Hastings Environmental Law Journal

Volume 19
Number 1 *Winter 2013*

Article 8

1-1-2013

Oil Companies and Their Branded Dealers' Contaminated Gas Stations: The Case for Arranger Liability under Washington's and Alaska's Environmental Cost Recovery Statutes

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I. Introduction

While gas station underground storage tanks ("USTs") are among the most common polluters in this country, in many cases, often the only deep pocket connected with the contaminated site is the oil company (hereinafter the "refiner") that supplied the hazardous product.[1] But refiners rarely face cost recovery lawsuits because CERCLA,[2] the federal statute that provides a private right of action, and most state statutes modeled after CERCLA, exclude petroleum contamination from their reach. The states of Washington and Alaska have no petroleum exclusion in their CERCLA analogs. However, even in these states, conventional wisdom holds that the refiner is only liable if it was an "owner" or an "operator" of the contaminated station. It is the thesis of this paper that, under Washington's and Alaska's environmental cost recovery statutes (and any similar statute that does not exclude petroleum), even a non-owner/operator refiner can be held liable for cleanup costs, as an "arranger."[3]

1. There are four distribution pathways refiners use to get their product to market. In the first two, the refiner owns and operates the gas station as a company store, or owns the real estate and leases it to a dealer, who is obligated to purchase his inventory from the refiner. In these cases, refiner liability under the "owner" (and, in the case of the company store, also the "operator") prong of the statute is undisputed. In the third distribution model, the subject of this paper, a dealer owns and operates the station, and the refiner sells to the dealer through an exclusive supply agreement. The fourth model is distribution via jobbers, a complex fact pattern beyond the scope of this paper.

2. Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601- 9675 (2006).

3. WASH. REV. CODE § 70.105 *et seq.*, ALASKA STAT. ANN. § 46.03.822 (West 2012). Some state tank fund statutes allow the tank fund to pursue cost recovery lawsuits under liability schemes patterned after CERCLA, and thus, could also employ the arranger liability theory advanced in this paper. See, for example, the Indiana and Iowa tank fund statutes that were the subjects of the cases. *Supra* note 66. While private citizens cannot use the tank fund statutes, of course, the availability of a cause of action against deep pocket refiners can ensure that the fund is solvent and able to assist in private cleanups.

Arranger liability[4] is the CERCLA analog of the common law rule that a principal will be held vicariously liable for the torts of its independent contractor, when the work it engages the contractor to perform is abnormally dangerous. The leading case for this proposition is U.S. *v. Aceto Agr. Chemicals Corp.*:[5]

> At issue in this appeal is whether the defendants "arranged for" the disposal of hazardous substances under the Act . . . . [The] defendants could be liable under common law for the abnormally dangerous activities of Aidex acting as an independent contractor, *see Restatement (Second) of Torts* § 427A (1965) . . . . [T]he common law [is] an appropriate source of guidance when the statutory language and legislative history of CERCLA prove inconclusive.[6]

CERCLA defines "arranger" as:

> Any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.[7]

The common law elements are all present in the statutory scheme, with the added requirement under CERCLA, and state analogs, that the

4. That is, arranger liability under the theory advanced in this paper and the cases cited in support. The plain vanilla, non-exotic application of arranger liability makes the generator of hazardous waste responsible for contamination of a facility, usually a hazardous waste dumpsite, to which the wastes are brought for the purpose of disposal. *See e.g.*, Burlington Northern and Santa Fe Ry. Co. v. U.S., (2009) 556 U.S. 599, 611 (citing 42 U.S.C. § 9607(a)(3) in stating that "an arranger . . . [is an entity that] arrange[s] for disposal . . . of hazardous substances."). As with the owner and operator prongs of CERCLA and state analogs, arranger liability has been explored for application to potentially liable persons ("PLPs") with more remote or complex connections to the contaminated facility, including fact patterns other than the one considered in this paper.

5. 872 F.2d 1373 (8th Cir. 1989).

6. *Id.* at 1379; *see also* Matter of Bell Petroleum Services, Inc. v. Sequa Corp., 3 F.3d 889, 895, 897 (5th Cir. 1993) (stating that courts should look to the common-law principles of tort liability for guidance in interpreting the scope of liability in CERCLA cases).

7. 42 U.S.C. § 9607(a)(4) (emphasis added).

potentially liable party ("PLP") "owned or possessed" the hazardous substances. Thus, a PLP may be an arranger when it had a contractual relationship with the operator ("*by contract, agreement or otherwise*"), in connection with which the PLP brought hazardous substances to the operator's facility ("*owned or possessed*"), and contamination ensued. In appropriate circumstances, such a PLP can be said to have "arranged for the disposal," and be held responsible for the cleanup costs. In the arranger liability theory posited in this article, the circumstances giving rise to liability are the principal/contractor relationship between the PLP and the operator, and the abnormally dangerous nature of the work performed under that contract.

In the refiner/dealer case, the contractual relationship is a dealership. The gas station operator, commonly known as a "dealer," is engaged by the refiner to sell its hazardous product to the general public. Selling gasoline at retail is an abnormally dangerous activity because the product can only be dispensed from underground tanks, and (at least in earlier generations of the technology), USTs all too often leak.[8]

The principal is the refiner and the contractor is the dealer. The dealer is liable for the cleanup costs. The refiner shares, vicariously, the dealer's liability, because of the abnormally dangerous nature of the work. That is the common law version of the liability pathway. In the language of arranger liability, the refiner has a contractual relationship with the dealer, in the course of which the refiner's hazardous product contaminates the dealer's gas station. The refiner "arranged for the disposal" because it engaged the dealer to perform a contract it knew was likely to result in disposal.

II. The Four Elements of this Arranger Liability Theory

A. PLP and Operator have a Principal/Contractor Relationship

Not just any contractual relationship between the PLP and the operator will serve. If, for example, Company A buys widgets from Company B, a simple buyer and seller contractual relationship is formed. But, if Company A contracts with Company B to produce special widgets to A's specifications, a manufacture-to-suit contract (the most common fact pattern in the cases discussed in this paper) is formed and a

8. *See*, *e.g.*, Shell Oil Co. v. Meyer, 705 N.E.2d 962, 978 (1998) (agreeing with trial court finding that "underground storage tanks leak despite any known precautions . . . . Contaminant finding its way onto the property of the Landowners has elements of both a trespass and a nuisance and, in addition, is *abnormally dangerous*") (emphasis added).

principal/contractor relationship arises. This is the first leg of this arranger liability case.

B. The Risk of Contamination is "Inherent" in the Work

This element is the analog of the common law requirement of "abnormally dangerous." The cases use the term "inherent"[9] (as in, "inherent in the process") or other words of similar import.[10]

C. The PLP "Owned or Possessed" the Hazardous Substance

This element is a creature of CERCLA, not common law, but it fits the paradigm well. Owner/operator liability pins responsibility on any person who owned or operated the facility at the time of the disposal.[11] With arranger liability, the court looks at the person who brought the hazardous substances to the facility,[12] and the connection that person had to the circumstances of the disposal.[13]

9. U.S. v. Aceto Agr. Chemicals Corp., 872 F.2d 1373, 1379 (8th Cir. 1989) (holding "[Aceto] 'contributed to' Aidex's disposal of wastes . . . [because Aceto] contracted with Aidex to formulate their technical grade pesticides; they retained ownership of the pesticide throughout the process; and *inherent* in the process is the generation of wastes.") (emphasis added); *see also* Levin Metals Corp. v. Parr-Richmond Terminal Co., 781 F.Supp. 1448 (N.D. Cal. 1991).

10. S*ee e.g.*, City of Tulsa v. Tyson Foods, Inc., 258 F.Supp.2d 1263, 1296 (N.D. Okla. 2003) (stating "poultry waste *necessarily follows* from the growing of poultry") (emphasis added); U.S. v. Velsicol Chemical Corp., 701 F.Supp. 140 (W.D. Tenn. 1987) (In holding that "plaintiff's complaint contains allegations that Velsicol and Terminix *arranged* with Arlington Blending for disposal of hazardous substances," the court relied on plaintiff's complaint that "alleges . . . the generation of wastes containing hazardous substances was an *incident of* the formulation and packaging processes") (emphasis added).

11. CERCLA imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any . . . facility at which such hazardous substances were disposed . . . ." 42 U.S.C. § 9607(a)(1).

12. That is, the PLP had possession just before the substance came into the operator's possession, or had responsibility for it (as of that moment) by virtue of ownership —"owned or possessed."

13. A PLP can have multiple connections to the circumstances of the disposal; each a separate, potential arranger cause of action. In addition to the main thesis of this paper, the principal/contractor connection, and the

In the line of authority discussed in this article, the "owned or possessed" element tends to catch PLPs who are in the hazardous substance business and usually, though not always, to exonerate PLPs whose core business is other than hazardous substances. Thus, this element serves to cast the liability net on Congress' intended targets, the parties who can "account . . . in the pricing of their products, for the environmental externalities associated with improper disposal."[14]

When the PLP does not own or possess,[15] the courts sometimes find liability on the second leg alone, the PLP's connection to the circumstances of the disposal. That is materiality/enterprise liability, the last element in the case.

D. Enterprise Liability: The Contract is Material to the PLP's Business

The last element is materiality: the contract performed by the operator is material to the PLP's business. In a similar vein, the cases are often swayed by factors this author thinks of as "enterprise liability," such as lopsided bargaining power or lopsided allocation of benefits in favor of the PLP. This is basic tort law: strict liability reflects a determination that a particular person should bear a particular loss, regardless of fault, because the loss is properly attributed to that person's business.[16] "Thus, an unmistakable purpose behind CERCLA's strict liability standard was to force the parties who *profit* from the use and generation of hazardous wastes . . . to account in the pricing of their products, for the environmental externalities

arranger liability theory briefly discussed in Sections VI and VII below, a refiner PLP is also responsible as an arranger if it spilled product during delivery. *See* Modern Sewer Corporation v. Nelson Distributing, 125 Wn. App. 564, 572, 109 P.3d 11 (2005). Such spillage was apparently not uncommon in mid-twentieth century gas stations, and is thus another avenue to explore in bringing a case against a non-owner/operator refiner. *See e.g.*, Bahrle v. Exxon Corporation, 145 N.J. 144 (1996).

14. J.S. Lincoln v. Republic Ecology Corp., 765 F.Supp. 633, 636 (C.D. Cal. 1991).

15. "Owned or possessed" is not, of course, an issue in the refiner/dealer case; the refiner always owns and possesses, and physically delivers, the substance to the operator's facility.

16. *See* FOWLER HARPER AND FLEMING JAMES, THE LAW OF TORTS,1400 (Little, Brown, 2ed. 1956), *cited in* Bleeda v. Hickman-Williams & Co., 44 Mich. App. 29, 33 (1972) ([T]he chief warrant for vicarious liability must be found in the principle that an enterprise (and its beneficiaries) should pay for the losses caused by the risks which it creates (even without its fault)").

associated with improper disposal."[17] CERCLA's policy is to shift costs "to the parties who benefited."[18]

Materiality is not so much an element of the case as a weighting factor. Materiality is often cited to further justify a court's decision, or, in close cases, to tip the liability scales one way or the other. As one court summarized, "[t]he real question in all independent contractor cases is whether a man may 'farm out' or 'lop off' some of his affairs and escape liabilities in connection with them."[19] Notice, the court used the phrase "some of his affairs," not "a *material* part of his affairs." But by the same token, the more important or profitable the contract is to the PLP, the more appropriate the imposition of vicarious liability.

III. The Cases

A. Chemical Formulators

Where all the elements come together, (i) the PLP and the operator have a principal/contractor relationship, (ii) the work is abnormally dangerous (likely to pollute), *and* (iii) the PLP "owned or possessed" the hazardous substance (i.e., brought it to the facility), there is a group of cases that have a surprisingly common fact pattern. In these cases, the PLP is in the business of manufacturing a hazardous product and engages the operator to carry out a discrete and waste-generating piece of the process. This author found eight cases in all, including and largely led by *Aceto*, the case quoted in the introduction. All held their PLPs liable (or upheld the theory, remanding for more facts), seven on CERCLA arranger liability,[20] one

17. *Republic Ecology Corp.*, *supra* note 14, at 635-36 (emphasis in original).

18. *Sequa Corp.*, *supra* note 6, at 897.

19. Bleeda v. Hickman-Williams & Co., 44 Mich. App. 29, 33 (1972) (*quoting* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.11, 1400**.** To this author's ear, the locution Harper and James were groping for is "fob off" (farm out/lop off), a phrase that captures the essence of this liability theory).

20. *Aceto*, *supra* note 9 (pesticide formulator held liable through arranger liability); Levin Metals Corp. v. Parr-Richmond Terminal Co., 781 F.Supp. 1448 (N.D. Cal. 1991) (pesticide formulator held liable through arranger liability); U.S. v. Velsicol Chemical Corp, 701 F.Supp. 140 (W.D.Tenn. 1987) (chemical formulator held liable through arranger liability); Jones-Hamilton Co. v. Beazer Materials & Services, Inc., 973 F.2d 688 (9th Cir. 1992) (chemical formulator held liable through arranger liability); Mathews v. Dow Chemical Co., 947 F.Supp. 1517 (D. Colo. 1996) (packaging of paint thinner and other products, held liable on arranger theory but operator escaped liability); Morton Intern, Inc. v. A.E. Staley Mfg. Co., 343

under common law. Three of these cases are appellate level CERCLA cases, including one from the Ninth Circuit, *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*[21] The common law case, *Bleeda v. Hickman-Williams & Company*,[22] has an excellent discussion of the policies behind principal/contractor vicarious liability.

In one case without the "owned or possessed" element, but otherwise meeting all other requirements, there was a different result. In *Concrete Sales and Services, Inc. v. Blue Bird Body Co.*,[23] there was no liability for PLPs engaged in non-hazardous-substance-manufacturing businesses, who brought their products to the operator's plant to be electroplated.[24]

B. Industrial Poultry Farming

In a group of cases brought on non-arranger liability theories (thus, no need to meet the "owned or possessed" element),[25] chicken magnate Tyson was held responsible for pollution resulting from the intensive farming practices of its contract poultry farmers.[26]

F.3d 669 (3rd Cir. 2003) (chemical formulator held liable through arranger liability); U.S. v. Mallinckrodt, Inc., 343 F.Supp.2d 809 (E.D. Mo. 2004) (reconditioning of used drums, where contamination originated from the chemical residues in the drums and lead paint on the outside of the drums, held liable through arranger liability).

21. *Jones-Hamilton Co.*, *supra* note 20.

22. 44 Mich. App. 29 (1972).

23. 211 F.3d 1333 (11th Cir. 2000).

24. *Id.* at 1339.

25. Tyson owned the chicks, the feed and the medicines. The farmers owned the waste. The farmers used, sold or gave away the waste for use as fertilizer. *City of Tulsa v. Tyson Foods*, *supra* note 10, at 1273.

26. "The chicken houses have cropped up like weeds since Tyson Foods, the world's largest processor of pork, beef and poultry, brought its industrial farming system to Owensboro in the 1990 . . . . The high concentration of so many animals has contaminated drinking water and fouled the air throughout Kentucky." Organic Connection, http://organicconnection.wordpress.com/category/uncategorized/page/12/ (last visited Oct. 22, 2012) (quoting Krishtine De Lyon, *The Dark Side of Kentucky: Tyson Chicken Houses* (Apr. 12, 2007), *See* Tyson Foods, Inc. v. Stevens, 783 So.2d 804 (Ala. 2000) (vicarious liability for nuisance); City of Tulsa v. Tyson Foods Inc., 258 F.Supp.2d 1263 (N.D. Okla. 2003) (vicarious liability for nuisance); Sierra Club, Inc. v. Tyson Chicken, 299 F.Supp.2d 693 (W.D. Ky. 2003) (finding Tyson to be a "person in charge" under CERCLA and an "operator" under EPCRA).

C. Procurement for a War Effort

The final group of cases also presents a surprisingly common fact pattern, eleven that this writer found, in which the U.S. government contracted for the production of materials needed in a war effort. The government was found liable in two of these cases[27] and lost a motion for summary judgment in another.[28] One case advanced the issue by denying both parties' cross-motions for summary judgment.[29] The government escaped liability in the final seven cases.[30]

The U.S. government, of course, is not in the hazardous substance business, and in most cases did not "own or possess" the chemicals that polluted the war contractors' facilities.[31] But in a few cases, where the materiality/enterprise liability factors were very strong, the courts found liability.

At one end of the spectrum, in the two cases holding the government liable, the war was World War II and the product was a substitute for

27. FMC Corp. v. U.S. Dept. of Commerce, 29 F.3d 833 (3rd Cir. 1994); Cadillac Fairview/California, Inc. v. Dow Chem. Co., 299 F.3d 1019 (9th Cir. 2002) (finding liability on owner, operator and arranger grounds).

28. Elf Atochem North America v. U.S., 914 F.Supp. 1166 (E.D. Pa. 1996) (denying the government's motion for summary judgment on operator and arranger liability in regards to a poison gas manufacturer).

29. Rospatch Jessco Corp. v. Chrysler Corp. 962 F.Supp. 998 (W.D. Mich. 1995) (Korean War case denying cross motions for summary judgment).

30. U.S. v. Shell Oil Co., 294 F.3d 1045 (9th Cir. 2002) (finding no liability in the production of aviation fuel); State of Wash. V. U.S., 930 F.Supp. 474 (W.D. Wa. 1996) (shipyard operator or owner found not liable; arranger liability not argued); East Bay Mun. Dist. v. U.S. Dept. of Commerce, 948 F.Supp. 78 (D. D.C. 1996), aff'd 142 F.3d 479 (1998) (found no liability where the government contracted with mining companies for their zinc output); U.S. v. Iron Mountain Mines, Inc., 881 F.Supp. 1432 (E.D. Cal. 1995); Coeur D'Alene Tribe v. Asarco Inc., 280 F.Supp.2d 1094 (D. Idaho 2003); U.S. v. Vertac Chem. Corp., 46 F.3d 803 (8th Cir. 1995), aff'd 95 F.3d 1148 (Vietnam/Agent Orange cases, no liability); Maxus Energy Corp. v. U.S., 898 F.Supp. 399 (N.D. Tex. 1995) Vietnam/Agent Orange cases, no liability).

31. For example, in one case (FMC *Corp.*, *supra* note 27, at 837), the government assisted the operator in getting needed raw materials (including the polluting substances) through the War Production Board's priority rating system, but did not own the materials. From this author's read of all but *Cadillac Fairview*, the government did not take title to any substances until delivery of the final product.

rubber.[32] In 1942, almost the entire world's supply of rubber was under Japanese control.[33] Calling the scarcity of rubber the "greatest threat to the success of the Allied cause,"[34] the *Cadillac Fairview* court reprimanded the government for contesting liability in the first place, stating "[t]his is a shocking case. The government is trying to take money from firms it conscripted for a critical part of a great war effort."[35]

At the other end of the spectrum are two Vietnam/Agent Orange cases, in both of which the government prevailed.[36] Clearly, Vietnam was no World War II, and Agent Orange was no synthetic rubber. In a particularly uncanny fit, the sole Korean War case saw both sides denied cross-motions for summary judgment, and the court musing that the case fell somewhere between *Vertac Chem. Corp* (Vietnam) and FMC (World War II).[37]

The poultry producer and war-procurement cases also illustrate enterprise liability factors. Tyson had vastly superior bargaining power over its Appalachian poultry farmers[38] and the War Production Board negotiated the FMC contract under threat of seizure. In the two war effort cases where the government was held liable, the government set the prices for the

32. FMC *Corp.*, *supra* note 27, at 836; *see also Cadillac Fairview/California*, *supra* note 27, at 1022.

33. *Cadillac Fairview/California*, *supra* note 27, at 1021, 22 (stating "in 1942, the Japanese had conquered almost all of the world's natural rubber-producing areas in Southeast Asia"; quoting the findings of a committee established by President Roosevelt: "[o]f all critical and strategic materials, rubber is the one which presents the greatest threat to the safety of our nation and the success of the Allied cause"). *See also* "MALAYA" (Warner Bros. 1949), Spencer Tracy and James Stewart smuggle rubber for the war effort. To quote from imperfect memory the line setting up the movie's premise, "An army runs on tires . . . ."

34. *Cadillac Fairview/California*, *supra* note 27, at 1022.

35. *Id.* at 1029.

36. U.S. v. Vertac Chem. Corp., 46 F.3d 803 (8th Cir. 1995), aff'd 95 F.3d 1148 (Vietnam/Agent Orange cases, no liability); Maxus Energy Corp. v. U.S., 898 F.Supp. 399 (N.D. Tex. 1995) Vietnam/Agent Orange cases, no liability).

37. Rospatch Jessco Corp. v. Chrysler Corp. 962 F.Supp. 998, 1005 (W.D. Mich. 1995) (Korean War case denying cross motions for summary judgment). " 'The United States' involvement in the present case falls somewhere in between its involvement in FMC and *Vertac*."

38. " 'These companies seek rural areas where unemployment, or underemployment, is high and people are desperate for ways to stay on the farm,' says Aloma Dew, a Sierra Club organizer in Kentucky." Suzi Parker, *How Poultry Producers are Ravaging the Rural South*, GRIST, http://www.grist.org/article/parker1/ (last visited Sept 9, 2012).

operator's product and some of the raw materials[39] and paid below-market prices for the operator's synthetic rubber patent.[40] Conversely, in many of the war effort cases exonerating the government, the courts noted that the contracts were profitable and eagerly sought by the operators.[41] [42] [43]

IV. The Refiner as an "Arranger"

A. Principal/Contractor Relationship

Where the PLP is the manufacturer and seller of the hazardous substance, the "owned or possessed" element is always satisfied. But there are few cases holding vendor PLPs liable as arrangers (or common-law principals). This is because, in most vendor cases, the relationship between PLP and operator is just vendor/purchaser, not principal/contractor. The operator is the consumer of the product, and, other than agreeing to pay the

39. FMC Corp. v. U.S. Dept. of Commerce, 29 F.3d 833 (3rd Cir. 1994).

40. *Cadillac Fairview/California*, *supra* note 27, 1026. "Dow correctly points out that the evidence showed it shared its patents for amounts well below market rates, accepted a far below market management fee, and lost much of the benefit it might have realized when the government sold the plant to Shell Oil instead of Dow after the war."

Compare the division of spoils between Tyson and the chicken farmers: "It's a system, says the United Food and Commercial Workers, that leaves 71 percent of growers earning below poverty-level wages." Parker, *supra* note 38.

41. Finding the government offered premiums to mining companies to enter into output contracts: East Bay Mun. Dist. v. U.S. Dept. of Commerce, 948 F.Supp. 78, 83 (D. D.C. 1996), aff'd 142 F.3d 479 (1998) (premium price established for all production over quota); U.S. v. Iron Mountain Mines, Inc., 881 F.Supp. 1432, 1436 (E.D. Cal. 1995 ("The government also established the Premium Price Plan as an incentive for the production of copper and zinc; prices were set to encourage maximum production"); Coeur D'Alene Tribe v. Asarco Inc., 280 F.Supp.2d 1094, 1108 (D. Idaho 2003) ("During World War II, the government controlled: the price for the metals via the premium price plan and quota system . . .").

42. U.S. v. Shell Oil Co., 294 F.3d 1045, 1050 (9th Cir. 2002) (finding the avgas contracts "were profitable throughout the war."

43. Operators actively sought the government contracts: U.S. v. Vertac Chem. Corp., 46 F.3d 803 (8th Cir. 1995), aff'd 95 F.3d 1148; Maxus Energy Corp. v. U.S., 898 F.Supp. 399 (N.D. Tex. 1995).

purchase price, nothing in the contract amounts to the operator undertaking to do something for the PLP's benefit.[44]

A vendor/purchaser relationship rises to the level of principal/contractor when the operator purchases, not for his own consumption, but for resale, as an exclusive dealer in the PLP's hazardous product. The operator is then essentially the PLP's sales agent.

This author has had the opportunity to review a few refiner/dealer agreements,[45] and they amply demonstrate the principal/contractor nature of the relationship. The dealer is not just buying a product, free to do whatever he wishes with it. Rather, using Exxon's form as an example:[46] (i) the dealer may only resell the merchandise from one specified gas station; (ii) the dealer covenants to operate the station for "reasonable hours"; (iii) the dealer covenants to "diligently promote" the dealer's products; and (iv) as typical of a true franchisor/franchisee relationship, the refiner imposes operating standards on the dealer, inspects for compliance, maintains training programs for dealers, etc. Most significantly, the dealer commits to buy from the refiner exclusively,[47] typically for a term of ten years or more.[48]

44. *E.g.*, Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988) (PLP manufactured a chemical used in the treatment of the operator's lumber products).

45. The exclusive supply agreement is, of course, the contract that forms the basis of the refiner arranger case, as in "*arranged by contract*, *agreement* or otherwise." 42 U.S.C. § 9607(a)(4) (emphasis added), *supra* note 7.

46. Exxon's supply agreement and related documents can be found online, in pleadings posted to facilitate the administration of a class action lawsuit brought against Exxon by its dealers, Allapattah v. Exxon Corp, Case No. 91-0986-Civ-Gold (S.D. Fla). *See*, EXXON DEALER CLASS ACTION WEBSITE, www.exxondealerclassaction.com, (last visited Sep. 9, 2012) and a related website, EXXON DEALER CLASS ACTION WEBSITE, http://cert.gardencitygroup.com/docketview/fs/admin (last visited Sep. 9, 2012). At the latter site is a link entitled "Docket," Entry 99, 71-77 of which is Exxon's file on one of its dealers, Tops Petroleum, including the exclusive supply agreement. Entitled simply "Sales Agreement," it can be found at http://www.cert.gardencitygroup.com/docketview/sync/pdf/07-18-05%20(3).pdf,.

47. Probably for anti-trust reasons, the refiner cannot require the dealer to carry its brand exclusively, so the supply agreement typically only requires the dealer to carry certain minimum stocks of the refiner's brand (e.g., 50%, or a certain number of pumps). As a practical matter, once the dealer is ordering from the refiner, the refiner will get all or most of the dealer's business.

48. For example, the supply agreement between Exxon and Tops Petroleum, a dealer who owned its station, was ten years in length and, from an internal memorandum also posted with the *Allapattah* filing, it appears that a fifteen-year term had originally been considered. Entitled "MK-9 Proposal," this memo appears in the Tops Petroleum file posted on the *Allahpattah* website. *See* EXXON DEALER CLASS ACTION WEBSITE, *supra* note 46, AT 95. *See also* Testimony of Dennis C. DeCota, Executive Director of the California Service Station and Automotive Repair Association before [US Senate] Joint Economic Committee, Chairman: Charles Schumer regarding *Is Market Concentration in the U.S. Petroleum Industry Harming Consumers*?, at 12 (May 23, 2007). The California Gasoline Crisis: *Dealers who purchase their land and improvements in metropolitan markets must sign long-term supply agreements for ten to fifteen years and are forced to give the oil companies the first right of refusal if they choose to sell*, *available at* http://www.jec.senate.gov/archive/hearings/05.23.07%20 Oil%20Industry%20Consolidation/Testimony%20-%20DeCota.pdf.

By comparison, when the refiner owns* the real estate and leases to a lessee-dealer, the refiner keeps the term of the lease and accompanying supply agreement short. *See*, *e.g.*, FTC v. Texaco Inc., 393 U.S. 223, 227 (1968) ("These dealers typically hold a one-year lease on their stations, and these leases are subject to termination at the end of any year on 10 days' notice . . . . The contract under which Texaco dealers receive their vital supply of gasoline and other petroleum products also runs from year to year and is terminable on 30 days' notice under Texaco's standard form contract.")

So prevalent was the practice of refiners keeping lessee-dealers on short-term deals, among the reforms instituted by the PMPA, refiners are now required to give their lessee-dealers lease terms of at least three years. "We used to have 90-day leases and when the PMPA law [Petroleum Marketing Practices Act, 15 U.S.C. sections 2801 et seq.], the federal law, came on board, they [were] required to offer us 3-year leases." Minutes of the Senate Committee on Commerce and Labor, Sixty-ninth Session (June 10, 1997). This pattern, short leases for lessee-dealers, long supply agreements for dealers who own their stations, was also reported in CA Atty General Bill Lockyers's May 2000 *Report on Gasoline Pricing in California*, *available at* http://oag.ca.gov/news/press-releases/attorney-general-lockyer-issues-report-gasoline-pricing-california: "According to members of the Task Force, approximately 70 percent of California retail stations are operated under station lease agreements with a major California refiner. Such dealers are known as 'lessee-dealers.' These leases are typically predicated on supply agreements, with a three-year term, that require the lessee dealers to purchase their gasoline supplies exclusively from their branded refiner. . . . A large portion of . . . independent dealers enter into 'branding arrangements' with a refiner or a branded jobber that allow them to sell a refiner's particular brand. These contracts typically have terms of at least three years, Thus, the refiner engages the dealer to operate a gas station for a term of ten or more years, so that the refiner will have a guaranteed outlet for the sale of its product. The agency picture is completed with the refiner's name, logo and trade dress prominently displayed all over the station, on the pole sign you can see from the freeway. In the Leave-it-to-Beaver world of the mid-20th century, the dealer wore the refiner's uniform.[49] In two of the chemical-formulator arranger cases, the operator packaged the PLP's product for sale to consumers.[50] The branded gas station is the refiner's consumer packaging.

B. Materiality/Enterprise Liability

Gasoline has its challenges. It is a consumer product, so it requires sales outlets in neighborhood shopping districts. As a practical matter and general rule, a gas station can only carry one refiner's brand at a time, so every refiner in a given market has a gas station all to itself. And of course, gasoline can only be sold from facilities that are inherently dangerous to the

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and some members of the Task Force noted that branding agreements may have terms as long as 10 years." Thus, a clear pattern emerges: when the refiner controls the real estate, it keeps the dealer on a short leash. When the dealer controls the real estate, the refiner seeks a meaningful relationship.

*Using the term "ownership" here in its CERCLA sense, to include a leasehold estate. Delaney v. Town of Carmel, 55 F.Supp.2d 237, 258-59 (S.D.N.Y. 1999) ("The owner of a leasehold of a CERCLA facility may be liable as an owner of that facility.") United States v. A & N Cleaners & Launderers, Inc., 788 F.Supp. 1317, 1332-34 (S.D.N.Y 1992); United States v. South Carolina Recycling and Disposal, Inc. 653 F.Supp. 984, 1002-03 (D.S.C. 1984), *aff'd in part, vacated in part sub nom.*, United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988). *See* Commander Oil Corp., v. Barlo Equipment Corp., 215 F.3d 321 (2000) (2nd Cir.), for circumstances under which a lessee/sublessor was held not to be an "owner" for CERCLA liability. Thus, where the refiner leases the station site from a third party, it subleases to the dealer, and all three are likely considered "owners."

49. You could trust your car to the man who wore the [big, red Texaco] Star.

50. US v. Velsicol Chemical Corp., 701 F.Supp. 140, 141 (W.D. Tenn. 1987) ("[T]he plaintiff alleges that the defendants arranged for Arlington Blending to formulate and package pesticides containing hazardous substances.") Mathews v. Dow Chemical Co., 947 F.Supp. 1517, 1519 (D. Colo. 1996) ("The Thoro property was used as a terminal facility for the packaging, storage and shipment of various cleaning solvents, antifreeze materials, paint thinner, and other hazardous substances").

environment. If Lex Luthor had schemed to contaminate every prime retail corner in the country, he could hardly have devised a more diabolical plot than cars, Americans, and USTs.

However, there is no other way to sell gasoline at retail. These dedicated retail outlets, gas stations,[51] whether the refiner controls them through ownership or exclusive supply agreements,[52] are critically important to the refiner. Sales are a simple and direct function of the number and quality of branded stations the refiner controls.[53]

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51. Exxon calls them "secure and ratable outlet[s]" in its 2007 annual report (*supra* note 53) and "retail stores" in its internal memoranda. *See* EXXON DEALER CLASS ACTION WEBSITE, *supra* note 46. That is, "retail stores" as in "Retail Store No. 4-0135." Like all companies in the retail business, Exxon keeps track of its "retail stores" with a numeric tracking system. It is clear from the *Allapattah* documents that this tracking system makes no distinction between stores that Exxon owns and leases to lessee-dealers, and dealer-owned stores that Exxon controls through exclusive supply agreements. While it could not be discerned one way or the other from the *Allapattah* filings, it seems logical that Exxon maintains the same numeric tracking system for its company-owned and –operated stores as well.

52. A case can also be made for treating the exclusive supply agreement as an ownership interest in the dealer's facility. It is, for all intents and purposes, a restrictive covenant that binds that property to serve as an exclusive outlet for the sale of the refiner's product. Certainly, the refiner achieves the same benefit through the supply agreement that it gets from owning the stations that are operated as company stores, or leased out to lessee-dealers with exclusive supply agreements, namely, dedicated outlets for its product. This is a particularly viable argument under Washington's definition of "owner," a person having "*any* ownership interest" in the facility. RCW 70.105D.020(17)(a) (Emphasis added). In one supply agreement that this author had the opportunity to review, where the dealer owned the real estate (had fee title), the refiner required the dealer to give it a right of first refusal if the dealer chose to sell the property. A good argument can be made that a right of first refusal is also an ownership interest.

53. ExxonMobil, for example, boasts of the "secure and ratable outlets," 32,000 branded gas stations as of its 2007 Annual Report, that allow it to "capture the highest value for our refined molecules." EXXON MOBILE CORPORATION, 2007 SUMMARY ANNUAL REPORT 30, *available at* http://www.exxonmobil.com/corporate/files/news_pub_sar_2007.pdf:

Fuels Marketing provides a secure and ratable outlet for our refineries . . . We continue to leverage integration with our refining business across our four Fuels Marketing business lines. Downstream cross-functional teams

Thus, the refiner/dealer case has materiality. As for the other factors that tip the liability scales, such as lopsided bargaining power and allocation of benefits, Peak Oil and other circumstances have led to record profits in the oil industry.[54] But it doesn't take an expert witness to figure out, as between the refiner and the dealer, which party has reaped the benefits. The refiner sets the wholesale price the dealer pays, daily, in the refiner's sole discretion. For one piece of anecdotal evidence[55] that caught this author's eye:

> Every time Sohalia Rezazadah rings up a sale at her Exxon station in the Oakton section of Fairfax, VA, her cash register sends the information to Exxon Mobil's central computers. If she raises the price of gasoline a couple of pennies, chances are that Exxon will raise the wholesale price she pays by the same amountFalseJerry Daggle owns five Exxon stations in Northern Virginia, and even though they have different competitive conditions and prices, "Exxon magically lets me make about 8 cents a gallon" at each one, he said.[56]

focus on optimizing product placement across the broad spectrum of customer segments to capture the highest value for our refined molecules.

54. Businessinsider.com, *Oil Company Profits to Blow by Last Year and It's not Just Because of Soaring Crude Prices*, http://www.businessinsider.com/oil-profits-exxon-22011-4 and *Oil Profits Likely to Impress*, WALL STREET JOURNAL (Apr. 24, 2011), *available at* http://online.wsj.com/article/SB10001424052748704071704576277523933629728.html.

55. Steve Mufson, *Peeved at Prices? Don't Blame the Dealer*, WASH. POST (May 25, 2008), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/05/24/AR2008052401961.html.

56. *Id.*; Possibly, due to industry consolidation and other factors, refiners have more power over their dealers today than ever. However, the practice of treating dealers as little more than commissioned sales agents goes way back. In earlier service station days, products such as tires, batteries, and automotive accessories ("TBA") were often carried as a secondary line of merchandise and services at service stations. In the 1940s, some of the oil companies got together with tire manufacturers to work out a mutually beneficial deal. The oil company got a 10% commission on all TBA sold at the refiner's branded stations, and the tire manufacturer got its sales boosted. And while the oil companies insisted that their dealers were free to carry any brand of TBA they chose, TBA deals earned oil companies several million in commissions before the FTC put the kibosh on it, in the early 60s. *See, e.g.*, FTC v. Texaco, Inc., 393 U.S. 223 (1968), *supra* note 48; Atlantic Refining Co. v. F.T.C., 381 U.S. 357 (1965); Shell Oil Co. v. F.T.C, 360 F.2d 470 (5th Cir. 1966).

This is an appropriate point to mention the elephant in the room, that this is the most profitable industry in the history of the world, whose product has left a trail of waste in its path. And yet, due to CERCLA's petroleum exclusion, the oil companies have largely escaped liability. At least in the States of Washington and Alaska, that does not have to be the case.

C. Inherent Risk/Abnormally Dangerous Activity

This article will not spend too much time discussing whether the inherent risk/abnormally dangerous element can be proven. For the time period in which the worst UST leaks occurred, pre-LUST,[57] it should be easy to demonstrate that USTs leaked more often than not, and the oil industry was well aware of the fact. In fact, there is one case holding that operating a gas station UST in the 1960s – 80s was indeed an abnormally dangerous activity, because of USTs' propensity to leak, for the purpose of making a refiner share vicariously the liability of the independent commissioned driver it engaged to make deliveries.[58]

D. The Counter-Arguments

The more traditional defenses to exotic arranger liability theories are considered at length below. This section addresses an anticipated argument distinguishing the *Aceto* line of cases (the chemical formulators) from the refiner/dealer case. There is one fact in the *Aceto* line of cases not shared by the refiner/dealer case. In *Aceto*, the PLP retained ownership of the hazardous substance after delivery to the operator's facility.[59] Thus, the PLP owned the substance when it suffered its unfortunate disposal.[60] In the

57. LUSTs ("Leaking Underground Storage Tanks") are state programs that set standards for underground storage tank construction and leak detection, enacted pursuant to the federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1976) (amended 1978).

58. Shell Oil Co. v. Meyer, 705 NE.2d 962, 978 (Ind. 1998) (filling the USTs was held to be a "daily operation of the facility" within the meaning of that state's tank fund statute, so the driver was liable as an operator, and the refiner was vicariously liable).

59. "Plaintiffs allege defendants owned the technical grade pesticide alleged to be a "hazardous substance" under CERCLA, the work in process and the resulting chemical grade product; that is, the defendant retained ownership of its pesticide throughout the formulation and packaging process." *Aceto*, *supra* note 9, at 1378.

60. *Aceto*, *supra* note 9, at 1373.

refiner/dealer case, title to the hazardous product passes to the dealer when delivery is made. But this is a weak distinction at best.

First, we are interpreting a statute in which "owned *or* possessed hazardous substances" is a specific element of the liability case.[61] Under the statute, the PLP does not have to have ever owned the substances, let alone, be the owner at the time of the disposal.

It is also clear that the "owned or possessed" element applies at the moment the substance is delivered by the PLP to the facility, not at the time of disposal. This is especially clear in the Washington statute's definition of "arranger," "any person who owned or possessed a hazardous substance and who . . . arranged for disposal of the hazardous substance at the facility . . . ."[62] There is an understood, elided "then" or "thereafter" in that locution: "any person who owned a substance and [*then*] arranged for disposal . . . ."[63] Furthermore, logically, "owned or possessed" cannot mean as of the time of disposal, because the PLP cannot possibly be in possession then, the substance is physically at the operator's facility.

While the *Aceto* line of cases often attaches importance to the fact that the PLP owned the hazardous substance, this does not make ownership an element of the liability case. It is not an element of the common law principle/contractor case; vicarious liability is not limited to cases where the contractor works on something the principle owns.[64] Rather, ownership is only one piece of evidence that may be advanced to prove the materiality of the contract to the PLP's business. Materiality can be demonstrated in many different ways.[65]

61. 42 U.S.C. § 9607(a)(4) (emphasis added), *supra* note 7.

62. WASH. REV. CODE § 70.105D.040(c) (West 2012). *See infra* Section VIII (Washington's statutory language, and the case law thereunder, are discussed more fully).

63. *Id*.

64. *See* RESTATEMENT (THIRD) OF TORTS § 55.

65. Facts demonstrating materiality in these cases (in addition to ownership of the product) are typical of a manufacture-to-suit contract, *e.g.*, the principal provides detailed specifications for the work and inspects for quality. In FMC Corp. v. United States, 786 F.Supp. 471 (E.D. Pa. 1992), the government actively assisted the contractor in many ways, including procurement of scarce materials and labor, to the extent of mediating labor disputes at the plant and setting up another operator to supply a needed raw material. That the principal owned the substance on which the operator performed its work is simply in the nature of the contract the operator was engaged to perform.

V. Reported Refiner/Dealer Cases

As CERCLA and most state analogs exclude petroleum contamination, there are only a handful of reported cases considering statutory refiner liability for contaminated gas stations. There are a handful of tank fund cases that, despite vigorous prosecution, only argued "owner/operator" liability and did not present an arranger liability theory.[66] However, there are two cases, decided under common law theories, which are right on point.

The first of these cases[67] held that one refiner defendant did not have sufficient control over the dealer to merit vicarious liability for trespass. However, a second refiner defendant, which, for a period of time, supplied the dealer on a consignment basis, was held liable.[68] What is significant is, the court apparently thought the consignment dealer's liability was so self-evident, it did not even merit a discussion.[69] Consignment is, of course, the dealer acting very literally as the refiner's sales agent.[70] The court simply failed to see that the same thing is going on in the more standard refiner/dealer relationship, the dealer is essentially the refiner's sales agent. Certainly, the consignment refiner exercised no more control over the dealer, in any relevant respect, than did the refiner defendant who had a more traditional supply relationship with its dealer.

In the second case, the plaintiffs in *Bahrle v. Exxon Corp.* argued that refiner defendants should be held vicariously liable as principals responsible for an abnormally dangerous activity carried out by an independent contractor.[71] This is the exact theory posited here. One defendant, Texaco, which had supplied the contaminated station through a

66. *See Meyer*, *supra* note 8; Shell Oil Co. v. Lovold Co., 705 N.E.2d 981 (Ind. 1999); Kaghann's Korner, Inc. v. Brown & Sons Fuel Co., Inc., 706 N.E.2d 556 (Ind. 1999); Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp., 606 N.W.2d 359, 362 (Iowa 2000).

67. JBT/Twinbrook Metro Ltd. P'ship v. Wheeler, 346 Md. 601 (Md. 1996).

68. *Id.* at 627.

69. *Id.*

70. "Consignment" is defined as: "Trading arrangement in which a seller sends goods to a buyer or reseller who pays the seller only as and when the goods are sold. The seller remains the owner (title holder) of the goods until they are paid for . . . ." BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/consignment-sale.html (last visited Oct. 22, 2012).

71. 145 N.J. 144 (1996).

jobber, was held not liable.[72] The court's decision to let Texaco off the hook provides a tantalizing negative pregnant for our case:

> Plaintiffs' claim against Texaco fails for the basic reason that they have failed to prove that Texaco hired Rule [the dealer] as an independent contractor. Except for the three- to six-month period during the early 1970s when Texaco supplied Rule with gasoline, Rule had no direct relationship with Texaco. Rule dealt exclusively with Kalsch-Forte [the jobber]. A contractual relationship existed between Rule and Kalsch-Forte, not between Rule and Texaco.[73]

That is, no vicarious liability because no direct principal/contractor relationship in a jobber-supplied station.[74] Meanwhile, defendant Exxon, which did have a direct supply contract with the *Bahrle* dealer, settled out of the case early.[75]

There are few reported CERCLA cases analogous to the refiner/dealer case, because there are few consumer products that are both hazardous and dispensed from leaky facilities, such that the dealer's store gets contaminated. The closest this author knows of are two cases considering a refiner's liability for the disposal of used motor oil collected by dealers performing oil change services. In *General Elec. Co. v. AAMCO Transmissions, Inc.*,[76] the court found the refiner not liable as an arranger, noting that the

72. *Id.* at 155.

73. *Id.*

74. The jobber-supplied station is a complex case that is outside the purview of this paper. However, there may be a pathway to arranger liability that is much stronger than the common law case. The arranger liability theory discussed briefly below in Sections VI and VII, breach of the refiner's affirmative duty of care, may serve to bring into the liability net even refiners employing this most insulated distribution model.

More and more, oil companies choose the jobber distribution model, in order to afford themselves all the benefits of controlling retail outlets, while avoiding the responsibility that comes with ownership. The court in *Meyer* acknowledged that refiners use jobbers specifically to avoid liability. *Supra* note 8, at 978. However, far from being shocked, the court congratulated the oil industry on the success of the maneuver. *Id.* "In the 1960s Shell and many other major oil companies apparently sought to limit their exposure to liability by introduction of the jobber into the distribution chain . . . . [W]e conclude that this effort was largely successful." *Id.*

75. *Bahrle*, *supra* note 71, at 148.

76. 962 F.2d 281 (2nd Cir. 1992).

refiner did not require the dealer to offer oil change services to the public. That fits the paradigm: If the refiner does not require its dealer to do oil changes, then there is no principal/contractor relationship with respect to the refiner's motor oil product. In the case of *United States v. Arrowhead Refining Co.*,[77] the court said that there would be no liability even if the refiner did so require its dealers to do oil changes, because the oil change business provided more benefit to the dealer than to the refiner.[78] And there you have materiality/enterprise liability factors resulting in a defense verdict.[79]

VI. Control is Not an Element of the Arranger Case

A continuing source of frustration for this author is the Environmental Bar's determination to make all remote PLP cases about exercising control over the operator.[80] It is apparently inconceivable to practitioners in this field that remote liability can be based on anything other than exercising control, and they believe this makes for good policy.

To any defendant insisting that no remote arranger case can be made, absent the exercise of control over the operator, there are two ready responses. First, the "operator" prong of the cost recovery scheme already captures remote PLPs that exercise control.[81] Under basic rules of construction, if a statute covers one concept with a particular term and definition (operator liability), and then introduces a second concept with a different term and definition (arranger), two different things are intended.[82] Second, *Aceto* and its progeny comprise a significant body of case law imposing arranger liability for reasons other than exercise of control.[83]

77. 829 F.Supp. 1078 (D. Minn. 1992).

78. *Id.* at 1093.

79. *Id.* at 1094.

80. By "remote PLP," this author means a PLP who does not occupy one of the automatic liability roles, like direct ownership or operation, but rather has some connection to the owner, operator, or facility.

81. This is expressly incorporated into Washington's definition of operator as "any person . . . who exercises any control over the facility." WASH. REV. CODE § 70.105D.020(17)(a) (West 2012).

82. "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

83. *Aceto*, *supra* note 9.

But because this axiom has become so ingrained in the conventional wisdom, and because broad statements can be quoted from too many loosely written opinions,[84] a more developed response is merited.

A. Control as a Governing Liability Principle is Bad Policy

Control as a governing liability principle in remote PLP environmental cases is sadly pervasive. Thus, for example, in the case of *Moses Lake*, a federal court interpreting Washington's cost recovery statute, the court makes blanket statements such as this one (purporting to show the difference between operator liability and arranger liability):

The well-settled rule is that 'operator' liability only attaches if the defendant had authority to control the cause of the contamination . . . . With regard to 'arranger' liability, the relevant question is 'control' over 'disposal' arising from something other than the 'operation' of a facility, for example, by way of some contractual relationship or transaction.[85]

Even *Aceto* loses its footing here, dismissing a defendant's control argument based on a previous arranger case decided by that court, by asserting that the *Aceto* PLP's ability to control the operator could be "inferred" from its ownership of the product the operator was working on.[86]

Such pronouncements do real harm. With overbroad language like that quoted from *Moses Lake* and *Aceto* informing the conventional wisdom, environmental lawyers typically advise their clients to have nothing to do with another company's environmental compliance practices, because the client could end up with liability if things go wrong; whether or not its input was helpful or hurtful, whether or not the harm could have been prevented in the first place.[87] "[A]voidance of this liability is precisely the reason that major oil producers today check everything at a station except the USTs . . . ."[88] When case law and commentary lead parties with UST expertise to go out of their way not to assist their less sophisticated dealers, as an

84. *See, e.g.*, *Burlington Northern*, *supra* note 4 (language quoted at note 111 below).

85. *City of Moses Lake v.* U.S., 458 F.Supp.2d 1198, 1225-29 (E.D. Wash. 2006). Among other criticisms one might level at this statement, the court distinguishes operator control from arranger "control" by putting quotation quotes around the word in one usage but not the other, and quote marks around arranger "disposal" but not operator disposal. Distinguishing one descriptor from the other with nothing other than punctuation is, this author suggests, not persuasive argument.

86. *Aceto*, *supra* note 9, at 1382.

87. *Lovold Co.*, *supra* note 66, at 980.

88. *Id.*

industry-wide phenomenon, this hardly furthers the goal of protecting the environment.

Such has been the unfortunate result of the Environmental Bar's obsession with control, its determination to make control the *sine qua non* of all remote PLP cases. Persons who might otherwise influence the environmental practices of others for the better have been advised to keep hands well off.[89]

The challenge to crafting a workable liability rule is that environmental harm is sometimes preventable and sometimes not. Legislatures and courts want to craft the law so as to encourage prevention as much as possible, while still imposing responsibility on a strict liability basis where merited. It can be done. The common law has this all figured out.

B. Control as a Governing Liability Principle is Bad Law

Let's start with the statutory framework. Under arranger liability, a person who "owned or possessed" a hazardous substance (for short, we'll refer to him as an "owner/possessor") cannot just hand off possession or title to a third person, the operator, and be free of further responsibility for the substance. If the arrangement between owner/possessor PLP and operator is for the express purpose of disposing of the substance, the PLP is strictly liable for any mishap that subsequently occurs, even if disposal at the operator's facility was legal and entirely responsible. That's the basic iteration of arranger liability, an arrangement for the express purpose of disposal.[90]

The tougher calls are when an inadvertent disposal occurs at the operator's facility. This is where the common law comes in handy.

This article looks at one liability pathway based on common law, principal/contractor liability for an abnormally dangerous activity. There is no question that control is not an element of this liability case under the common law: while the general rule does predicate liability on the principal's control over the contractor,[91] abnormally dangerous activity is

89. In-house with a large financial institution in the late-80s, this author witnessed firsthand this conventional wisdom take hold in the real estate lending bar. Sharman Braff, *The Lender as Environmental Policeman: Comment on EPA's Draft Lender liability Rules*, 5 TOXICS L. REP. at 1429 (Apr. 10, 1991)].

90. In the next section, we will rebut the argument that express intent to dispose is the only proper basis for arranger liability.

91. *See* RESTATEMENT (THIRD) OF TORTS §§ 55 and 56. "An actor who hires an independent contractor for an activity creating a risk of physical harm is subject to liability for physical harm when the actor's negligence is a factual cause of any such harm within the scope of liability, subject to the duty

one of many well-established exceptions.[92] It is also well-established that this is a strict liability case, responsibility lies without regard to fault on the part of principal or contractor, due to the abnormally dangerous nature of the activity: the harm is likely to occur despite all due precautions.

Application of common law tort principles also serves to bring reason and sense to other inadvertent-disposal arranger cases.[93] In this author's very limited review of such arranger cases, the common law principles often align with the court's decision and reasoning, if not always its express language. These cases often come down to the most basic tort principle of all: Did the defendant, under the circumstances of that case, owe a duty of care?

Through this common law tort prism, for example, the case of *Moses Lake*, with its otherwise confounding language, makes sense. We dismiss the court's unhelpful control-premised liability rule, quoted above. *Moses Lake* later goes on to say that the relevant inquiry is whether the PLP "reasonably could have done something to prevent the resulting contamination, or to have corrected the same as soon as possible."[94] Basic, tort law duty of care. And indeed, the *Moses Lake* ruling turns on whether the PLP was at fault in the design of the equipment and system that allowed hazardous substances to be released into the environment.[95]

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limitation in Section 56. *Id.* at § 55. "As to work entrusted to an independent contractor, the actor owes a duty of care only with respect to any part of the work over which the actor has retained control." *Id.* at § 56.

92. "An actor [principal] who hires an independent contractor to do work that the actor knows or should know involves an abnormally dangerous activity is subject to vicarious liability for physical harm when the activity is the factual cause of any such harm within the scope of liability." *Id.* at § 59.

93. While somewhat off-topic for this article, a short digression, is helpful to further inoculate our refiner/dealer plaintiff from this anticipated counter-argument.

94. *Moses Lake*, *supra* note 85, at 1234.

95. The court found a question of fact as to the PLP's culpability, sufficient to defeat a motion for summary judgment. *See e.g.*, *Moses Lake*, *supra* note 85, at 1234: "While Lockheed designed the layout of the equipment in the MAMS facility and installed the equipment, there is no conclusive, undisputed evidence establishing that release of TCE waste into the ground was inherent in the operation of the equipment at the MAMS facility. There is no conclusive, undisputed evidence that Lockheed knew there was some kind of defect in the plumbing in the MAMS facility which would allow TCE waste to end up in the ground; that it knew the plumbing led to unlined ditches and pits that leached to the ground; or that it knew of or had the power to "control" TCE waste being poured down drains, showers and eye wash stations, ultimately being discharged to the ground, as

In similar fashion, inadvertent-disposal arranger cases such as NEPACCO,[96] *Berg*,[97] and *Modern Sewer*[98] can best be reconciled with logic and good policy by characterizing them as cases that turn on, not whether the PLP exercised or had the ability to exercise control over the operator, but whether the PLP had an affirmative duty of care in the circumstances of that case, and properly discharged the duty.[99]

As a final gloss on this side trip into non-principal/contractor arranger cases, it is also well to note that many inadvertent disposal cases entertain, and sometimes result in liability verdicts against, non-owner/possessor PLP defendants. This is a particularly broad interpretation of arranger liability, dispensing with the statutory element of "owned or possessed." (As noted in the discussion of the state statutes in Section VIII below, Washington's statutory language expressly invites this broader casting of the arranger liability net.) For purposes of the mission of this article, making the case for refiner/dealer liability (in which "owned or possessed" is not an issue, this element is indisputably satisfied), this observation is one more distinction to ward off refiner defendants who might throw out control-riddled case language in their defense. As *Aceto* notes in dismissing its own defendant's attempt at such an argument, its previous ruling in the NEPACCO case applied arranger liability to "those who had the authority to control the disposal, *even without ownership or possession*."[100]

The next section discusses at length the recent Supreme Court case of *Burlington Northern*. The purpose of that discussion is to rebut the argument that arranger liability can never apply to an inadvertent disposal. Among

opposed to some holding tank. There is no conclusive, undisputed evidence that Lockheed designed the plumbing system."

96. Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Company, Inc., 842 F.2d 977 (8th Cir. 1988) (sometimes referred to as "NEPACCO").

97. Berg v. Popham, 113 P.3d 604 (Alaska 2005)

98. Modern Sewer Corp. v. Nelson Distrib., Inc., 125 Wash. App. 564 (2005). In *Modern Sewer*, the PLP inadvertently pumped fuel into the groundwater, mistaking a monitoring well for a UST fill pipe.

99. *See, e.g.*, this explanation of the NEPACCO case in U.S. *v.* Shell: "However, we believe that the Oil Companies' conception of "authority to control" is based on an incorrect reading of NEPACCO. In NEPACCO, there was actual control exercised by vice-president Lee, who gave permission to the plant supervisor to dispose of the waste at the farm . . . . Moreover, an analogy to NEPACCO misses the essence of that case: The court in NEPACCO held officers of a bankrupt company liable for an actual misdeed of that corporation." U.S. *v.* *Shell Oil Co.*, *supra* note 30, at 1057.

100. *Aceto*, *supra* note 9, at 1382 (emphasis added).

other things, the analysis of *Burlington Northern* will draw on the thesis posited in this section. In this author's opinion, the *Burlington Northern* case is a prime example of a court applying common law tort principles to decide an inadvertent arranger liability case, even though such principles are never expressly named or acknowledged in the opinion.

VII. Didn't *Burlington Northern* Kill Exotic Arranger Liability Theories? (The "Useful Product/Intent to Dispose" Defense)

The argument against creative applications of arranger liability usually centers on the related concepts of "useful product" and "intent to dispose." Under this interpretation, a PLP can only be an arranger with respect to a contaminated facility if it brought hazardous substances to the facility specifically in order to dispose of them.[101] The argument is sometimes articulated as "there can be no disposal liability when the substance brought by the PLP to the facility was not hazardous waste when delivered, but rather a 'useful product.' "[102]

In an 8 to 1 decision, the U.S. Supreme Court in *Burlington Northern* overturned a Ninth Circuit decision imposing arranger liability on a chemical manufacturer for its customer's contaminated facility.[103] The PLP manufactured and sold pesticides to an operator in the business of aerial spraying for farm clients.[104] Among other things, the chemicals were stored in large tanks that leaked.[105] Despite the happy result for the defendant, *Burlington Northern* did not establish "useful product/intent to dispose" as an absolute defense to arranger liability.[106] To the contrary, the Supreme Court carefully limited its ruling to the facts of the case before it, explaining that "the determination whether an entity is an arranger requires a *fact-specific inquiry* that looks beyond the parties' characterization of the transaction as a 'disposal' or a 'sale,' and seeks to discern whether the arrangement was one

101. The argument is, the word "arrange" connotes intentionality—"intent to dispose"—in its common dictionary definition. This author finds the counter-argument more persuasive, that the term "disposal" is defined in the statute to include unintentional releases. See discussion in *Burlington Northern*, *supra* note 4, at 612.

102. *Burlington Northern*, *supra* note 4, at 610-612; *see also* discussion of *Seattle City Light* and *Modern Sewer* in Section VIII, below.

103. *Burlington Northern*, *supra* note 4, at 599.

104. *Id*. at 602-04.

105. *Id*. at 604.

106. *Id*. at 612.

Congress intended to fall within the scope of CERCLA's strict liability provisions."[107]

The Court's "fact-specific inquiry" revealed that the *Burlington Northern* spills were largely the operator's fault, due to "sloppy" housekeeping, and that Shell, the PLP defendant, had made substantial efforts to help its customer handle the product responsibly.[108] The facts cited as "not supporting liability" were:

> [T]hat Shell took numerous steps to help its distributors *reduce* the likelihood of such spills, providing them with detailed safety manuals, requiring them to maintain adequate storage facilities, and providing discounts for those who took safety precautions . . . . Although Shell's efforts were less than successful, *given these facts*, Shell's mere knowledge that spills and leaks continued to occur is insufficient grounds for concluding that Shell "arranged for" the disposal . . . .[109]

Thus, the *Burlington Northern* PLP avoided arranger liability because it took affirmative steps to help the operator prevent spills. Not because the hazardous substance was a useful product when delivered, and not because arranger liability can never apply to anything but a literally intentional disposal. Had it been the Court's intention to adopt "useful product/intent to dispose" as an absolute defense, *Burlington Northern* would have been the perfect opportunity to so rule. That the Court did not take this step is especially apparent in Justice Ginsburg's dissent. If the majority had just made "useful product/intent to dispose" the law of the land, a dissenting opinion would have laid out the arguments against such a rule. Justice Ginsburg mentions no such disagreement with the majority.[110] Rather, she based her dissent on very specific facts; facts that tended to show culpability on the PLP's part (the PLP required the operator to take delivery of, and thus store, the product in large tanks that leaked),[111] just as the majority opinion highlighted facts that showed the PLP acting responsibly. ("As the *facts found by the District Court bear out* . . . Shell "arranged for disposal . . . .")[112]

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107. *Id.* at 610 (emphasis added).

108. *Id.* at 604.

109. *Id.* at 612-13 (second emphasis added).

110. *Id.* (Ginsburg, R., dissenting).

111. Exxon's form supply agreement also requires the dealer to maintain underground storage tanks. Not that there is, in the case of a gas station, any alternative. *Id.* at 621 (Ginsburg, R., dissenting).

112. *Id.* at 1884-85 (Ginsburg, R., dissenting). As in the cases and conventional wisdom discussed in the preceding Section VI, Justice

In other words, under both the majority and dissenting opinions, in order avoid arranger liability, to be considered to not have "intended" a disposal to occur, the PLP may have an affirmative duty of care to discharge. In *Burlington Northern*, both majority and dissent implicitly found that Shell did have a duty of care, they just disagreed about whether Shell discharged it.[113]

Burlington Northern did not overrule *Aceto* or its progeny. *Aceto* is nowhere mentioned in the Supreme Court decision.[114] The hazardous substances at issue in the *Aceto* cases were very much useful products when delivered to those operators, and waste disposal was not the reason those PLPs brought the substances to the operators' facilities.[115] *Aceto*, therefore, remains good law.

Finally, even if *Burlington Northern* could be interpreted to disallow arranger liability in any case but intentional disposal, a court interpreting state law is not bound by a CERCLA decision. The state court is interpreting a different statute, under a different jurisprudential hierarchy, and CERCLA cases interpreting the parallel federal law, while persuasive, are not controlling. Indeed, both Alaska's and Washington's statutes have been both written and interpreted more liberally than CERCLA on arranger

Ginsburg's opinion unfortunately perpetuates the "ability to control" meme: In her opinion, the lowers courts appropriately found Shell liable "given the control rein held by Shell over the mode of delivery and transfer . . . ." *Id.* It is well to note that it was not Shell's control over the mode of delivery and transfer, but the fact that the delivery mode Shell required (bulk storage), in preference to other, less convenient alternatives, caused the harm: "Because D-D is corrosive, bulk storage of the chemical led to numerous tank failures and spills as the chemical rusted tanks and eroded valves." *Id.* at 1886. That is, it was not control *per se*, but the misuse of it, the defendant's failure of its duty of care, that led Justice Ginsburg to vote to hold this PLP liable.

113. *Id.* Indeed therefore, far from ending exotic arranger liability, *Burlington Northern* implicitly holds that the vendor of a hazardous substance may have an affirmative duty to help its vendee handle the product responsibly, and breach of this duty will make the vendor liable as an arranger. This is another avenue to explore in the case against the refiner. If it is indeed true that the oil industry has taken a hands-off approach to its dealers' tanks and compliance practices, that conventional wisdom could backfire. *See Lovold Co.*, *supra* note 66.

114. *Id.*

115. 872 F.2d 1373 (8th Cir. 1989)

liability, and Washington courts have already rejected "intent to dispose" as a defense.[116]

VIII. Arranger Liability Under Washington and Alaska Statutes

Both in their statutory language and in case law, Alaska and Washington give arranger liability a liberal interpretation.

A. Washington

Washington's CERCLA analog, the Model Toxics Control Act ("MTCA") provides the following variation on the concept of "arranger":

> Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal of treatment of the hazardous substance, or arranged with a transporter for transport for disposal of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility.[117]

1. Intent to Dispose

In *City of Seattle (Seattle City Light) v. Washington State Dep't of Transportation*,[118] the court quoted our lead case, *Aceto*, and found that arranger liability does not require intent to dispose: "[I]t is possible to 'arrange' for disposal even while hoping that it ends up in the best of all possible spots, or while insisting that proper practices be rigorously followed."[119]

A second case, *Modern Sewer Corporation v. Nelson Distributing*, is directly on point, explaining that "[t]he term 'disposal' as used in MTCA's "arranger" liability provision encompasses intentional as well as unintentional disposal."[120] Requiring proof of intent "would discourage companies from

116. *See, e.g.*, City of Seattle (Seattle City Light) v. Washington State Dep't of Transp., 98 Wash. App. 165, 173 (1999); Modern Sewer Corp. v. Nelson Distrib., Inc., 125 Wash. App. 564 (2005).

117. WASH. REV. CODE § 70.105D.040(c) (West 2012).

118. 98 Wash. App. 165 (1999).

119. 989 P.2d at 1169.

120. 109 P.3d 11 (2005), at 14 (*quoting City of Seattle*, *supra* note 116, at 171.)

carefully tracking their hazardous substances, contrary to the intent and purpose of the MTCA."[121]

2. Arranger Liability is More Liberal Under MTCA than Under CERCLA

By design and interpretation, MTCA is more liberal than CERCLA. MTCA's stated policy is to safeguard the healthy environment it deems a "fundamental and inalienable right [that] each person has a responsibility to preserve and enhance . . . ."[122] This is a "solemn obligation of the present generation for the benefit of future generations."[123] MTCA's more liberal approach is particularly evident in arranger liability, the statutory definition of which goes further than CERCLA's, with the addition of this phrase to its definition: ". . . or otherwise generated hazardous wastes disposed of or treated at the facility."[124] This added language denotes that the liability net is to be broadly cast; among other things, it allows for arranger liability against PLPs who did not "own or possess."[125] The "or otherwise generated" language is also further proof that MTCA arranger liability has no intentionality requirement, since there is no connotation of "intent to dispose" in the concept "or otherwise generated wastes."

B. Alaska

Alaska's statute uses CERCLA's definition of "arranger" almost verbatim:

> Any person who by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances owned or possessed by the person, at any facility . . . owned or operated by another party or entity and containing hazardous substances, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance.[126]

121. *Id.*

122. WASH. REV. CODE, *supra* note 117.

123. *Id.*

124. *Id.*

125. *Id. See* discussion in Section VI.

126. ALASKA STAT. § 46.03.822 (West 2012). The variation is the addition of the word "or" before a phrase elided in the language quoted in this paper. In CERCLA, the phrase reads "hazardous substances owned or possessed by the person, by any other party or entity, at any facility . . . ." 42 U.S.C. § 9607(a)(1) In the Alaska statute, the phrase is: "hazardous substances owned or possessed by the person, *or* by any other party or

The court in *Berg v. Popham*[127] held that Alaska's statute intends a more liberal reach for arranger liability than CERCLA. It held the manufacturer of dry cleaning equipment liable as an arranger for the contamination caused by a retail dry cleaning plant discharging wastes into the sewer system (because the manufacturer designed the system to discharge waste solvent directly into the sanitary sewer system)—a fairly aggressive decision.[128] And while in another case, an Alaska court refused to hold a jobber responsible for a gas station cleanup, finding strong legislative intent to not draw fuel "distributors" into the liability net, refiners (as demonstrated above) have a much stronger connection to a branded gas station than a distributor does to the independent stations it serves.[129]

C. State Law Summarized

Thus, in both statutory language and reported decisions, Washington and Alaska have shown a willingness to give arranger liability a broad interpretation. Washington cases have rejected the "intent to dispose" defense, and quoted our lead case, *Aceto*, with approval. Coupled with these states' decision to reject CERCLA's petroleum exclusion in the first place, it would seem that the refiner/dealer liability theory posited in this article would find a receptive audience in their courts.

IX. Conclusion

There is a small but solid body of authority, drawn from black letter common law, with facts closely analogous to the refiner/dealer case. The CERCLA and state analog liability scheme is meant to target the parties who profit from the hazardous substances. In the refiner/dealer case, the PLP is one of the dirtiest, as well as the wealthiest, industry in the history of the

entity, at any facility . . . ." While an argument can be advanced that Alaska's language merely corrects a typo in CERCLA's language, the court in *Berg v. Popham* found the different language suggests legislative intention to apply arranger liability more broadly under Alaska's scheme than under CERCLA's. *Supra* note 97.

127. *Id.*, *supra* note 97.

128. *Id.*

129. Parks Hiway Enters., LLC v. CEM Leasing, Inc., 995 P.2d 657, 660-61 (Alaska 2000). The *Parks Hiway* plaintiff does not appear to have argued arranger liability, and even though it invoked the common law principle of abnormally dangerous activity in its effort to find a tort cause of action, it did not argue the principal/contractor theory of vicarious liability. As noted in the text, the principal/contractor relationship is much clearer between a refiner and a branded dealer, than a jobber and an independent dealer.

world. There is every good reason for a court in Washington or Alaska to find a refiner liable for the contaminated station, even if the refiner's only connection to the site was supplying product.

The particular value of the arranger theory is to bring a significant PLP into the liability net in cases where an easy hook, like ownership, does not exist. But the theory can also be employed to bring a second cause of action (owner *and* arranger liability) against refiners who both owned and supplied the contaminated station, as in the lessee-dealer distribution model.

Although the so-called "Gore factors" may allow a plaintiff to argue equitable allocation based on benefits reaped by the owner-refiner, as compared to other PLPs, arranger liability very directly demonstrates why the owner-refiner is more responsible than, say, the landlord it leased the site from.[130] Both are "owners" within the contemplation of the statutory scheme. But the refiner is also an arranger. [131] Indeed, the only reason the refiner took ownership of the site in the first place, was so it could sell its gasoline there. The owner-refiner may have profited from the lessee-dealer's rent, who knows if and how much, but it was the profit to be made from supplying the station (refiner as arranger) that the refiner was after.

It is to be hoped that post-LUST gas stations won't experience the significant problems that arose with the USTs in service in the last century. And some day, presumably, all the pre-LUST stations will be cleaned up. Until that day, in the States of Washington and Alaska, there is a viable liability theory on which refiners who otherwise escape liability entirely, and owner-refiners who otherwise point equitable allocation fingers, can be held accountable for "the environmental externalities associated with" their profitable but hazardous product.

130. Named for then Vice-President Al Gore, who proposed that six factors be incorporated into CERCLA for guidance as to when liability should be joint and several and when by contribution. Though never enacted, the factors are often used to determine equitable allocation of liability shares. S*ee* Envtl. Transp. Syss., Inc., v. ENSCO, Inc., 969 F.2d 503 (7th Circ.1992).

131. In both FMC and C*adillac*, the PLPs were already liable as owners and their liability shares were increased by the court finding them also liable as operators and arrangers. S*ee* FMC Corp. v. U.S., 786 F.Supp. 471 (E.D. Pa. 1992); *see also* Cadillac Fairview/California v. Dow Chem. Co., 299 F.3d 1019 (9th Cir. 2002).