to the UPD, which is discussed in detail below.

liability arising from contamination occurring independently of the manufacturer's actions during the purchaser's exclusive possession.[93]

In looking to whether disposal is inherent, the court de-emphasizes actual control over the process to reach the correct conclusion: Shell is liable for spillage inherent in the transfer process and should not be able to escape liability simply by passing control to a third party. This circumstance is somewhat synonymous with a generator who, wishing to avoid liability for disposal, gives a third party complete control over disposal of its by-products then argues that it presumed the third party would properly dispose of the waste. Allowing such a result is contrary to the policies of CERCLA.[94] In other words, Shell should not be allowed to avoid liability by "closing its eyes" to disposal that was an inherent part of the delivery process that it arranged. Further, refusing to find Shell responsible for this spillage places the entire burden on the property owner and the transporter, neither of which could prevent inherent spillage nor change the delivery process. The Ninth Circuit appropriately extended liability because, under this circumstance, the arrangement was both a sale of a useful product and disposal.

While this extension of arranger liability may be appropriate, the Ninth Circuit failed to establish necessary limits to liability and hinted at a reading far beyond the bounds of reasonable imposition of liability. The court spends a substantial portion of its discussion of Shell's responsibility focusing on "leakage" from B&B's storage tanks.[95] Because of this focus, "immediately" arguably does not mean "near in time," but rather, it means "directly," e.g. cancer was the "immediate" cause of death. If "immediately" is read as "directly," as would be the case in finding Shell responsible for providing a chemical that gradually corroded storage tanks, then this decision improperly sweeps in a vast swath of manufacturers of virgin products into the web of arranger liability simply because they sold a virgin product to a party who failed to properly maintain its storage facilities or used improper storage facilities. Further, without the temporal element, the scope of liability for these products extends indefinitely so long as there is direct causation. The Ninth Circuit did not explicitly constrain liability to a temporal element limited to the transfer process but instead left open the door to imposition of liability upon manufacturers of virgin products for the improper handling of these products by the

[93] For example, "immediately" appropriately encompasses the delivery in *Burlington* where Shell arranged for the process resulting in disposal despite the fact that B&B may contractually have exclusive possession at this point. On the other hand, it does not extend to spillage resulting from B&B's transfer of the chemical from its tanks into its chemical applicators because this spillage is hardly contemporaneous with the delivery arranged by Shell.

[94] *Catellus*, 34 F.3d 748, 752 (9th Cir. 1994) (manufactures should not be allowed "to simply 'close their eyes' to the method of disposal of hazardous substances" (quoting United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1382 (8th Cir. 1989))).

[95] *See Burlington*, 520 F.3d at 950. For example, the court noted Shell's liability "stems from the leaked chemicals" and "the portion of product that never made it to the fields for its intended use . . . ." *Id.* The court also noted Shell's encouragement of bulk sales resulted in "leakage from corrosion of the large steel tanks," and Shell reduced the price in an amount determined to be "linked to loss from leakage . . . ." *Id.* at 951–52.

purchaser long after the sale. This is beyond the reasonable bounds of CERCLA and discourages the sale of useful products that should be covered under the useful product doctrine.

D. The Current Application of the Useful Product Doctrine

The useful product doctrine applies to the transfer of a hazardous substance from one party to another and limits the transferor's liability for subsequent contamination arising from use or misuse of the substance by the transferee or other downstream users.[96] Because hazardous substances are widely used in our highly industrialized society, this is a crucial limitation on CERCLA liability that promotes the production and use of beneficial substances and comports with the overall policy that the party responsible for the contamination should be responsible for remediation. As with arranger liability, the current doctrine developed as a piecemeal response to various fact patterns before the court.

Virgin products, by their very nature, are almost inevitably useful products, and the UPD applies with particular force to the transfer of virgin products. The current doctrine exempts manufacturers from liability arising from the sale of a hazardous substance "that *later* [was] disposed of . . . *after* it is used as intended."[97] The doctrine does not apply where "the sale of a useful product necessarily and immediately results in the [disposal] of hazardous substances" because the portions subject to disposal "are *never* used for their intended purpose."[98] Although "used as intended" and "used for their intended purpose" implies that a manufacturer's liability may extend beyond the transfer of possession, ownership and control (and, indeed, the *Burlington* decision, if read broadly, could support this implication),[99] no court has found an innocent manufacturer liable for contamination arising solely from the purchaser's disposal of the product.[100] In other words, "used as intended" and "used for their intended purpose" is not a limitation on the UPD imposing liability upon a manufacturer for unintended uses. Rather, it is a confirmation that when the intended use of a virgin product necessarily results in the disposal of a hazardous substance, the UPD applies. Unintended uses of a virgin product by the purchaser,

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96 *Id.* at 949–50.

97 *Id.* at 949 (citing 3550 Stevens Creek Assocs. v. Barclays Bank of Cal. (*Stevens Creek*), 915 F.2d 1355, 1362–65 (9th Cir. 1990)).

98 *Id.* at 950. (citing Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991)).

99 The *Burlington* court cited evidence including leakage from storage tanks occurring after transfer of the chemical and rebates for improvements in bulk handling. *Id.* at 950–52. Further, the Ninth Circuit, noting that the district court assigned liability for the "portion of the product that never made it to the fields," stated "Shell's liability here stems from the leaked chemicals rather than the fertilizer that was used as fertilizer . . . ." *Id.* at 950. These statements imply that Shell could be liable as an arranger for actions occurring wholly upon B&B's property after complete transfer of ownership, possession, and control.

100 *See Shell Oil*, 294 F.3d 1045, 1058 (9th Cir. 2002) (quoting United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1451 (E.D. Cal. 1995)).

absent extraordinary circumstances,[101] cannot lead to arranger liability.

Secondary materials are analyzed under the same general framework as virgin products, but the UPD is extended under this analysis. Secondary materials are different in that they inevitably contain some portion of the product that is never used as intended and requires inevitable disposal. Briefly, the application hinges upon CERCLA's definition of "disposal,"[102] which references the RCRA definition that is limited to "waste."[103] Thus, the sale of a secondary material is an arrangement for disposal only if it constitutes "waste."[104] The Ninth Circuit has enumerated several nonexclusive factors for this waste analysis including commercial reality and value,[105] intent underlying the transaction,[106] whether the material is a principal product or by-product,[107] whether the material is useable for the principal business of the arranger,[108] and the previous means of dealing with the material.[109] Currently, the court applies the UPD to secondary materials through a fact-specific inquiry utilizing any relevant factors and considering similarities with prior cases.[110] As such, an examining court must conduct a close analysis of the reasoning leading up to *Alco Pacific*.

IV. THE USEFUL PRODUCT DOCTRINE AS APPLIED TO SECONDARY MATERIALS

The Ninth Circuit relies on the "waste" distinction imported from RCRA to apply the UPD to secondary materials. Its highly subjective analysis also relies on a fact-specific inquiry that requires comparison between fact patterns and close examination of prior opinions; however, the common thread running through these cases seems to be that, even where precedent appears to command a specific result, the fact-specific inquiry controls the analysis and frustrates any bright line rule applicable to future cases.

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101 Extraordinary circumstances that could make a manufacturer of virgin products liable for unintended used by a purchaser have yet to arise, yet such circumstances are within reason. For example, if a manufacturer sells a hazardous substance to a purchaser with knowledge that the purchaser intends to store the substance in an unlined pit, the manufacturer may be considered an arranger for disposal through the sale even though the sale would otherwise be a useful product. The potential for such a problem led other courts to refuse a per se rule and conclude that "even though a manufacturer does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed, the manufacturer may be liable" if evidence indicates the manufacturer is responsible for "otherwise arranging" for the disposal. Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990).

102 *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601(29) (2000).

103 *See* Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6903(3) (2000).

104 *See Stevens Creek*, 915 F.2d 1355, 1362 (9th Cir. 1990); *see also* A & W Smelter and Refiners v. Clinton, 146 F.3d 1107, 1112 (9th Cir. 1998).

105 *Alco Pacific*, 508 F.3d 930, 938 (9th Cir. 2007).

106 *Id.*

107 *Id.*

108 *See id.* at 939. This factor is a subset of the intent analysis in *Alco Pacific*.

109 *See A & W Smelter*, 146 F.3d at 1113 (9th Cir. 1993). This factor is essentially encompassed within the intent analysis from *Alco Pacific*.

110 *See Alco Pacific*, 508 F.3d at 938 (declining to adopt a rigid set of factors for "this fact-intensive inquiry").

A. CERCLA's Definition of "Disposal" and Importation of the "Waste" Requirement

In *Alco Pacific*, the Ninth Circuit succinctly stated its basic interpretation of the useful product doctrine as applied to secondary materials: "A person may be held liable as an arranger under § 9607(a)(3) only if the material in question constitutes *waste* rather than a useful product."[111] This concept arises from the statutory definition of "disposal," which "shall have the meaning provided in section 1004 of [RCRA]."[112] Section 1004 defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid *waste* or hazardous *waste* into or on any land or water."[113] CERCLA's definition of "hazardous waste" again refers to the RCRA definition,[114] which defines "hazardous waste" as "solid waste" with hazardous characteristics.[115] "Solid waste" is undefined by CERCLA, but RCRA defines it as any "discarded material."[116] Following this line of reasoning to its conclusion, in order to arrange for "disposal" under CERCLA, the material subject to the arrangement must be "discarded waste;" therefore, a material that is not "discarded waste" is a useful product, and the UPD insulates the seller from liability.

3550 Stevens Creek Associates v. Barclays Bank of California (*Stevens Creek*)[117] is the genesis of the "waste" requirement. In *Stevens Creek*, the purchaser of a building containing asbestos sought to recover remediation costs from the seller by alleging the sale was an arrangement for disposal under section 9607(a)(3); however, the court rejected this argument, holding that materials used in construction were not "disposed of" but were built into the structure and remain part of the structure.[118] In reaching this conclusion, the court determined that "disposal" requires "an affirmative act of discarding a substance as waste."[119] The plaintiff argued that "waste" was irrelevant because CERCLA uses "hazardous waste" and "hazardous substances" interchangeably;[120] however, the court rejected this argument, asserting that Congress chose to import the RCRA definition, and the meaning of the definition is clear.[121] In doing so, the *Stevens Creek* court

111 *Id.* at 934 (emphasis added) (internal quotations omitted).

112 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601(29) (2000).

113 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6903(3) (2000) (emphasis added).

114 42 U.S.C. § 9601(29) (2000).

115 42 U.S.C. § 6903(5) (2000).

116 *Id.* § 6903(27).

117 915 F.2d 1355 (9th Cir. 1990).

118 *Id.* at 1361. From a policy standpoint, *Stevens Creek* reached the "right" decision considering the widespread use of asbestos in virtually every structure constructed prior to the mid-1970s and the impending liability crisis that would arise if the seller of a structure is an arranger under CERCLA; however, other courts have dealt with asbestos under the CERCLA's consumer products exception, 42 U.S.C. § 9601(9).

119 *Stevens Creek*, 915 F.2d at 1362.

120 *Id.*

121 *Id.*

established the "waste" requirement and opened the door of the UPD to secondary materials.

In *Louisiana-Pacific Corp. v. ASARCO, Inc.*,[122] the Ninth Circuit, without specifically addressing the UPD, considered whether a sale could be both a sale of a valuable product under state law and disposal of a hazardous substance under CERCLA. ASARCO previously dumped slag from smelting operations in a nearby bay, but later sold the slag to a middleman for resale to log yards as ballast.[123] The slag was periodically removed from the log yards and taken to a landfill, causing contamination.[124] The court held that, although the jury determined that the slag was a "product" under state law, it may also be a "waste" under CERCLA.[125] Later Ninth Circuit opinions distinguished *ASARCO* from other cases because the material in question was a by-product that the "producers had to get rid of" instead of a principal business product;[126] however, the court refused to read *ASARCO* to mean by-products are always "waste."[127] *ASARCO* was limited to "the situation where the by-product being sold will have to continue to be used in its identical state until it is disposed of."[128] In other words, a generator of secondary materials cannot avoid arranger liability by merely finding a new use for a secondary material in its current form.

In *Catellus Development Corp. v. United States* (*Catellus*),[129] the Ninth Circuit again expanded the "waste" requirement by adopting not only the RCRA statutory definitions, but also RCRA regulations. In *Catellus*, an auto parts store accepted used batteries from customers and sold them to a battery cracking plant, which extracted the lead and dumped the leftover casings, causing lead contamination.[130] The court first adopted the *Stevens Creek* logic, but then concluded "we are to look to the current [RCRA] regulations in interpreting section 107(a)(3) of CERCLA."[131] The court determined the batteries were "reclaimed," i.e., "processed to recover a usable product," and thus "discarded;" therefore, the casings were "waste."[132] Noting that continued ownership and control is not required, the court then held that "[i]t is sufficient that the substance had the characteristic of waste . . . at the point at which it was delivered to another party."[133]

Cadillac Fairview/California, Inc. v. United States (*Cadillac Fairview*)[134] presents a slightly different circumstance where spent material is "cleaned"

122 24 F.3d 1565 (9th Cir. 1994).
123 *Id.* at 1570.
124 *Id.* at 1571.
125 *Id.* at 1575.
126 *Alco Pacific*, 508 F.3d 930, 935 (9th Cir. 2007).
127 *Id.* (citing *Catellus*, 34 F.3d 748, 751 (9th Cir. 1994)).
128 *Id.*
129 34 F.3d 748 (9th Cir. 1994).
130 *Id. at* 749–50.
131 *Id.* at 751.
132 *Id.* at 752.
133 *Id.*
134 41 F.3d 562 (9th Cir. 1994).

and returned to the generator of the secondary material. In this case, Dow Chemical (Dow) produced styrene and sold it to rubber companies.[135] Eventually, the styrene became too contaminated for use, so the rubber companies sold it to Dow for seven cents per pound, and Dow removed the contaminants and resold the clean styrene back to the rubber companies for nine cents per pound.[136] The contaminants from the styrene were dumped on and contaminated Dow's property.[137] In concluding that the rubber companies were not entitled to summary judgment, the court looked to the purpose of the transaction—the removal and release of hazardous substances—and determined that it was not beyond the scope of CERCLA liability "simply because it is cast in the form of a sale."[138]

Later, the *Alco Pacific* court examined the *Cadillac Fairview* decision, and stated "we held that the [UPD] would not apply if the true nature of the transactions . . . was an arrangement for treatment[,]"[139] and "we found that . . . [r]emoval and release of the hazardous substances was not only the inevitable consequence, but the very purpose of the [transaction.]"[140] These comments, taken together, close the door for application of the UPD to situations where a secondary material is sold to another party for removal of contaminants and then returned as a virgin product.

A & W Smelter & Refiners v. Clinton (*A & W*)[141] is unique in that it involved a pile of ore, a raw material, mixed with slag, a by-product. Again, the court applied the UPD in light of the waste requirement. Rejecting the district court's holding that, because processing would result in by-products, the pile is a waste, the court distinguished between raw materials and slag. "[H]ad [the pile] been only lead-bearing slag, it would have been a hazardous waste[;]"[142] however, because it included raw materials, the question becomes whether the "ore was mixed with enough slag so that it was no longer useable for A & W's principal business,"[143] a factual determination requiring remand.

Alco Pacific is the current culmination of the application of the waste requirement to the UPD. Noting that a person may be an arranger "only if the material in question constitutes waste rather than a useful product[,]"[144] the court examined its prior cases applying the UPD to both virgin and secondary materials and enumerated three nonexclusive factors in the secondary materials analysis: 1) the "commercial reality and value[,]" (i.e. whether the material is linked to the market value of the materials extracted from it); 2) the "intent underlying the transaction;" and 3) whether the

135 *Id.* at 563.
136 *Id.* at 564.
137 *Id.*
138 *Id.* at 566.
139 *Alco Pacific*, 508 F.3d 930, 939 (9th Cir. 2007).
140 *Id.* at 936 (internal quotations omitted).
141 146 F.3d 1107 (9th Cir. 1998).
142 *Id.* at 1113.
143 *Id.*
144 *Alco Pacific*, 508 F.3d at 934 (internal quotations omitted).

material is a principal product or by-product.[145] Although the court reversed the district court's grant of summary judgment to defendants, it also refused the State's request to determine as a matter of law that the UPD does not apply.[146] The State argued that a significant portion of the slag necessarily constituted waste, and the defendants merely shifted their responsibility to dispose of this waste to the purchaser.[147] Noting only the price link to the market value of lead to be extracted from the slag, the court rejected this argument.[148] Further, the court, citing *Catellus*, determined that classification as a by-product is not dispositive, and it refused to read *A & W* to establish a rule that only materials useful to the producer's principal business are subject to the UPD.[149] In essence, the court refused to establish any essential factor and ensured that, in future cases, lengthy fact investigations will ensue.

B. The Current Useful Product Doctrine Analysis for Secondary Materials

The UPD analysis for secondary materials revolves around the fact-specific inquiry that is informed, although schizophrenically, by these decisions. First, the focus must be upon "waste" as defined in RCRA and RCRA regulations.[150] Further, the analysis examines whether the secondary material has the "characteristic" of "waste" at the time of transfer.[151] Finally, while certain factors are elucidated, the examining court may rely upon any considerations it sees fit.[152]

A careful examination of these cases reveals a strange dichotomy in the limitations upon application of the UPD to transfers of secondary materials. First, *ASARCO* makes clear that the UPD does not apply to the sale of secondary materials that otherwise constitute waste and are used in the same form until their eventual disposal. Second, *Cadillac Fairview* precludes application of the UPD to circumstances where secondary materials are sold for treatment, the materials are processed and waste is produced, and the materials are resold to an original seller. The abnormality in the analysis arises in the third circumstance: where a secondary material is sold to a party, who processes the material and produces waste, and the material is then sold to a third party. Although *Catellus* arguably closes the door in this circumstance, the *Alco Pacific* court, in refusing to make a categorical rule, ensured the UPD remains active, depending on the outcome of the fact-specific inquiry.

A closer examination of the court's "analysis" reveals little more than a hodge-podge of opinions that pay lip service to their predecessors and then proceed upon paths that, while usually reaching the "correct" decision, leave

145 *Id.* at 938.
146 *Id.* at 940.
147 *Id.* at 939.
148 *Id.*
149 *Id.* at 940.
150 *Catellus*, 34 F.3d 748, 751 (9th Cir. 1994).
151 *Id.* at 752.
152 *Alco Pacific*, 508 F.3d at 938.

no hint as to what sort of sale of a secondary material will actually satisfy the UPD. For example, in *Alco Pacific*, the court, although espousing the statement "[a] person may be held liable . . . only if the material in question constitutes 'waste,'"[153] never discusses *Stevens Creek* and ignores the *Catellus* mandate "to look to the current [RCRA] regulations in interpreting section 107(a)(3) of CERCLA."[154] If the court followed this unequivocal (and never overruled) statement, it could determine, as a matter of law, the status of the *Alco Pacific* defendants because, as discussed *infra* Part V.A, RCRA regulations clearly define "reclaimed" materials and the defendants' activities fall squarely into this classification.[155]

The first problem with the court's current approach is that the "waste" requirement is an unworkable and improper analysis for application of the UPD to secondary materials. Rather, the court should adopt an analysis that focuses upon the transaction instead of the status of the material. The second, somewhat related problem with the court's analysis is its overzealous protection of the fact-specific inquiry, a breeding ground for drawn-out litigation, to the detriment of all definiteness. The court should elucidate some guidance and stick to its guns, creating a system whereby litigants can anticipate whether the UPD will apply to the sale of their secondary materials.

V. THE NINTH CIRCUIT'S APPLICATION OF THE USEFUL PRODUCT DOCTRINE TO SECONDARY MATERIALS IS INCORRECT BECAUSE THE FOCUS SHOULD LIE UPON THE TRANSACTION, NOT THE CURRENT STATE OF THE MATERIAL

Beginning in *Stevens Creek*, the Ninth Circuit veered from CERCLA and infused the useful product doctrine analysis with the "waste" requirement. The importation of RCRA's "waste" requirement mischaracterizes the transaction by hinging liability upon classification as waste instead of focusing on whether there is an arrangement for disposal. The proper focus should fall upon the transaction and the definition of "disposal" absent "waste." Further, the current CERCLA liability analysis compels a finding that sellers of secondary materials are arrangers, thus, under an appropriate UPD analysis, the sale of virtually any secondary material falls outside of the scope of the useful product doctrine.

A. Importation of RCRA's "Waste" Requirement Misses the Mark

Although CERCLA, by its plain language, imports the definition of "disposal" from RCRA, the current analysis reads too much into this incorporation and misses the mark. The "waste" requirement itself is contrary to the language, structure, and intent of CERCLA, and the focus on

153 *Id.* at 934.

154 *Catellus*, 34 F.3d at 751.

155 Indeed, it appears that the *Alco Pacific* defendants' slag would not be "waste" under the current regulations and, therefore, the defendants would escape CERCLA liability. *See* 40 C.F.R. §§ 261.1(c)(3), 261.2(a)(1), 261.2(a)(2)(ii), 261.2(c)(3) (2007).

"waste" shifts the analysis from whether there is an arrangement for disposal to whether the material is "discarded." Because the UPD, a common-law principle, arises independently from the "waste" requirement, the "waste" requirement should be struck from the analysis altogether.

Under CERCLA section 107(a)(3), any person who "arranged for disposal or treatment . . . of hazardous substances" is potentially liable. Section 101(29) of CERCLA declares that "disposal," "hazardous waste," and "treatment"[156] "shall have the meaning provided in section 1004 of [RCRA]."[157] Under RCRA, "disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water . . ."[158] and "treatment" applies only "when used in connection with hazardous waste."[159] "Hazardous waste" is defined as a subset of "solid waste."[160] CERCLA does not define "waste" or "solid waste," (nor does it incorporate the RCRA definitions by reference); however, RCRA defines "solid waste" as any "discarded material."[161] Because "discarded material" is not defined in CERCLA or RCRA, two options arise: 1) look to RCRA regulations for the meaning of any undefined terms, or 2) incorporate only the verbs from the RCRA definition of "disposal" and presume "solid waste or hazardous waste" is interchangeable with the CERCLA definition of "hazardous substances." The Ninth Circuit chose to look to RCRA regulations.

1. CERCLA Incorporates the Statutory Definition of "Hazardous Waste" from RCRA, Thus the RCRA Regulations Utilized by the Ninth Circuit are Inapplicable.

Arranger liability is not limited to disposal; rather, section 107(a) attributes liability to any person who "arranged for disposal or *treatment*."[162] CERCLA also defines "treatment" by incorporating the RCRA definition, which states:

> The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amendable for recovery, amenable for storage, or reduced in volume.[163]

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156 "Treatment," under RCRA, "means any method, technique, or process . . . designed to change the . . . character or composition of any hazardous waste." Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6903(34) (2000).

157 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601(29) (2000).

158 42 U.S.C. § 6903(3) (2000).

159 *Id.* § 6903(34).

160 *Id.* § 6903(5).

161 *Id.* § 6903(27)

162 42 U.S.C. § 9607(a)(3) (2000) (emphasis added).

163 42 U.S.C. § 6903(34) (2000).

The plain language of this provision limits "treatment" to "hazardous waste," yet two different definitions for "hazardous waste" exist in RCRA. The statutory definition, found in Subchapter I of RCRA, defines "hazardous waste" as "solid waste" that may "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."[164] The regulatory definition arises from Subchapter III, which commands the United States Environmental Protection Agency (EPA) to promulgate regulations to identify the characteristics of hazardous waste and list specific hazardous wastes "which should be subject to the provisions of this subchapter . . . ."[165] EPA, in turn, established four characteristics—ignitability, corrosivity, reactivity, and toxicity—and listed hundreds of wastes.[166]

As with the statutory definition, under the regulatory definition a "hazardous waste" must be a "solid waste;"[167] however, EPA's regulations clearly state "the definition of solid waste contained in this part applies only to wastes that are hazardous for purposes of regulations implementing Subtitle C of RCRA."[168] In other words, the regulatory definitions of "solid waste" and "discarded" are applicable only to the regulatory definition of "hazardous waste;" otherwise, the statutory definition of "hazardous waste," which looks to risks to health and the environment, is applicable. The ramifications of this distinction are very important because, due to regulatory exemptions from classification as "solid waste,"[169] the regulatory definition of "hazardous waste" is far narrower than the statutory definition. As such, the threshold question becomes whether CERCLA incorporated the regulatory definition or the statutory definition of "hazardous waste."

CERCLA defines "hazardous substances" to include "any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of [RCRA.]"[170] CERCLA defines "hazardous waste" by explicitly incorporating the *statutory* definition from RCRA.[171] While this definition is limited to those wastes that also meet an identified characteristic or are listed, this is merely a limitation on the breadth of "hazardous substance" under CERCLA that constrains "hazardous substances" to those substances fitting the statutory definition of "hazardous waste" *and* exhibiting a characteristic or listed by EPA. This is not an express incorporation of the regulatory definition of "hazardous waste" and should not be read to contradict the express incorporation of the statutory definition.

Arranger liability attaches for "disposal or treatment" of a hazardous

164 *Id.* § 6903(5).

165 *Id.* § 6921(a).

166 40 C.F.R. §§ 261.21–261.24, 261.31–261.33 (2007).

167 *Id.* § 261.3(a).

168 *Id.* § 261.1(b)(1).

169 *See, e.g.*, *id.*

170 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601(14) (2006).

171 *Id.* § 9601(29).

substance,[172] and there must be a consistent definition of "hazardous waste" for each term. Since "treatment" can only refer to the statutory definition of "hazardous waste," so too must "disposal" adhere to the statutory definition. The Ninth Circuit looked to RCRA regulations that are applicable only to the *regulatory* definition of "hazardous waste" to define "discarded," and, in doing so, inappropriately limited the reach of CERCLA. In fact, the court should not have looked to RCRA regulations at all.

2. No Version of RCRA Regulations Provides a Feasible Framework for the CERCLA Analysis; Therefore, the Ninth Circuit Erred in Looking to RCRA Regulations.

Further, even if it were appropriate to look to RCRA regulations, an examination of the regulations proves they actually inhibit the CERCLA analysis. In choosing to reference RCRA regulations to interpret "discarded material," the threshold question is which version of RCRA regulations should be utilized. There are three reasonable options: 1) RCRA regulations corresponding to the first legislative appearance of CERCLA's incorporation of RCRA's definition of "disposal;" 2) RCRA regulations corresponding to the passage of CERCLA, i.e., the 1980 version of the regulations; or 3) current RCRA regulations.[173] Each option strongly suggests that the court erred in utilizing RCRA regulations.

a. The Genesis of the CERCLA Definition of "Disposal" Predates RCRA Regulations.

CERCLA's legislative history never speaks directly to whether "disposal" requires a material to be a "waste;" however, the legislative history suggests that RCRA regulations have no place in the analysis. The incorporation of the RCRA definition of "disposal" into CERCLA can be traced back to the introduction of Senate Bill 1480 (S. 1480),[174] a precursor bill to CERCLA.[175] Both S. 1480 and CERCLA define "disposal" and "hazardous waste" by stating the terms "shall have the meaning provided in section 1004 of [RCRA]."[176] The authors of S. 1480, introduced on July 11, 1979,[177] could not have intended to incorporate present RCRA regulations because the EPA did not promulgate RCRA regulations until May 19, 1980.[178]

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172 *Id.* § 9607(a)(3).

173 A fourth option—RCRA regulations at the time of the release—is not reasonable since many releases occurred prior to enactment of RCRA.

174 S. 1480, 96th Cong. (1979).

175 THE ENVIRONMENTAL LAW INSTITUTE, SUPERFUND: A LEGISLATIVE HISTORY xvii–xxi (Helen Cohn Needham & Mark Menefee eds., 1983). The bill that eventually became CERCLA, referred to as the Stafford–Randolph Substitute, was a compromise between the Senate's vision of CERCLA—S. 1480—and two competing house bills—H.R. 7020 and H.R. 85—that sought similar ends through amendments to RCRA. *See id.* at xvii–xx.

176 S. 1480, 96th Cong. § 2(3) (1979).

177 S. 1480, 96th Cong. (1979).

178 Hazardous Waste Management System: Identification and Listing of Hazardous Waste, 45

Although the sponsors of S. 1480 arguably meant to incorporate only the statutory definition, it is clear that the first option—look to RCRA regulations in place at the time the first legislative appearance of the incorporation of the RCRA definition—fails.

b. Incorporation of RCRA Regulations That Were in Place at the Time of the Enactment of CERCLA Speaks Against the "Waste" Requirement and Complicates Interpretation.

The Ninth Circuit could have looked to the 1980 RCRA regulations in place at the time of CERCLA's enactment to refine the definition of "disposal;" however, it chose not to do so. Although these regulations appear to be the most reasonable of the three available options, key provisions of these regulations directly contradict the "waste" requirement. Further, even if the court were able to circumvent the contradicting regulatory provisions, the definition of "discarded" in these regulations provides no more clarity than the statutory definitions standing alone and opens a Pandora's box of loopholes.

As previously discussed, the statutory definition of "disposal" turns upon whether a material is "solid waste" that is "discarded." Under the 1980 RCRA regulations, "solid waste" is "any other waste material,"[179] and this term includes any material that is "discarded," "has served its original intended use and sometimes is discarded[,]" or "[i]s a manufacturing or mining by-product and sometimes is discarded."[180] A material is "discarded" if it is "abandoned (and not used, re-used, re-claimed or recycled) by being . . . [d]isposed of[,]" incinerated, or treated in lieu of disposal.[181] Further, "[a] material is 'disposed of' if it is discharged, deposited, injected, dumped, spilled, leaked or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into ground or surface water."[182]

This regulatory definition contradicts the "waste" requirement. "Solid waste" includes "any other waste material which is not [specifically] excluded" by regulation,[183] and "any other waste material" includes not only "discarded" materials but also materials that are "sometimes" discarded.[184] In other words, "any other material" is not limited to materials that are *actually* discarded, but rather, the type of material must *never* be discarded. Because "sometimes" is an extraordinarily expansive term, the phrases "served its original intended use" and "manufacturing or mining by-product"

Fed. Reg. 33,084 (May 19, 1980) (codified as amended at 40 C.F.R. pt. 261).

179 40 C.F.R. § 261.2(a) (1980).

180 *Id.* § 261.2(a)(1)–(3).

181 *Id.* § 261.2(c).

182 *Id.* § 261.2(d).

183 *Id.* § 261.2(a). Specific exclusions are limited to domestic sewage, industrial wastewater regulated under the Clean Water Act, irrigation return flows, certain atomic materials, and materials subject to in-situ mining techniques. *Id.* § 261.4(a).

184 *Id.* § 261.2(b).

are likely to be the actual limiters in the scope of "solid waste."[185] These phrases are likewise very broad; however, they include only secondary materials and not virgin products. In essence, the 1980 regulations *require* a distinction between virgin and secondary materials and classify virtually all secondary materials as "solid waste" irrespective of whether they are actually "discarded."

Assuming that the court was able to evade the "sometimes" language and determine that the statutory language mandated the material actually be "discarded," many more obstacles arise before the court can reach its final destination. The first problem arises from the definition of "discarded," which hinges on the material being "abandoned . . . and not used, re-used, reclaimed or recycled . . . ."[186] The terms "abandoned," "used," "re-used," "reclaimed" and "recycled" are not defined in RCRA or the 1980 regulations; therefore, a court looking to the 1980 RCRA regulations for guidance in defining "discarded" would necessarily find itself entrenched in a litany of arguments over the meaning of each of these terms. Further, the four enumerated exceptions to "abandoned" are broad enough to encompass virtually every fact pattern considered by the Ninth Circuit in the aforementioned secondary materials cases.[187] Rather than providing any clarity into the meaning of "discarded," the 1980 RCRA regulations simply muddy the waters and open the floodgates to exemptions from liability.

Moving beyond the "abandoned" threshold, the 1980 regulatory definition requires the abandoned material be "disposed of," incinerated or "physically, chemically, or biologically treated" in lieu of disposal.[188] To begin, "treated" is undefined in the 1980 regulations, creating yet another interpretive issue for the reviewing court. Further, "disposed of" curiously incorporates a definition virtually identical to the statutory definition of "disposal" with the only substantive difference being the regulatory definition substitutes "material" for "solid waste or hazardous waste."[189] In essence, the end result of interpretation of "discarded" through 1980 RCRA regulations is to transform an undefined term—"discarded"—into several undefined terms while carving out sweeping exceptions to liability. As such, it is no wonder the Ninth Circuit avoided the 1980 RCRA regulations, but instead chose to look to current RCRA regulations.

185 *Id.*

186 *Id.* § 261.2(c).

187 For example, the *Alco Pacific* and *Catellus* defendants clearly transferred secondary materials for reclamation, thus they could not have "abandoned" the materials under the 1980 RCRA regulations. The *Cadillac Fairview* defendants arguably "recycled" their spent solvents, and the *A & W* defendant never actually "abandoned" the ore pile. Even the *ASARCO* defendant would escape arranger liability because its slag was "reused" as ballast. *See supra* Part IV.A.

188 40 C.F.R. § 261.2(c) (1980).

189 *Compare id.* § 261.2(d) *with* Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6903(3) (2006).

c. Use of Current RCRA Regulations Forsakes Any and All Stability in the CERCLA Liability Analysis.

The Ninth Circuit, in *Catellus*, concluded that the court must look to *current* RCRA regulations.[190] This approach presents a serious problem. It is improper to base CERCLA liability upon RCRA regulations because those regulations can change without consideration of the effects on CERCLA liability. The trouble with this approach becomes apparent when considering recent proposed changes to RCRA rules. Under proposed regulations, "[h]azardous secondary material that is generated and then transferred to another person for the purpose of reclamation is not a solid waste" so long as the material is not accumulated speculatively, no middleman is involved, and EPA is provided a one-time notification.[191] The effect of this proposed regulation, if codified, would be that any secondary material transferred "to recover a useable product" is not a solid waste; therefore, the generator of the secondary material is not liable for contamination under CERCLA because this is a "useful product" and not a "waste." In other words, so long as an industrial by-product retains some constituent that may be recovered and used, the generator of the by-product avoids any and all liability for disposal simply by characterizing the transaction as a sale of a "useful product."[192] In effect, if the court looks to current RCRA regulations, CERCLA liability becomes unpredictable and permeable to the sly polluter, and any attempt to establish precedent may be toppled by a slight change in the RCRA regulatory regime.

3. The "Waste" Requirement Should Be Eliminated From the CERCLA Analysis.

As demonstrated above, incorporation of RCRA regulations is entirely inappropriate in the CERCLA context; therefore, the Ninth Circuit must look elsewhere if it desires to cling to the "waste" requirement. The only remaining option is to define "discarded" by its common meaning, which is "to drop, dismiss, let go, or get rid of as no longer useful [or] valuable[;]"[193] however, this option also fails.

190 *Catellus*, 34 F.3d 748, 751 (9th Cir. 1994).

191 Revisions to the Definition of Solid Waste, 72 Fed. Reg. 14,172, 14,217 (proposed Mar. 26, 2007) (to be codified at 40 C.F.R. § 261.4).

192 The complete ramifications of this definition are better understood by using an example. Assume a generator of a by-product, wary of high disposal costs, sets its business model to leave just enough reclaimable material in its by-product to economically justify reclamation. The generator sells the by-product (at a price linked to market price of the reclaimable material) to a fly-by-night reclamation business, which extracts the reclaimable material and dumps the remainder in the "back forty," eventually resulting in groundwater contamination. Under the proposed definition, the by-product is not "waste" under RCRA, thus not "waste" under CERCLA. As such, the UPD applies and the generator is not liable for arranging for disposal of a hazardous substance, even though it generated the contaminating substance and only a minimal amount of material is reclaimed. Essentially, the generator passes the buck on to the Superfund and the State.

193 WEBSTER'S THIRD NEW INT'L DICTIONARY 644 (1961).

Under the incorporated RCRA definition, "treatment" refers to "hazardous waste," a subset of "solid waste;" therefore, if "solid waste" must be "discarded," a material may only be treated if it is discarded, i.e., "gotten rid of." This result is counterintuitive and contrary to the statute because "treatment" includes making a hazardous waste "amenable for recovery,"[194] and, if one seeks to recover a material, the material is not discarded.[195] The only solution to this conflict is to remove the "waste" requirement from "treatment." In doing so, the "waste" requirement must also be removed from "disposal;" otherwise, the reviewing court would necessarily follow the same line of reasoning in examining the same provision yet reach a different decision. Such a conclusion is arbitrary at best.

Any use of RCRA regulations to inform imposition of CERCLA liability is problematic at best. The definition of "treatment" that references the statutory definition "hazardous waste" further demonstrates that it is simply incorrect to infuse the CERCLA analysis with RCRA regulations. Further, if regulations are employed in the analysis, irrespective of which version of the regulations is utilized, the analysis proves to be unworkable and unpredictable. The Ninth Circuit made a wrong turn when it turned to RCRA regulations. Instead, it should have taken a step back and considered whether to incorporate the concept of "waste" at all.

It is unlikely Congress intended to limit arranger liability to "waste" through an incorporation of a definition from RCRA and implied incorporation of RCRA regulatory definitions subject to constant alteration. Further, careful consideration of the definition of "treatment" in light of the "waste" requirement presents an irreconcilable conflict between the statute and the court's interpretation. Instead of reading the "waste" requirement into CERCLA's reference to RCRA's definition of "disposal" and "treatment," the definition of "disposal" incorporated into CERCLA should look only to the verbs. Likewise, the CERCLA definition of "treatment" should incorporate the substantive content and exchange the term "waste" with "substance." If "waste" in the RCRA definitions is discounted, the focus returns to whether a transaction is an arrangement for disposal or treatment of a "hazardous substance" instead of whether the material is a discarded waste.

B. Focusing on the Transaction and Dissecting the Secondary Material

If neither "disposal" nor treatment requires "waste," the court must look to the purpose of the transaction instead of the classification of the material. In doing so, the material is simply a "hazardous substance," a classification that retains its character beyond the subsequent processing or other utilization of the substance. The UPD continues to protect the manufacturer of a

194 42 U.S.C. § 6903(34) (2000).

195 For example, assume a company sends a spent material offsite so that it may be reprocessed to remove contaminants and returned to the manufacturing process. The company retains ownership of the material throughout the process and pays a fee to the treatment facility. Unless the company "discarded" the material, this act is not "treatment" if the "waste" requirement attaches.

hazardous substance "that *later* [is] disposed of . . . *after* it is used as intended."[196]

After striking the "waste" requirement, CERCLA arranger liability attaches to a person who "arranged for disposal or treatment . . . of hazardous substances."[197] "Disposal" then becomes any "discharge, deposit, injection, dumping, spilling, leaking, or placing of any [hazardous substance] into or on any land or water so that such [hazardous substance] or any constituent thereof may enter the environment[.]"[198] This statutory definition of "disposal" does not explicitly include the sale of a hazardous substance to another party; however, courts must remain wary and continue "look[ing] beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance."[199] In addition, after excising the "waste" requirement, "treatment" also applies to "hazardous substances" and not only "hazardous waste."

"Hazardous substance" under CERCLA is far broader than "waste" under RCRA. In particular, the "waste" requirement analysis calls for consideration of the material as whole because the classification turns upon whether the material was "discarded." "Hazardous substance," on the other hand, does not require consideration of the state of the product; rather, the substance or some component of the mixture[200] must simply be listed under the criteria in section 102 or in a statute mentioned in section 101(14). This distinction carries grave ramifications for generators of secondary materials because the analysis hinges upon whether the transaction is an arrangement for disposal or treatment of a hazardous substance. Where a secondary material contains some reclaimable material but also some undesirable hazardous constituent, a sales transaction involves both the sale of a useful product *and* the arrangement for disposal *and* treatment of a hazardous substance. As such, the seller should be liable for the hazardous substance that is destined for disposal.

This concept is already somewhat embedded in Ninth Circuit precedent. In *Cadillac Fairview*, contaminated styrene, a secondary material, was transferred from the rubber companies to Dow, which removed hazardous substances from the styrene.[201] The styrene thus became the functional equivalent of a virgin product to be returned to the rubber companies, yet the extracted substance contaminated Dow's property. The court held, as interpreted in *Alco Pacific*, that "[r]emoval and release of the hazardous substances was not only the inevitable consequence, but the very

196 *Burlington*, 520 F.3d 918, 949 (9th Cir. 2008).

197 CERCLA, 42 U.S.C. § 9607(a)(3) (2000).

198 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 6903(3) (2000).

199 *Burlington*, 520 F.3d at 951 (alteration in original) (quoting United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1381 (8th Cir. 1989)).

200 Any "mixture . . . [that] contains hazardous substances . . . is itself hazardous for purposes of determining CERCLA liability." B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1201 (2d Cir. 1992).

201 *Cadillac Fairview*, 41 F.3d 562, 564 (9th Cir. 1994).

purpose of the return of the contaminated styrene to Dow."[202] Further, "the [UPD] would not apply if the true nature of the transactions between the rubber companies and Dow was an arrangement for treatment of contaminated styrene."[203] The rubber companies' potential liability arises from the improper disposal of the extracted substances and not from the sale of contaminated styrene; therefore, the *Cadillac Fairview* analysis looked to the transaction to determine the ultimate state of the material. In doing so, the court effectively used the purpose of the transaction to dissect the secondary material and determine, irrespective of its state at the time of sale, that the transaction could be an arrangement for treatment of the styrene and disposal of the hazardous contaminant.

The transaction-centric approach to the UPD essentially eliminates the doctrine's application to secondary materials because virtually all secondary materials contain some unusable component destined for disposal. For example, assume a by-product contains two hazardous substances, one useful and one undesirable, and it is sold for reclamation. The transaction is a sale of *two* hazardous substances, not a "waste" or useful product. Further, the components of the by-product can be readily dissected according to the purpose of the transaction, i.e., the "useful product" is separated from the substance destined for disposal so that each may be examined when considering the transaction. Once this dissection is complete, the UPD applies to the portion that is a useful product, while arranger liability attaches to the portion subject to disposal. In doing so, a much more equitable result arises: the generator of a secondary material is not liable for the portions of that product put to productive use, yet must ensure its "waste" receives a proper disposal.

C. The Proper Analysis Should Distinguish Between Virgin and Secondary Materials and Focus on the Transaction

1. Step 1: Is this a Virgin Product or Secondary Material?

The problem with universal application of this analysis is the complications it presents to virgin products. For example, assume a virgin product properly used in an industrial process will result in generation of a separate hazardous substance. If the virgin product is dissected, then the manufacturer could be liable for the separate hazardous substances contained within the virgin product that will form the by-product, thus abdicating the UPD. The answer is to avoid universal application by first separating virgin products from secondary materials, and applying the analysis only to secondary materials. Because these are two fundamentally different kinds of products already subject to different UPD analyses, this should not create problems. In other words, the proper threshold

[202] *Alco Pacific*, 508 F.3d 930, 936 (9th Cir. 2007) (alteration in original) (quoting *Cadillac Fairvew*, 41 F.3d at 566).

[203] *Id.* at 939 (quoting *Cadillac Fairview*, 41 F.3d at 566).

determination for application of the analysis is whether the product is a virgin product or secondary material. Virgin products are categorically exempt from dissection yet secondary materials are dissected as part of the analysis of the transaction.

2. Step 2: Look to the Transaction and Dissect the Secondary Material

After determining whether a product is a virgin product or a secondary material, the examining court should consider the purpose of the transaction to inform its dissection of the secondary material accordingly. Because some portion of secondary material may become "artificial" virgin products as a result of reprocessing, the analysis should separate the components of the secondary material and set aside those portions that will in fact become artificial virgin products from those portions destined for disposal. The secondary material seller would then be responsible for only the hazardous substances that it generated that necessarily require disposal. Consider the following example.

Assume "A" generates secondary material SP, which is comprised of three components: X (a hazardous substance), Y (a hazardous substance) and Z (a nonhazardous substance). "A" then sells SP to "B". Now consider four possible scenarios:

1. B completely separates X, Y and Z. B resells X and Y as artificial virgin products.
2. B completely isolates X and resells it as an artificial virgin product; however, Y and Z are not separated and the combined materials are subject to disposal.
3. B separates 98% of X and Y and resells this as virgin products; however, 2% of X and Y remain in the mixture, which requires disposal.
4. B intends to separate X and Y from Z then resell X and Y; however, in mid-process, B's equipment explodes, spewing XYZ in every direction and contaminating B's property.

In the first scenario, A's liability for future disposal of X and Y is determined as if A sold virgin products to B, i.e. the entire sale of hazardous substances falls under the UPD. This eliminates any potential disposal-related contamination problem arising from the materials generated by A because Z, a nonhazardous substance, is the only material requiring proper disposal. This process furthers A's interests in disposing of unwanted materials and the public interest in virgin products.

The second scenario presents a situation similar to the spent styrene in *Cadillac Fairview*. A's liability for X is considered as if A sold a virgin product; however, A's liability for YZ is analyzed as a secondary material. This analysis is fair to A because A will not be responsible for downstream contamination arising from X, and A may contract for greater assurances from B that YZ will receive proper disposal or treatment. While this may

increase transaction costs to A, in theory, the disposal of XYZ would be greater than the disposal of YZ; therefore, if the net value of X after extraction, combined with the reduced disposal costs, is greater than the transaction costs and risk value, A should proceed. Further, A is much more likely to ensure that B engages in proper handling of the materials and maintains an operation capable of remediation of any resulting contamination at its own expense.

The third scenario is much like the sale of lead slag or dross for reprocessing because only a certain amount of lead can be isolated from the slag. Here, just as in the first scenario, A's liability for the 98% of X and Y is determined as if A sold virgin products; however, A's responsibility for the mixture with 2% of the original X and Y is considered as a secondary material.[204] Again, A benefits through reduced volume that is required for disposal and perhaps reduced toxicity, and A is more likely to utilize a reputable reclamation facility with a solid environmental track record.

The final scenario presents a wrinkle in the process that demands careful consideration because it is B's facility that is contaminated instead of the facility of a downstream user. Under this situation, A is potentially an arranger for both disposal *and* treatment of a hazardous substance. This dynamic arises because treatment includes any method rendering a hazardous substance "amenable to recovery."[205]

Although this fact pattern clearly presents a disposal, A is not necessarily an arranger for disposal under CERCLA. A lacks intent, knowledge and control over any aspect of disposal. Further, the spillage here is not inherent in the activity, so constructive knowledge of spillage should not be imputed to A. Finally, the purpose of the transaction involves only treatment and not disposal; therefore, in considering the transaction, A is not liable as an arranger for disposal.

On the other hand, A is an arranger for treatment. To be liable under section 9607(a)(3), A must have arranged for treatment of a hazardous substance at B's facility and B's facility must "contain[] such hazardous substances . . . ."[206] Here, all that is required is that A arranged for treatment of XYZ and B's property is contaminated by X and/or Y, regardless of whether or not the property is contaminated by *A's* X or Y. As such, A is a PRP under section 9607(a)(3) despite having no role whatsoever in the actual disposal of XYZ. This is entirely consistent with the transaction-centric analysis because the purpose of this transaction (as well as the other three transactions) is treatment of a secondary material to create virgin materials. In other words, there is a distinction between

204 In other words, A is not responsible for contamination arising from the reclaimed lead at some point downstream; however, A is responsible for contamination arising from the spent slag.

205 Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6903(34) (2000).

206 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(3) (2000).

treatment and disposal and, although A would not be liable for disposal had treatment been successful, the treatment process failed, leaving A liable.[207]

3. Step 3: Assign Liability for Disposal

The final step requires that a court, after dissecting the secondary material, assign liability to a generator for the portion of the material that constitutes an arrangement for disposal or treatment and apply the UPD to the portion that becomes a useful product. This analysis essentially means that almost all secondary materials will bring about some degree of potential liability for generators; however, the degree of responsibility for contamination will be reflected in the apportionment stage of the analysis. Although this exemption of secondary materials from the useful product doctrine may be less than palatable to many generators, the truth of the matter is that no generator has yet to convince the Ninth Circuit that its secondary material actually falls within the UPD.

VI. THE CURRENT CONCEPTION OF BROADER ARRANGER LIABILITY AND THE PROPER USEFUL PRODUCT DOCTRINE ANALYSIS COMPELS THE DETERMINATION THAT THE SALE OF A SECONDARY MATERIAL IS AN ARRANGEMENT FOR DISPOSAL

The Ninth Circuit's current conception of broader arranger liability compels the determination that a sale of a secondary material is an arrangement for disposal or treatment. In fact, every secondary materials case heard by the Ninth Circuit has determined that the transaction could be an arrangement for disposal but for the application of the useful product doctrine. As discussed below, under any conception of the UPD, sale of secondary materials cannot be the sale of a useful product unless the Ninth Circuit ignores its precedent.

A. Useful Products Doctrine Aside, the Sale of Secondary Materials is an Arrangement for Disposal

In this post-*Burlington* world, broader arranger liability reaches beyond its typical boundaries and expands into the grey area beyond the control of the manufacturer/generator of hazardous substances. It "involves transactions that contemplate disposal as a *part* of, but not the focus of, the transaction [where] the 'arranger' is either the source of the pollution or manages its disposal."[208] In other words, "[a]rranging for a transaction in which there necessarily would be . . . some . . . form of disposal of hazardous substances is sufficient."[209] In this section, arranger liability is considered in

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[207] In fact, this is similar to a generator who arranges for proper disposal yet is held liable as an arranger after its secondary material is improperly disposed of and the disposal facility is contaminated. The generator remains liable for its hazardous substances in this situation; therefore, a generator should be liable where treatment is ineffective.

[208] *Burlington*, 520 F.3d 918, 948 (9th Cir. 2008).

[209] *Id.* at 949.

isolation from the UPD, and the result demonstrates that, UPD aside, the sale of secondary materials is an arrangement for disposal.

1. Disposal is Inherent in the Transaction.

Secondary materials, by their nature, fall within this broad language because a portion of the secondary materials is comprised of hazardous substances destined for disposal without reuse. In its prior cases involving arranger liability, the Ninth Circuit has considered secondary materials including: 1) slag containing reclaimable materials,[210] 2) spent automotive batteries,[211] 3) contaminated styrene,[212] and 4) slag without reclaimable materials used as ballast.[213]

The first two materials—slag and spent batteries—involve the circumstance where the hazardous substance—lead—is so intertwined with presumably nonhazardous substances that complete separation of the lead from the remainder is impractical, if not impossible. In these circumstances, both the slag generator and the spent battery reseller knew a portion of the lead would remain in the processed slag or cracked batteries, and the remainder would require disposal. Likewise, the third material—contaminated styrene—contained a significant portion, although not a majority portion, of hazardous materials that will be removed from the styrene, and the removed materials would require eventual disposal. Finally, the entirety of the slag used as ballast is destined for disposal. In each of these circumstances, a significant portion of the material is destined for disposal. Further, in each of these circumstances, the Ninth Circuit either found arranger liability or reversed the lower courts' determinations that no liability exists. As some portion of secondary materials is destined for disposal, disposal is unquestionably inherent in the transaction.

2. The Sale of Secondary Products Meets the Arranger Liability Factors.

Intent and knowledge is certainly met for all secondary materials. In *Burlington*, the Ninth Circuit determined Shell possessed sufficient knowledge of the transfer process to be liable for spillage.[214] Although there is some indication of actual knowledge arising from the price reductions for leakage, the court's focus on the fact that spills occurred *every time* speaks more to imputed knowledge.[215]

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210 *Alco Pacific*, 508 F.3d 930, 932 (9th Cir. 2007).

211 *Catellus*, 34 F.3d 748, 749 (9th Cir. 1994).

212 *Cadillac Fairview*, 41 F.3d 562, 563–64 (9th Cir. 1994).

213 *ASARCO*, 24 F.3d 1565, 1570–71 (9th Cir. 1994).

214 *Burlington*, 520 F.3d at 951.

215 The extent to which the court relied upon the price reduction for "leakage" and the extent it relied upon the inherent spillage is not sufficiently elucidated. The court also speaks as to leaks from B&B's corroded tanks, which is certainly "leakage." On the other hand, the lower court's determination that spills occurred every time arises from testimony of B&B employees and tanker drivers. United States v. Atchison, Topeka & Santa Fe Ry. Co., Nos. CV-F-92-5068, CV-F-96-6226, CV-F-96-6228, 2003 U.S. Dist. LEXIS 23130, at *57–61, *64 (E.D. Cal. July 14, 2003).

Under either the actual or imputed knowledge, generators of secondary materials possess sufficient knowledge to meet the *Burlington* standard. They are certainly aware of the content of the secondary material sold and aware that a portion of the material will not be reused. In other words, disposal will occur *every time* a transaction for a secondary material is completed. Whereas Shell could at least presume its entire product will be put to productive, safe use, generators of secondary materials know a portion of the product has no future other than disposal. As such, knowledge of disposal should be imputed to generators.

Furthermore, evidence of actual knowledge necessarily arises as part of the analysis. First, unless the generator asserts the UPD applies to a sale, the sale is an arrangement for disposal. Next, under *Alco Pacific*, the price of the secondary material must be linked to the market value of the portion to be extracted.[216] Therefore, to apply the UPD, the generator must contract for a price that applies to the portion extracted, and this contract will necessarily show that a portion of the secondary material—the useless portion—is not to be extracted. Thus, just as Shell's price reduction for leakage proves actual knowledge of disposal, this contract shows actual knowledge on the part of the generator that a part of the secondary material is destined for disposal.

The other factors, ownership and control, are also met when applying the current Ninth Circuit analysis to secondary materials. In *Burlington*, the court noted that Shell owned the chemicals "at the time the sale was entered into" and "[t]he statute requires nothing more in terms of ownership."[217] Generators of secondary materials surely meet this minimal requirement of prior ownership.

Control, on the other hand, is less apparent; however, control is not a necessary element. In *Cadillac Fairview*, the rubber companies neither controlled nor owned the substances during the waste generating process, yet arranger liability applied.[218] Similarly, *Catellus* demonstrated a complete dearth of control or ownership during the waste-producing step. Instead, these cases looked to the purpose of the transaction or the "characteristic" of the substance "at the point at which it was delivered to another party."[219] Further, the generator in *ASARCO* lacked any direct control over the eventual disposal of the slag by the log yards.[220] In addition, the defendant in *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*[221] lacked any control over the waste producing process.[222] Finally, Shell's "control" over the

There was no evidence that Shell actually knew spills occurred during every delivery aside from handling instructions designed to eliminate spills. *Id.* at *61–64.

216 *Alco Pacific*, 508 F.3d 930, 938 (9th Cir. 2007).

217 *Burlington*, 520 F.3d at 951.

218 *Alco Pacific*, 508 F.3d at 936, 939 (citing *Cadillac Fairview*, 41 F.3d 562, 566 (9th Cir. 1994)). For further explanation, see the discussion of *Cadillac Fairview*, *supra* section IV.A.

219 *Catellus*, 34 F.3d 748, 752 (9th Cir. 1994).

220 *See ASARCO*, 24 F.3d 1565, 1571–72 (9th Cir. 1994).

221 973 F.2d 688 (9th Cir. 1992).

222 *See id.* at 693 (although the defendant's employees may have been aware of the disposal, there is no evidence indicating it controlled disposal).

process in *Burlington* consisted, at most, of encouragement of bulk sales, selection of the carrier, and publication of (unheeded) handling instructions.[223] This tangential "control" over the transfer process sets a low bar, more akin to "influence" than actual control.[224] All of these cases share one common element—in each, the arranger owned the secondary material prior to disposal or treatment by another party. In essence, control is not necessary where the arranger actually owns or owned the substance, and the generators meet the ownership "at the time the sale was entered into" requirement enunciated under *Burlington*.

Each sale of a secondary material involves a circumstance where there *necessarily* will be some form of disposal. Generators of secondary materials possess the requisite knowledge of inevitable disposal to find an arrangement for disposal and meet the *Burlington* standard of prior ownership. Control is not required unless ownership or prior ownership is absent from the equation; therefore, in the absence of the UPD, the generators should be considered arrangers for disposal.

B. Secondary Substances Do Not Fit Within the Proper Conception of the Useful Product Doctrine

The UPD is the primary restraint upon arranger liability under Ninth Circuit precedent. As discussed in Section V.A, importation of the "waste" requirement leads to a flawed analysis; therefore the UPD, as applied to virgin products, should be extended to secondary materials. In doing so, the *Alco Pacific* factors and other similar considerations must be put aside in favor of a straightforward analysis of the transaction. Once these considerations are excluded, Section V instructs that the UPD is applicable only to the hazardous substances that indeed become useful products while the remainder of the secondary material does not benefit from the doctrine's protection. The result is that, in virtually every case, a sale of secondary materials involves some arrangement for disposal that falls outside of the UPD.

Although, under this proposed analysis, the threshold distinction between virgin and secondary materials is really the paramount consideration, the UPD still has a role, albeit a less prominent one, at the end of the analysis. This role is accurately reflected in a slight linguistic distinction. While the Ninth Circuit typically refers to the "useful product doctrine," some lower courts have used the term "useful product defense."[225] This alternate phrasing is representative of the present state of confusion. The doctrine is really a principle to which the courts must adhere, rather than an excuse to be asserted in defense of a claim. In other words, the court must adhere to the principle that, although some (virgin) materials may eventually require disposal, the utility of these materials is such that, in

223 *Burlington*, 520 F.3d 918, 950–51 (9th Cir. 2008)

224 *Id.* at 962 (Bea, J., dissenting).

225 United States v. Lyon, No. CV F 07-0491 LJO GAS, 2007 WL 4374167, at *3–4 (E.D. Cal. Dec. 14, 2007).

principle, their sale should not be discouraged by imposing liability on the manufacturer. On the other hand, other materials are of marginal or no utility to the generator and, although they may be "useful" to another, the sale should not insulate the generator from liability for contamination arising from the part of the material that is destined for disposal.

Perhaps the confused transformation of a principle to a defense arises from the phraseology itself. By referring to a material as a "useful product," the doctrine infuses a subjective view of utility and a sense that the "product" must be viewed as whole. Although this terminology may foster some misperceptions of the proper application of the doctrine, the real cause of misperceptions is the erratic, semi-informed case-by-case analysis employed by the Ninth Circuit in secondary materials cases. Once the court takes a step back, moves away from the "waste" requirement, and considers the transaction, the sale of secondary materials is revealed for what it is: a veiled attempt to dispose of hazardous substances and avoid future liability by transmogrifying the principle of the UPD into little more than a loophole. The UPD has a role in the arranger liability analysis, but that role is to protect useful products and not to disguise disposal.

VII. CONCLUSION

The Ninth Circuit's conception of broader arranger liability casts a vast net into the sea of liability, and recent expansions of the scope of liability stretch into the deepest of waters. The useful product doctrine is a necessary tool to constrain this imperialistic march of liability, yet the doctrine started off on the wrong foot. As *Stevens Creek* aptly illustrates,[226] bad facts make bad law, and the time has come for the court to retreat from the "waste" requirement and open up to a new era in the application of the doctrine. By approaching the analysis in a way that looks to the purpose of the transaction and utilizes this purpose to dissect the secondary materials prior to the liability determination, the arranger liability analysis becomes true to CERCLA and fair to the regulated entities.

[226] *Stevens Creek*, 915 F.2d 1355, 1362 (9th Cir. 1990).