

Notes

GOING IN CERCLAS: THE EVOLUTION OF ARRANGER LIABILITY AND THE NOT-SO- USEFUL USEFUL PRODUCT DOCTRINE

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ABSTRACT—Since the Supreme Court decision *Burlington Northern & Santa Fe Railway Co. v. United States*, courts have wrestled with what it means to be an arranger under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). One aspect of arranger liability that has undergone radical change in the past decade is the useful product doctrine, which allows a party to escape arranger liability by proving it was selling a useful product rather than arranging for disposal.

Prior to *Burlington Northern*, courts applied the useful product doctrine restrictively, only allowing parties selling virgin products to escape liability and imposing liability on parties selling useful secondary products. Following *Burlington Northern*, this shifted, with courts requiring concrete evidence of intent in arrangements for disposal and allowing parties selling secondary products to escape liability even when their actions directly contributed to environmental contamination.

This Note argues that this shift in the useful product doctrine will negatively impact the Superfund litigation landscape, and more importantly, the environment. This Note also posits that the shift in the useful product doctrine can be correlated to a shift in administrative law, away from deferring to agency decisions and towards a more searching judicial inquiry. This Note argues that the courts should scale back their permissive approach to the useful product doctrine and give greater weight to agency expertise and agency liability determinations when ruling on arranger liability cases in the useful product arena.

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INTRODUCTION

When carbonless copy paper was introduced in 1953 by chemists at the National Cash Register Corporation (NCR), it revolutionized the world of paper forms by reducing waste.¹ Nonetheless, NCR simultaneously made the fateful decision to sell scraps from the carbonless paper, known as “broke,” to paper companies that used it as recyclable fiber.² These paper companies, located on the Fox River in central Wisconsin, in turn discharged into the river as a part of their production process.³

Despite being quickly eclipsed by copy machines, carbonless paper has maintained a legacy, albeit not a happy one. Until about 1971, high levels of cancer-causing polychlorinated biphenyls (PCBs) were dumped into the Fox River by the paper companies that purchased NCR’s broke.⁴ A lengthy, billion-dollar cleanup effort followed and, predictably, lawsuits

¹ See *The Who, What When Where & Why of NCR Forms - No Carbon Required*, MARSID M&M GROUP, <http://www.mmprint.com/NCRForm-Printing-History.cfm> [https://perma.cc/NLA3-Q6XZ]; *Appvion Marks 60 Years of Making Carbonless Paper*, PR NEWSWIRE (Mar. 24, 2014), <http://www.prnewswire.com/news-releases/appvion-marks-60-years-of-making-carbonless-paper-251943771.html> [https://perma.cc/RA88-9FK7].

² *Appleton Papers, Inc., v. George A. Whiting Paper Co.*, 776 F. Supp. 2d 857, 861 (E.D. Wis. 2011).

³ *Id.*; *Lower Fox River and Green Bay Site*, EPA, <http://www3.epa.gov/region5/cleanup/foxriver/> [https://perma.cc/WAS9-QJJS] (last updated Nov. 14, 2016).

⁴ *Appleton*, 776 F. Supp. 2d at 861; *Lower Fox River*, *supra* note 3.

ensued.⁵ These lawsuits required judges to consider whether and to what extent a company like NCR should be held responsible for its role in environmental contamination—a form of legal responsibility known as arranger liability.

Arranger liability lies within the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or “Superfund”), the federal statute designed to clean up sites contaminated with hazardous substances.⁶ In addition to liability for arranging for disposal of a hazardous substance, a potentially responsible party (PRP) can also be found liable if it is a current owner or operator of the facility, was the owner or operator at the time of disposal, or if it transported waste to a facility.⁷

Courts have wrestled with arranger liability⁸ since the Supreme Court’s seminal 2009 decision in *Burlington Northern & Santa Fe Railway Co. v. United States*⁹ dramatically changed the standard for this type of CERCLA liability.¹⁰ Judicial decisions before *Burlington Northern* favored a broad interpretation of the arranger provision, subjecting those who arrange for hazardous waste disposal to a strict liability standard.¹¹ The

⁵ *Lower Fox River*, *supra* note 3; Paul Srubas, *Fox River PCB Liability Reshuffled in Judge’s Ruling*, GREEN BAY PRESS-GAZETTE (May 20, 2015, 8:06 AM), <http://www.greenbaypressgazette.com/story/news/local/2015/05/19/ncrs-liability-fox-river-pcb-cleanup-reduced-judges-ruling/27613087/> [<https://perma.cc/6G82-HEZE>].

⁶ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2012).

⁷ *Id.* § 9607(a).

⁸ Arranger liability, sometimes referred to as generator liability, is a rather nebulous concept. The statute says that an arranger is

any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances

Id. If a party produces a hazardous substance and then contracts for disposal off-site, that qualifies as arranging for disposal. *See* Anna Marple DuBoise, *Expanding the Scope of Arranger Liability Under CERCLA*, 43 U. KAN. L. REV. 469, 472–73 (1995). However, as will be discussed, the sale of a useful product that happens to contain a hazardous component would not qualify as arrangement for disposal. *See id.* It is the many scenarios that fall between these two poles of arranger liability that makes the concept so complex. *See id.*

⁹ 556 U.S. 599 (2009).

¹⁰ Katrina J. Brown, Comment, *Contaminating the Superfund: Arranger Liability and the Evolution of CERCLA’s Not-So-Strict Liability*, 11 WYO. L. REV. 485, 507–08 (2011).

¹¹ *See* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion), *overruled on other grounds by* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Living Tr.*, 32 F.3d 1364, 1366 (9th Cir. 1994) (“CERCLA liability has been described as ‘a black hole that indiscriminately devours all who come near it.’” (quoting Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 6–7 (1993))); *United States v. Monsanto*

standard to qualify as an arranger was quite low and could be established through either direct or circumstantial evidence that indicated that the arranger knew¹² or should have known of the ultimate disposal.¹³ *Burlington Northern* fundamentally altered the liability analysis for arrangers by requiring that a party possess actual intent to dispose, rather than mere knowledge of disposal.¹⁴ Since *Burlington Northern*, the doctrine has continued to shift, moving towards a world of lessened liability for arrangers who can make a colorable argument that they were selling a useful product.

This Note falls within a broader framework of scholarship that addresses arranger liability, but it is the first to address the implications of a recent doctrinal shift in one specific area in which arranger liability has continued to change following *Burlington Northern*: the useful product doctrine. According to this doctrine, a PRP that sells hazardous material can escape arranger liability if it can prove that it was selling a useful product rather than arranging for disposal.¹⁵ Since *Burlington Northern* narrowed the definition of arranger, courts across the country have become increasingly permissive in allowing PRPs to raise the useful product doctrine defense and escape arranger liability.¹⁶ This represents a departure from earlier useful product cases, where parties were held to a higher standard and rarely skirted arranger liability.¹⁷ This shift can be exemplified

Co., 858 F.2d 160, 167 (4th Cir. 1988) (“We agree with the overwhelming body of precedent that has interpreted section 107(a) as establishing a strict liability scheme.”).

¹² United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1231 (6th Cir. 1996).

¹³ See Jayna M. Cacioppo, *Burlington Northern Limits on “Arranger” Liability Bleed into California Statutory Law*, TAFT (Mar. 24, 2015), <http://www.taftlaw.com/news/publications/detail/1229-i-burlington-northern-i-limits-on-arranger-liability-bleed-into-california-statutory-law> [https://perma.cc/TM4U-4KPE].

¹⁴ 556 U.S. at 612.

¹⁵ Marc P. Lawrence, *To Arrange or Not to Arrange: Intent Is the Question*, MICH. B.J., Oct. 2009, at 48, 50. A clear example of a successful use of the useful product doctrine would be the sale of a new but hazardous material that later contaminated the environment. This could occur with chemicals or new products with a hazardous component such as mercury thermometers or automotive batteries. Contrast these types of sales with a scenario in which the conveyance of a useful product may be unclear, such as a situation in which a party sells a used product to another party for salvage or reprocessing. See Brief Amicus Curiae of International Association of Defense Counsel in Support of Petitioner Shell Oil Company at 17 n.11, *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009) (No. 07-1601).

¹⁶ See, e.g., *Consolidation Coal Co. v. Ga. Power Co.*, 781 F.3d 129, 153–55 (4th Cir. 2015); *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 705–07 (7th Cir. 2014); *Team Enters., LLC v. W. Inv. Real Estate Tr.*, 647 F.3d 901, 907–09 (9th Cir. 2011).

¹⁷ See, e.g., *Morton Int’l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 683–84 (3d Cir. 2003); *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 566 (9th Cir. 1994) (per curiam); *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.* 973 F.2d 688, 695 (9th Cir. 1992); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380–82 (8th Cir. 1989).

in part by the types of materials that recent courts have found to be useful products. Before *Burlington Northern*, courts found the sales of styrene for reprocessing¹⁸ and lead slag for lead reclamation¹⁹ to be arrangements for disposal, while after *Burlington Northern*, courts found the sales of used transformers,²⁰ buildings contaminated with carcinogens,²¹ and scraps of carbonless copy paper²² to be sales of useful products.

The recent changes in the application of the useful product doctrine are indicative of a fundamental shift that has occurred in favor of defendants. Historically, CERCLA's joint and several liability scheme, coupled with low thresholds for finding liability across the four broad classes of PRPs, have led to the popular belief that CERCLA is a pro-plaintiff statute that penalizes anyone caught in its net.²³ Parties who suffer the misfortune of getting caught in the net must then pursue an equitable outcome in later actions for contribution or apportionment of harm.²⁴ However, the recent changes in the useful product cases indicate that, in this area, courts are limiting how widely the net can be cast. In particular, courts are considering a broad range of circumstantial evidence and moving away from the traditional strict liability approach that was used in the cases preceding *Burlington Northern*.²⁵

Going beyond *Burlington Northern*, courts are requiring the plaintiffs to do more to prove that an arranger intended to dispose of waste, as opposed to sell a useful product. While CERCLA places the burden on the defendant PRP to raise the useful product defense,²⁶ in practice, courts insist that the plaintiff conclusively prove that the material disposed of was not a useful product.²⁷ In this way, courts are transforming CERCLA from a "liability at any cost" statute to a scheme under which arranging entities

¹⁸ *Cadillac Fairview*, 41 F.3d at 566.

¹⁹ *Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc.*, 508 F.3d 930, 939 (9th Cir. 2007).

²⁰ *Consolidation Coal*, 781 F.3d at 153–54.

²¹ *United States v. Dico, Inc.*, 808 F.3d 342, 350–51 (8th Cir. 2015) (finding that the contaminated buildings could be considered useful).

²² *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 707 (7th Cir. 2014).

²³ See John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1446 (1997) ("Criticisms of CERCLA as substantively inequitable, harsh, or unfair fill the reported cases.").

²⁴ See 42 U.S.C. §§ 9607(a), 9613(f)(1) (2012).

²⁵ See *Consolidation Coal*, 781 F.3d at 153–54; *NCR Corp.*, 768 F.3d at 705–07; *United States v. General Electric Co.*, 670 F.3d 377, 385–86 (1st Cir. 2012); *Team Enterprises, LLC v. Western Investment Real Estate Trust*, 647 F.3d 901, 908–09 (9th Cir. 2011), for case examples of courts' use of a more holistic approach to the useful product doctrine.

²⁶ Courts characterize the useful product doctrine as a defense, implying that the defendant bears the burden of both asserting and proving the useful product doctrine to escape arranger liability. See, e.g., *Gould Inc. v. A & M Battery & Tire Serv.*, 933 F. Supp. 431, 436 (M.D. Pa. 1996).

²⁷ See *infra* Part II.

need little more than a plausible story of their intent in order to escape liability. By using circumstantial evidence to move away from strict liability, courts are subverting the statute and bringing it back to its common law roots, where stringent causation requirements allow defendants to get off scot-free.

The consequences of this shift may be more far-reaching than most observers have previously recognized. While the burden of proving the useful product defense officially rests with the defendant PRP, the increased costs and risks of litigation introduced by the changes in case law may discourage the EPA from pursuing cases under this doctrine. This could lead to a decline in Superfund litigation and ultimately impact the pace of cleanup efforts across the country, threatening both human and environmental health.

There is some evidence that this change in judicial application of the useful product doctrine can be linked to a larger trend in administrative law. Following *United States v. Mead Corp.*, courts have been less deferential to agency actions that occur outside of formal contexts (i.e., without formal adjudication or notice and comment).²⁸ The changes in the useful product doctrine mirror the trend set by *Mead*. The cases prior to *Burlington Northern*, with their narrow application of the doctrine, show courts' willingness to embrace the EPA's liability determination.²⁹ More recent cases, with courts' broadened application of the doctrine and their inclination to allow arrangers to escape from the CERCLA liability net, show a lack of willingness to have the EPA's finding of liability influence the outcome of courts' decisionmaking.

This Note analyzes the shift away from liability under the useful product doctrine, shows that this shift will have a dampening effect on litigation in the Superfund world, and correlates this shift with the changes in wider administrative law. In Part I, this Note explores the evolution of CERCLA arranger liability, from the statutory basis to the cases preceding *Burlington Northern*, that reflected the courts' tendency to narrowly apply the useful product doctrine where there was an arrangement for disposal. Part II investigates the modern useful product case law and demonstrates how these cases have expanded upon *Burlington Northern* to shift away from a punitive statutory focus to a broader application of the doctrine. Part

²⁸ See 533 U.S. 218, 229–31 (2001).

²⁹ This liability finding, the Unilateral Administrative Order (UAO), requires parties to undertake a short-term or long-term cleanup of a contaminated site, and is not developed in the context of notice-and-comment rulemaking or formal adjudication. See *Superfund Unilateral Orders*, EPA, <http://www.epa.gov/enforcement/superfund-unilateral-orders> [https://perma.cc/757V-BVHW] (last updated Jan. 5, 2016).

III explores the negative impact this shift will have on the Superfund world and on the environment. Finally, Part IV theorizes that the change in the application of the doctrine can be connected to a larger trend in administrative law in which modern courts are less likely to defer to informal agency findings and posits that courts should return to a more deferential standard.

I. THE EARLY EVOLUTION OF CERCLA ARRANGER LIABILITY

This Part will provide an overview of CERCLA arranger liability, focusing on its statutory foundations and interpretive case law. It will start by looking directly at the statute to understand what elements must be proven for liability to attach. It will then explore useful product cases prior to *Burlington Northern*, addressing three themes that exemplify how the courts' narrow application of the useful product doctrine historically imposed broad liability on arrangers. Finally, this Part will identify *Burlington Northern* as the turning point in arranger liability, after which courts began to more generously apply the useful product doctrine and more narrowly impose liability.

A. A Brief Introduction to CERCLA Liability and § 107(a)(3)

Congress passed CERCLA³⁰ in 1980 in response to increasingly problematic releases of hazardous substances into the environment,³¹ intending to protect both human and environmental health from any actual or threatened releases of pollutants.³² Congress designed CERCLA as a broad, strict liability statute to ensure that the costs of responding to any release of hazardous substances would be shouldered by those parties

³⁰ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2012).

³¹ In 1978, an investigation at Love Canal, New York found that houses located on a former hazardous waste site were contaminated and residents were experiencing health issues including “birth defects, miscarriages, epilepsy, liver abnormalities, sores, rectal bleeding, and headaches.” David W. Lannetti, Note, “Arranger Liability” Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Judicial Retreat from Legislative Intent, 40 WM. & MARY L. REV. 279, 281–82, 282 n.8 (1998).

³² See, e.g., § 9604(a) (allowing the President to respond to releases or threatened releases of hazardous substances or contaminants that might be of substantial or imminent harm to public welfare or the environment).

responsible for said release.³³ Liability under CERCLA has often been summarized as “the polluter pays.”³⁴

Four prongs must be met for a party to be liable under CERCLA. First, there must be a “release” or “substantial threat” of a release.³⁵ In keeping with the broad nature of CERCLA liability, release is expansively defined, including all active emissions (discharging, spilling, and dumping) as well as more passive emissions (leaking or abandonment of waste that leaches into the ground).³⁶ The second prong requires that the release be of a “hazardous substance.”³⁷ This is also broadly defined. It includes hazardous substances specifically designated in CERCLA, as well as hazardous substances so designated by the Clean Water Act, the Clean Air Act, the Solid Waste Disposal Act, and the Toxic Substances Control Act.³⁸ The third prong is met if the release of the hazardous substance comes from a “facility.”³⁹ A facility is generously defined and includes “any site or area where a hazardous substance has . . . come to be located.”⁴⁰ Finally, a party who meets the first three prongs of CERCLA liability must also belong to one of the four categories of PRPs: (1) current owners and operators, (2) owners and operators at the time of disposal, (3) persons who “arranged for disposal or treatment” of hazardous substances, or (4) persons who transported hazardous substances for treatment or disposal.⁴¹

This Note focuses exclusively on PRPs who qualify as arrangers. Section 107(a)(3) speaks directly to arranger liability, imposing responsibility on any party who “arranged for disposal or treatment . . . of hazardous substances.”⁴² “Disposal” in the arranger context is broadly defined and includes “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste” such that the

³³ S. REP. NO. 96-848, at 13 (1980) (“[T]hose responsible for any damage, environmental harm, or injury from [a hazardous release] bear the costs of their actions.”).

³⁴ E.g., Braunson Virjee, *Stimulating the Future of Superfund: Why the American Recovery and Reinvestment Act Calls for a Reinstatement of the Superfund Tax to Polluted Sites in Urban Environments*, SUSTAINABLE DEV. L. & POL’Y, Fall 2010, at 27.

³⁵ § 9604(a)(1).

³⁶ *Id.* § 9601(22) (“The term ‘release’ means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . .”).

³⁷ *Id.* § 9607(a)(4).

³⁸ *Id.* §§ 9601(14), 9602.

³⁹ *Id.* § 9607(a).

⁴⁰ *Id.* § 9601(9).

⁴¹ *Id.* § 9607(a)(1)–(4).

⁴² Comprehensive Environmental Response, Compensation, and Liability Act § 107(a)(3), 42 U.S.C. § 9607(a)(3)) (2012).

waste might reach the environment.⁴³ Disposal can be either active (dumping, spilling, discharging, placing) or passive (leaking).⁴⁴ While “arranged for” is not statutorily defined, in keeping with the broad nature of CERCLA liability, courts have traditionally construed it liberally, as will be discussed further in the next Section.

B. *The Useful Product Doctrine Pre-Burlington Northern*

The useful product doctrine is a judicially created exception to arranger liability in cases where the transfer of a hazardous substance served a purpose other than disposal.⁴⁵ While the useful product doctrine narrowed arranger liability in some cases,⁴⁶ prior to *Burlington Northern*, it was successfully invoked by litigants and applied by courts in very narrow circumstances. This Section will explore the circumstances under which the useful product doctrine was effectively invoked prior to *Burlington Northern*. It will focus on three themes: (1) the distinction between virgin and secondary products, (2) the emphasis on original utility, and (3) the low threshold for knowledge and intent. Before *Burlington Northern*, courts across circuits favored virgin materials as useful products, emphasized that materials must retain their original use to be useful products, and required only general knowledge of the possibility of contamination stemming from the sale of a useful product to prove liability.

⁴³ *Id.* § 6903(3). “Disposal” is defined in relation to the Solid Waste Disposal Act. *Id.* § 9601(29).

⁴⁴ Tommy Tucker Henson II, *What a Long, Strange Trip It’s Been: Broader Arranger Liability in the Ninth Circuit and Rethinking the Useful Product Doctrine*, 38 ENVTL. L. 941, 944–45 (2008).

⁴⁵ The Superfund Recycling Equity Act (SREA), an amendment to CERCLA, serves a similar purpose to the useful product doctrine. It states:

[A] person who arranged for recycling of recyclable material shall not be liable under sections 9607(a)(3) and 9607(a)(4) of this title with respect to such material. . . . [T]he term ‘recyclable material’ means . . . scrap metal, or spent lead-acid . . . batteries, as well as minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap.

§ 9627. This statutory provision provides what is generally referred to as the recycling exemption. The burden of proof is on the entity to establish that it is shielded from CERCLA liability by the recycling exemption defense. *See* EPA, SUPERFUND RECYCLING EQUITY ACT OF 1999: FACTORS TO CONSIDER IN A CERCLA ENFORCEMENT CASE 1 (2002), <https://www.epa.gov/sites/production/files/documents/srea-guide-1999.pdf> [<https://perma.cc/H6RC-RDKX>].

⁴⁶ It is presumed that entities or persons selling useful products are doing so for legitimate reasons while entities selling wholly hazardous waste materials are more likely to be doing so to get rid of the waste and may be trying to disguise the transfer in such a way that would shield them from arranger liability. *See* Team Enters., LLC v. W. Inv. Real Estate Tr., 647 F.3d 901, 908 (9th Cir. 2011). The doctrine shields the transferor from liability in cases where environmental contamination occurs as a result of the transferee’s independent use of the hazardous substance. It is a crucial limitation for parties who are legitimately transferring materials with hazardous components while attempting to serve a beneficial purpose. *See* Henson, *supra* note 44, at 955.

1. *Virgin vs. Secondary Materials*.—Before *Burlington Northern*, courts drew a sharp distinction between virgin and secondary materials. Virgin materials, products that are manufactured to be used in their current state,⁴⁷ were nearly always considered useful products. In *3550 Stevens Creek Associates v. Barclays Bank of California*, for example, the Ninth Circuit exempted a contractor who engaged in asbestos remediation from liability in the sale of a hazardous substance that was later disposed of after it was used as intended.⁴⁸ The court stated, “there is no meaningful difference for purposes of CERCLA between a party who sells or transports a [virgin] product containing or composed of hazardous substances for a productive use, and a party who actually puts that product to its constructive use”⁴⁹ Thus, neither the transfer of the virgin material nor the productive use of the virgin material was considered a disposal.⁵⁰ As a matter of simple logic, it makes sense that a product being sold in its original state for its intended use would be exempted from arranger liability via the useful product doctrine. Entities involved in the sale of virgin materials are most likely not trying to disguise a disposal of a hazardous material; rather they are engaging in a legitimate business relationship—the sale of a useful product—that will have a beneficial impact on the economy.⁵¹

While the exemption of virgin materials is fairly straightforward, courts have traditionally treated secondary materials very differently. Secondary materials can be products like lead slag and dross that contain a small percentage of reclaimable constituents,⁵² products like spent styrene contaminated with hazardous substances that must be removed before use,⁵³ or products like copper slag that generally require disposal but can be sold for some other use, like ballast in a log yard.⁵⁴ Historically, the distinction between virgin and secondary products was reasonable: while manufacturers of virgin products are selling a new and beneficial material,

⁴⁷ *Id.* at 949.

⁴⁸ 915 F.2d 1355, 1356 (9th Cir. 1990).

⁴⁹ *Id.* at 1362.

⁵⁰ *Id.*

⁵¹ See *Team Enters.*, 647 F.3d at 908.

⁵² Cal. Dep’t of Toxic Substances Control v. Alco Pac., Inc., 508 F.3d 930, 932 (9th Cir. 2007) (noting slag and dross resulting from lead smelting operations contain a minority percentage of useful lead, and in this case were sold to a lead smelter for lead reclamation).

⁵³ Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 564 (9th Cir. 1994) (per curiam) (discussing the transfer of spent styrene back to the manufacturer for removal of contaminants to return the styrene to its virgin state).

⁵⁴ See *La.–Pac. Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1570–71 (9th Cir. 1994) (discussing how logging companies would purchase copper slag to lay on the ground as a “ballast,” which eased operations by making the ground firmer).

there is the real possibility that producers of secondary materials are trying to dispose of otherwise only nominally useful waste products.⁵⁵ Moreover, secondary materials, unlike virgin materials, often contain both reclaimable materials and waste products.⁵⁶ These waste products, most often the unwanted consequence of a manufacturing process, must be disposed of in one manner or another.⁵⁷ If contamination occurred in the course of attempting to offload waste, the producer of the secondary material should be held responsible, consistent with CERCLA's broad liability scheme.⁵⁸

Generally, courts relied on CERCLA's broad definitions of waste and disposal to draw a distinction between waste material and useful products.⁵⁹ Courts disregarded the fact that the processing of a secondary material might lead to the reclamation of valuable constituents.⁶⁰ In *California Department of Toxic Substances Control v. Alco Pacific, Inc.*, for example, slag and dross, byproducts of a manufacturing process, were sold to a lead smelter so the smelter could reclaim the valuable lead inside.⁶¹ Despite the fact that this transaction would directly lead to the generation of a useful virgin material, the Ninth Circuit reversed summary judgment for the defendants, finding that "a reasonable fact-finder could conclude that [the defendants] sold the by-products of their manufacturing processes primarily for treatment and disposal purposes."⁶²

Prior to *Burlington Northern*, courts were generally skeptical of any arrangement that did not on its face appear to be a straightforward sale of a useful product. A clear example is *State of New York v. General Electric Co.*, where the court found that CERCLA liability could not be "facilely circumvented" by characterizing arrangements to dispose of a secondary material as sales, and that "persons cannot escape liability by 'contracting away' their responsibility or by alleging that the incident was caused by the act or omission of a third party."⁶³ The threshold for arranger liability for those who had transferred a secondary material was quite low. As a result,

⁵⁵ Henson, *supra* note 44, at 950.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *See* Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 508 F.3d 930, 934 (9th Cir. 2007) ("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.'" (first quoting *A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1112 (9th Cir. 1998); and then quoting *Catellus Dev. Corp. v. United States*, 34 F.3d 748, 750 (9th Cir. 1994)).

⁶⁰ *See* Henson, *supra* note 44, at 949–50.

⁶¹ 508 F.3d at 932.

⁶² *Id.* at 939.

⁶³ 592 F. Supp. 291, 297 (N.D.N.Y. 1984) (quoting S. REP. NO. 96-848, at 31 (1980)).

courts' broad interpretation of arranger liability prior to *Burlington Northern* ensured that almost any sale of a secondary material was an arrangement for disposal.

2. *Utility: Original Use.*—Courts also considered whether a material had retained its original utility in determining whether a party could escape arranger liability. This analysis often overlaps with the distinction between secondary and virgin materials, as virgin materials can clearly be used as intended and secondary materials generally cannot. In *Florida Power & Light Co. v. Allis Chalmers Corp.*, the Eleventh Circuit considered whether a manufacturer can be held liable for their original sale of transformers, after the original purchaser subsequently resold the transformers as scrap to a third party.⁶⁴ The court found that the manufacturer was not liable for the initial sale of the new, useful transformers but suggested that there could be liability in the subsequent sale of the used transformers as scrap because these used transformers no longer retained their original utility.⁶⁵ The court declined to create a per se rule that a seller of an arguably useful product can never be an arranger, asserting that this would “frustrate CERCLA’s broad remedial purpose” and “be contrary to prevailing case law.”⁶⁶

In keeping with the emphasis on original utility, courts also excluded from liability secondary materials that had a small percentage of hazardous substances that had to be removed for original use to be restored.⁶⁷ Entities that engaged in transactions in which contaminated materials were passed off for processing were found to be arranging for disposal. For example, the Ninth Circuit in *Cadillac Fairview/California Inc. v. United States* reversed summary judgment to the defendant PRP and determined that the trier of fact could conclude that the sale of contaminated styrene, a chemical used in rubber, to a third party for processing was an arrangement for disposal.⁶⁸ The court came to this conclusion despite the fact that the styrene could return to its virgin state, could still be used for its original purpose, and caused minimal environmental damage.⁶⁹

3. *Intent, Knowledge, and Control (or Lack Thereof).*—As part of an inquiry into whether a possible arranger intended to dispose of a material, courts examined whether a party had knowledge of a possible disposal or

⁶⁴ 893 F.2d 1313, 1315 (11th Cir. 1990).

⁶⁵ *See id.* at 1316–19.

⁶⁶ *Id.* at 1318.

⁶⁷ *See, e.g., Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 564 (9th Cir. 1994) (per curiam).

⁶⁸ *Id.* at 565–66.

⁶⁹ *See id.* at 564.

control over said disposal. Pre-*Burlington Northern*, general knowledge of the possibility of contamination was all that courts required in order to prove arranger liability.⁷⁰ While there are circumstances where an entity can have knowledge without intent or vice versa, typically knowledge of disposal and intent to dispose went hand in hand.⁷¹ If no evidence of actual knowledge or intent to dispose existed, courts were comfortable relying on circumstantial evidence to impute knowledge or intent to a party. For example, if a process typically resulted in hazardous contamination of the environment, courts were comfortable inferring both intent and knowledge from those factual circumstances.⁷² The Sixth Circuit in *United States v. Cello-Foil Products, Inc.* stated that “intent need not be proven by direct evidence, but can be inferred from the totality of the circumstances” when evaluating arranger liability.⁷³ The Third Circuit in *Morton International, Inc. v. A.E. Staley Manufacturing Co.* similarly adhered to a loose “general knowledge” standard in proving intent to dispose, stating that “general knowledge that waste disposal is an inherent or inevitable part of the process arranged for by the defendant may suffice to establish liability.”⁷⁴ The court concluded the defendant likely had knowledge of the possibility of environmental hazards related to mercury processing, given its use of mercury at its own plant.⁷⁵

Courts consistently rejected defendants’ assertions that they cannot be held liable because they lacked control over the contamination; a lack of control posed no bar to liability. If an entity owned a substance during the waste-generating process and demonstrated some measure of knowledge that a third party was likely to dispose of the material, they were often found liable even if they had no control over the contamination. In *United States v. Aceto Agricultural Chemicals Corp.*, the Eighth Circuit found that a pesticide company could be liable for spills perpetrated by a formulating company to which the pesticide company had supplied pesticides for processing.⁷⁶ Despite the fact that the spills were entirely caused by the formulating company, the court rejected the pesticide company’s claim that they did not intend to dispose of waste and were only passing on a useful

⁷⁰ See, e.g., *Morton Int’l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 678 (3d Cir. 2003).

⁷¹ See Henson, *supra* note 44, at 951 (“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.”).

⁷² *Id.* at 951–52.

⁷³ 100 F.3d 1227, 1231 (6th Cir. 1996).

⁷⁴ *Morton*, 343 F.3d at 678.

⁷⁵ *Id.* at 682.

⁷⁶ 872 F.2d 1373, 1380–82 (8th Cir. 1989).

product for processing.⁷⁷ The court noted that such a limited reading of the doctrine would frustrate “CERCLA’s ‘overwhelmingly remedial’ statutory scheme.”⁷⁸ Other circuits came to similar conclusions, finding defendants liable despite their complete lack of control over the actual contamination.⁷⁹ This is similar to courts’ emphasis on materials retaining their original use in order to be useful products and requiring only general knowledge of the possibility of contamination stemming from the sale of a useful product to prove liability.

C. Burlington Northern: *The Beginning of a New Narrative*

Burlington Northern represents a sea change in arranger liability and in CERCLA jurisprudence generally.⁸⁰ The case involved an agricultural chemical business, Brown & Bryant Inc. (B&B), that operated a chemical storage facility adjacent to land owned by two railroads.⁸¹ As part of this storage business, B&B contracted with Shell for bulk shipping of pesticides, including the pesticide D-D, which spilled during delivery and contaminated the adjacent parcel of land owned by the railroads.⁸² Despite the role Shell played in the ultimate contamination of the parcel of land, the Supreme Court found that Shell was not liable as an arranger.⁸³

The case raised the threshold of proving arranger liability.⁸⁴ Where it had once been an easy proposition for courts and plaintiffs to establish arranger liability,⁸⁵ liability after *Burlington Northern* requires much more substantial proof of wrongdoing. In particular, *Burlington Northern* transformed the intent standard: simple evidence of a party’s knowledge of potential environmental contamination was no longer enough to infer intent

⁷⁷ *Id.* at 1380.

⁷⁸ *Id.* (quoting *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986)).

⁷⁹ See *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 695 (9th Cir. 1992) (finding that the entity who owned raw materials arranged for disposal of toxic substances when they supplied toxic materials to a third-party formulator for processing that later ended up contaminating the environment, despite the fact that complete control was ceded to the formulator).

⁸⁰ See *Brown*, *supra* note 10, at 507.

⁸¹ *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602–03 (2009).

⁸² *Id.* at 603–04.

⁸³ *Id.* at 619.

⁸⁴ See Jon-Erik W. Magnus, Comment, *Lyon’s Roar, Then a Whimper: The Demise of Broad Arranger Liability in the Ninth Circuit After the Supreme Court’s Decision in Burlington Northern*, 3 GOLDEN GATE U. ENVTL. L.J. 427, 428 (2010) (“The consequence of the Supreme Court’s holding in *Burlington Northern* is a collective sigh of relief from products manufacturers that would have otherwise been subjected to the broad theory of arranger liability . . .”).

⁸⁵ See *supra* Section I.B.

and trigger arranger liability.⁸⁶ The Court stated that “[i]n order to qualify as an arranger, Shell must have entered into the sale . . . *with the intention* that at least a portion of the product be disposed of during the transfer process.”⁸⁷ The intent standard shifted from a general knowledge threshold to one of specific intent to dispose of hazardous substances within the transaction.⁸⁸

As part of the intent inquiry, the Court also considered the precautionary efforts that Shell had taken to prevent spills.⁸⁹ While circuit court precedent provided that circumstantial evidence could be used in making the determination of whether a transaction constituted the sale of a useful product,⁹⁰ *Burlington Northern* transformed how circumstantial evidence was used. The Court used circumstantial evidence to look beyond the nature of the transaction to understand the more holistic actions of the potential arranger. It pointed to the fact that Shell had taken precautions against spills, which included providing its distributors with safety manuals and offering discounts if they took certain safety precautions.⁹¹ Significantly, this is an expansion of the use of circumstantial evidence to include general exculpatory information, as opposed to the use of circumstantial evidence that presumed that the entity was at fault.⁹²

Ultimately, *Burlington Northern* was a significant blow to products-based CERCLA liability. Prior to *Burlington Northern*, it was possible for PRPs to pursue a contribution action against any product manufacturer that had generated a secondary product that had ultimately contaminated the environment.⁹³ Where a secondary material ultimately contaminated the environment, courts relied on their past orientation towards broad liability

⁸⁶ The Court cautioned that “knowledge alone is insufficient to prove that an entity ‘planned for’ the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.” *Burlington Northern*, 556 U.S. at 612; *see also* Lawrence, *supra* note 15, at 49–50 (“The *Burlington Northern* opinion adds a clear ‘intent-to-dispose’ requirement for courts to find a party liable as an arranger under section 107(a)(3).”).

⁸⁷ *Burlington Northern*, 556 U.S. at 612 (emphasis added).

⁸⁸ *See* Brown, *supra* note 10, at 508 (“The Court’s holding indicates a dramatic change from previous decisions where plaintiffs were once able to impose strict liability against defendants under CERCLA who had no actual knowledge of the illegal disposal.”).

⁸⁹ *Burlington Northern*, 556 U.S. at 613; *see* Walewska Watkins, Note, *Burlington Northern & Santa Fe Railway Co. v. United States: The Supreme Court Arranges for Disposal of CERCLA’s Strict Liability*, 23 TUL. ENVTL. L.J. 203, 215 (2009).

⁹⁰ *See supra* note 73 and accompanying text.

⁹¹ *Burlington Northern*, 556 U.S. at 613.

⁹² Recall the general knowledge standard established in cases prior to *Burlington Northern* in which courts required only evidence of general knowledge of the possibility of contamination for liability to attach. *See, e.g.*, *Morton Int’l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 678 (3d Cir. 2003); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380–82 (8th Cir. 1989).

⁹³ Magnus, *supra* note 84, at 452.

to resolve issues within the liability penumbra.⁹⁴ If courts sensed any gaps in CERCLA liability, they pointed to the statutory emphasis on ensuring that all parties were held responsible for cleanup.⁹⁵ However, by requiring clear intent to dispose, the Court in *Burlington Northern* shifted away from this presumption of broad liability to a more permissive approach that allowed Shell, a party that may have previously been caught in the arranger liability net, to escape fault.⁹⁶

While *Burlington Northern* did change the intent inquiry by making it more difficult for plaintiffs to establish the requisite intent necessary to impose arranger liability, it did not conclusively establish how the intent analysis should be completed by the lower courts.⁹⁷ The case required more substantial evidence of wrongdoing beyond mere knowledge and considered some exculpatory circumstantial evidence in assigning arranger liability but it did not draw bright lines as to what factors exactly should be weighed in the arranger liability inquiry. Following *Burlington Northern*, lower courts took advantage of the gaps in the case to develop an even more lenient approach to the useful product doctrine, as will be discussed in the following Part.

II. SHIFTING USE OF THE DOCTRINE

Following the Court's decision in *Burlington Northern*, the useful product doctrine has become an increasingly effective defensive tool for PRPs who are seeking to escape arranger liability. Lower courts have expanded upon the transformation of the intent standard laid out in *Burlington Northern* in order to dramatically narrow liability for arrangers under the useful product doctrine.

This Part will return to the three themes examined in Part I and show how these themes narrowed arranger liability. On the first theme, the distinction between virgin and secondary products, courts have become

⁹⁴ See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion), *overruled on other grounds by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

⁹⁵ See, e.g., *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1318 (11th Cir. 1990) (finding that a per se rule absolving manufacturers of liability would "frustrate CERCLA's broad remedial purpose").

⁹⁶ 556 U.S. at 613. This foreshadows the shift that occurred in the useful product doctrine, as will be discussed in Part II.

⁹⁷ See Heidi Rasmussen, *Re-"Arranging" CERCLA Liability: What Is the State of Arranger Liability Post-Burlington Northern Santa Fe Railway Company v. United States?*, 45 TEX. ENVTL. L.J. 381, 382 (2015) ("Scholars and potential arrangers hoped that *Burlington Northern* would provide much-needed clarification for the unique category of CERCLA arranger liability. Unfortunately, regarding arranger liability specifically, some scholars indicate that, even after *Burlington Northern*, there is still a need for clarification.").

much more willing to accept secondary products as useful products.⁹⁸ On the second theme, the requirement of original utility, courts have determined that materials no longer need to retain their full original utility to be considered useful products.⁹⁹ On the third theme, intent, courts have established a higher standard to prove intent, emphasizing control over the material and direct knowledge of disposal.¹⁰⁰ Finally, this Part will consider the fact that courts have become increasingly willing to consider circumstantial evidence to fill evidentiary gaps in favor of the defendant PRPs.¹⁰¹ This Part will conclude with a reflection on how this shift indicates a subversion of the values of the statute as a whole, from punitive to more permissive, moving the statute back to its common law roots.

A. *Secondary Products: Neither New nor Useful*

Prior to *Burlington Northern*, courts drew a hard line between virgin and secondary products. Virgin products were generally considered useful products¹⁰² while secondary products were rarely considered as such, even in light of evidence of their utility.¹⁰³ However, since *Burlington Northern*, despite the fact that the Court did not speak directly to this issue, lower courts have softened their approach to secondary products, such that today, there is no longer a hard and fast distinction between virgin and secondary materials in the useful product realm. For example, the Seventh Circuit found that a secondary byproduct of the paper milling process was considered a useful product even though it was not a virgin product.¹⁰⁴ The Fourth Circuit similarly found that used transformers were considered a useful product despite the fact that they were a secondary product and not a virgin material.¹⁰⁵ The Eighth Circuit also found that buildings contaminated with toxic chemicals could be a useful product even though they were decisively not a virgin material.¹⁰⁶

This dissolution of the distinction between secondary and virgin products has gone hand in hand with a loosening or outright abandonment of the original utility requirement. Courts prior to *Burlington Northern*

⁹⁸ See *infra* Section II.A.

⁹⁹ See *infra* Section II.A.

¹⁰⁰ See *infra* Section II.B.

¹⁰¹ See *infra* Section II.C.

¹⁰² See, e.g., 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1362 (9th Cir. 1990).

¹⁰³ See, e.g., Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 508 F.3d 930, 936 (9th Cir. 2007); Cadillac Fairview/Cal., Inc. v. United States, 41 F.3d 562, 566 (9th Cir. 1994) (per curiam).

¹⁰⁴ NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682, 705–07 (7th Cir. 2014).

¹⁰⁵ See Consolidation Coal Co. v. Ga. Power Co., 781 F.3d 129, 153–54 (4th Cir. 2015).

¹⁰⁶ See United States v. Dico, Inc., 808 F.3d 342, 350–51 (8th Cir. 2015).

emphasized the need for materials to retain their original utility in order for them to meet the useful product standard.¹⁰⁷ By contrast, recent decisions have allowed potential arrangers to invoke the useful product doctrine in instances where a material was conclusively unusable for its original purpose. In *NCR Corp. v. George A. Whiting Paper Co.*, the Seventh Circuit asserted that a material does not need to retain its original utility to be considered useful.¹⁰⁸ The court emphasized the fact that the material, despite the fact that it was not useful for its original purpose as carbonless copy paper, was indeed useful because it was an essential input for the purchaser's process as recyclable fiber.¹⁰⁹ The court, unlike its predecessors that excluded secondary materials that were contaminated with a minority percentage of a hazardous substance,¹¹⁰ overlooked the hazardous nature of the secondary byproduct and focused instead on the material's utility.¹¹¹ The Fourth Circuit in *Consolidation Coal Co. v. Georgia Power Co.*, similarly considered "the usefulness of the materials in the condition in which they were sold" to support a finding that the defendant did not arrange for disposal.¹¹²

Recent courts, by opening the door to secondary products that do not retain their original utility, have widened the range of scenarios in which the useful product doctrine can be effectively raised and, consequently, have made it easier for defendant PRPs to escape arranger liability even in cases where a secondary product has clearly contaminated the environment.¹¹³ This more lenient approach to secondary materials is not a case of courts wanting to incentivize recycling because there is already a statutory section specifically dealing with exempting recycling from CERCLA liability.¹¹⁴

B. Higher Standard for Proving Intent

In addition to changing the utility standard and opening up the possibility of secondary materials qualifying as useful products, courts

¹⁰⁷ See *Cadillac Fairview*, 41 F.3d at 566.

¹⁰⁸ 768 F.3d at 707.

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., *Cadillac Fairview*, 41 F.3d at 566.

¹¹¹ See *NCR Corp.*, 768 F.3d at 707.

¹¹² 781 F.3d 129, 153–55 (4th Cir. 2015) (quoting *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 775 (4th Cir. 1998)).

¹¹³ See, e.g., *United States v. Dico, Inc.*, 808 F.3d 342, 351 (8th Cir. 2015) (reversing summary judgment on the issue of arranger liability for a company that had sold buildings with large amounts of toxic PCB insulation that had contaminated the environment, because while the buildings were largely worthless and contaminated, some parts were still useful).

¹¹⁴ For more information on the Superfund Recycling Equity Act (SREA), see *supra* note 45.

have also raised the standard for proving intent to dispose, making it easier for defendant PRPs to invoke the useful product doctrine.¹¹⁵ While *Burlington Northern* required a heightened intent inquiry, courts have gone beyond the Court's requirements in the useful product arena. The recent useful product decisions have emphasized that control over disposal is a critical element in proving intent to dispose and thus in proving arranger liability—a drastic change from the pre-*Burlington Northern* jurisprudence. In *Consolidation Coal*, the Fourth Circuit found that the appellee was not an arranger in part because it “lacked knowledge of or control over what [the buyer] chose to do with the transformers [it] acquired.”¹¹⁶ In *Team Enterprises, LLC v. Western Investment Real Estate Trust*, the Ninth Circuit similarly found that the manufacturer did not exercise sufficient control over the operator's disposal process such that it could be liable as an arranger.¹¹⁷ This is in direct contrast to the pre-*Burlington Northern* cases where mere knowledge of the possibility of disposal was enough to prove intent to arrange for disposal.¹¹⁸

In addition to the emphasis on control, courts have also stated that specific knowledge of disposal is needed in order to prove arranger liability.¹¹⁹ By requiring direct knowledge of disposal, something not specifically required by the Court in *Burlington Northern*, lower courts have stretched *Burlington Northern* beyond its holding.¹²⁰ Unlike earlier courts that were satisfied with evidence of the PRP's general knowledge of the possibility of contamination to prove intent to dispose, recent courts have raised this standard, stating that more than general knowledge is needed to prove intent. Demonstrative of this trend, the Seventh Circuit in *NCR Corp.* held that the appellant's mere indifference to the fact that the byproduct could be released into the environment was not enough to show intent to dispose, and therefore, insufficient to prove arranger liability.¹²¹

¹¹⁵ Courts have made it clear that intent is a requisite part of being liable as an arranger. See *United States v. Cello-Foil Prods., Inc.*, 848 F. Supp. 1352, 1357 (W.D. Mich. 1994) (“Whatever else ‘otherwise arranged for disposal’ means . . . it does not apply to situations where there was no intent to dispose of a hazardous substance.”), *rev'd on other grounds*, 100 F.3d 1227 (6th Cir. 1996).

¹¹⁶ 781 F.3d at 152.

¹¹⁷ 647 F.3d 901, 910–11 (9th Cir. 2011).

¹¹⁸ See *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 678 (3d Cir. 2003) (“[G]eneral knowledge that waste disposal is an inherent or inevitable part of the process arranged for by the defendant may suffice to establish liability.”).

¹¹⁹ See *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 706 (7th Cir. 2014); *Team Enters.*, 647 F.3d at 908–09.

¹²⁰ While the Court found that “knowledge alone is insufficient to prove that an entity ‘planned for’ the disposal,” it did not require specific knowledge of the buyer's disposal plans in order to impose arranger liability. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 612 (2009).

¹²¹ 768 F.3d at 706–07.

Similarly, in *Team Enterprises*, the Ninth Circuit found that actions taken with the mere knowledge of future disposal were not enough to show intent to dispose.¹²² The Ninth Circuit, interpreting *Burlington Northern*, asserted that, “[w]hile actions taken with the *intent* to dispose of a hazardous substance are sufficient for arranger liability, actions taken with the mere *knowledge* of such future disposal are not.”¹²³ This emphasis on both control and specific knowledge of disposal raises the standard for proving intent to dispose such that it is easier for defendant arrangers to invoke the useful product doctrine and evade arranger liability.¹²⁴

C. Use of Circumstantial Evidence to Show Intent

Recent cases have also demonstrated an increasing willingness to use circumstantial evidence to satisfy the useful product exemption. Often, circumstantial evidence is the only evidence available. Because of the long and complicated histories of many CERCLA useful product cases, there are often evidentiary gaps regarding key issues such as intent.¹²⁵ Accordingly, and playing on the *Burlington Northern* idea that the broader circumstances of the transaction can be considered, courts have expanded their analysis of the useful product exemption to consider a holistic view of the transaction. As part of this shift, two categories of circumstantial evidence have been used to prove arrangement for disposal, both of which will be examined here: management of the material prior to sale and the value of the material.

¹²² 647 F.3d at 908–09.

¹²³ *Id.* at 908 (citing *Burlington Northern*, 556 U.S. at 612).

¹²⁴ The court in *United States v. Dico, Inc.* went a step further, indicating that a party could escape arranger liability even if it demonstrated intent to dispose. 808 F.3d 342, 349 (8th Cir. 2015) (“A party may sell a still ‘useful’ product, i.e., fit either for its intended purpose or some other purpose useful to the buyer, with the full intention to rid itself of environmental liability rather than a legitimate sale, for example where the cost of disposal or contamination remediation would greatly exceed its purchase price (e.g., selling a working and useful piece of machinery for \$10,000 that comes along with a \$100,000 price tag for remediation costs).”).

¹²⁵ Superfund sites have long histories. Many cleanups take decades. See *Financial Assurance, Bonding and CERCLA 108b*, EARTHWORKS, https://www.earthworksaction.org/issues/detail/financial_assurance_bonding_and_cercla_108b#.VpfFsJMrKT8 [<https://perma.cc/8X8B-3K4V>] (citing an EPA report stating that 59% of contaminated mining sites need around forty years of cleanup efforts). Contamination may have occurred far before the problem was detected for liability purposes. For example, the Fox River was contaminated in the 1950s, PCBs in the sediment were detected in the 1980s, and a cleanup plan was not proposed until 2001. See WIS. DEP’T OF NAT. RES. & EPA, PROPOSED REMEDIAL ACTION PLAN: LOWER FOX RIVER AND GREEN BAY 6 (2001), http://www3.epa.gov/region5/cleanup/foxriver/pdfs/proposed_plan.pdf [<https://perma.cc/XQ8D-DBTN>]. As of 2016, the cleanup was still ongoing. See *Lower Fox River*, *supra* note 3. Because of this, documents showing a party’s specific involvement with a contaminated site may be old or incomplete. Witnesses similarly may be difficult to locate or even deceased.

Courts have considered how the defendant PRP managed the material at issue before selling it to the party that contaminated the environment. If the material was carefully handled prior to the sale, courts tend to view this as evidence that there was no intent to dispose.¹²⁶ On the other hand, if the material was treated more like waste prior to sale, this treatment indicates that there likely was intent to dispose.¹²⁷ The Fourth Circuit in *Consolidation Coal* considered the management of used transformers prior to sale to indicate that the appellee had sold a useful product.¹²⁸ The court found that the transformers had been carefully handled because they had been largely drained of PCB-laden oil and had been capped during transfer.¹²⁹ In reality, there are many other reasons for the appellee's actions. Capping and draining could indicate that the PRP wanted to avoid contamination prior to or during transfer, for which they could be liable under CERCLA.¹³⁰ Although the fact that the appellee carefully handled the transformers does not entirely indicate that the transformers are useful products, this use of circumstantial evidence is in keeping with the courts' willingness to take a more expansive view of the useful product doctrine.

Courts have also used this circumstantial factor to find intent to dispose, but in those cases, courts required the treatment of the material to clearly indicate that a disposal was occurring. For example, in *United States v. General Electric Co.*, the First Circuit found that drums of scrap chemicals were treated so poorly prior to sale that they could not construe this management as anything but intent to dispose.¹³¹ They pointed to the fact that the drums were stored in a salvage yard and that no quality control measures whatsoever were taken to ensure the continued integrity of the chemicals.¹³²

Beyond the treatment of material, courts have also looked at the value of the material to determine whether there was a sale of a useful product or whether the transaction was simply a disposal. As part of this analysis, courts have considered the price at which the material was sold, whether multiple buyers were considered, and how the materials were valued by the

¹²⁶ See *Consolidation Coal Co. v. Ga. Power Co.*, 781 F.3d 129, 153–54 (4th Cir. 2015).

¹²⁷ See *United States v. Gen. Elec. Co.*, 670 F.3d 377, 385–86 (1st Cir. 2012).

¹²⁸ 781 F.3d at 153–54.

¹²⁹ *Id.* at 154.

¹³⁰ If the contamination had occurred prior to transfer, they could be liable as an owner or operator; if it occurred during transfer, they could be liable as a transporter under the statute. See 42 U.S.C. § 9607(a)(1)–(4) (2012).

¹³¹ 670 F.3d at 385–86.

¹³² *Id.*

seller prior to the sale.¹³³ The Fourth Circuit in *Consolidation Coal* found that the transformers at issue had an “unquestionably positive commercial value,” demonstrated by the fact that both the seller and buyer profited from the sale.¹³⁴ The seller recovered revenue beyond the scrap value of the transformer and the buyer resold some of the transformers for a profit.¹³⁵ Furthermore, there was a viable market for the transformers as they were sold at a competitive auction, with multiple buyers participating.¹³⁶ The Seventh Circuit in *NCR Corp.* similarly used evidence of the byproduct’s value to find no arranger liability.¹³⁷ The appellant had invested resources in processing the byproduct before sale, and then placed the byproduct into a competitive market in an attempt to recoup some of the production costs expended in preparing the byproduct.¹³⁸ The competitive pricing and viable market demonstrated the value of the byproduct, which supported the court’s conclusion that this was the sale of a useful product.¹³⁹

Courts’ willingness to read intent into this evidence about the value of the product is a significant departure from the pre-*Burlington Northern* courts that ended the intent inquiry after finding knowledge of the mere possibility of contamination occurring as the result of the sale of the material.¹⁴⁰ Moreover, it shows that recent courts have become increasingly keen to open up the scope of the inquiry to facilitate the successful use of the useful product doctrine. In reality, however, the fact that the seller made some marginal profit in no way conclusively means they were not disposing of the materials.

There have been cases in which the value of the material at issue has swung the pendulum the other way and indicated that the material was not a useful product. In *General Electric*, the First Circuit found GE to be liable as an arranger where circumstantial evidence indicated that the scrap chemicals at issue completely lacked value.¹⁴¹ The court examined whether the materials had been advertised to multiple buyers, whether there was a

¹³³ *United States v. Dico, Inc.*, 808 F.3d 342, 360 (8th Cir. 2015) (Kelly, J., concurring in part and dissenting in part); *Gen. Elec. Co.*, 670 F.3d at 385–86.

¹³⁴ 781 F.3d at 152–53.

¹³⁵ *Id.*

¹³⁶ *Id.* at 152.

¹³⁷ 768 F.3d 682, 704–07 (7th Cir. 2014).

¹³⁸ *Id.* at 704–05.

¹³⁹ *Id.* at 704–07.

¹⁴⁰ Compare *Morton Int’l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 678 (3d Cir. 2003) (applying a loose general knowledge standard for arranger liability), with *NCR Corp.*, 768 F.3d at 706 (stating that the appellant’s indifference to the fact that the byproduct could be released into the environment was not enough to show intent to dispose).

¹⁴¹ 670 F.3d 377, 384–85 (1st Cir. 2012).

general demand, and whether the chemicals had been competitively priced.¹⁴² It was only after finding that the material had no value that the court found arranger liability.¹⁴³ The court's willingness to even entertain these peripheral issues shows a shift from a narrow inquiry around a useful product to a more expansive one that makes it more difficult to impose liability.

A court's willingness to use circumstantial factors as part of the intent inquiry shows the shift from a narrow use of the doctrine to a broader use, where the standard moved from a question of whether a party knew or should have known that a disposal would occur to an examination of mitigating circumstances that show the transaction was a sale and not a disposal. The lower courts expanded on the mandate laid out by the Court in *Burlington Northern* to develop a permissive, pro-defendant approach to the useful product doctrine.

D. *Shifting Doctrine and a Return to the Common Law*

These changes in the doctrine indicate a subversion of the values of the statute, as stated by Congress when CERCLA was passed. CERCLA has traditionally placed a heavy emphasis on broad, punitive liability.¹⁴⁴ This emphasis on wide-reaching liability is consistent with the outcome of the cases decided before *Burlington Northern* in which there was a heavy burden on the defendant PRPs to demonstrate that the products at issue were indeed useful.¹⁴⁵ Courts pre-*Burlington Northern* did not consider secondary products, even those with some demonstrated usefulness, to be useful products, and the mere possibility of knowledge of disposal was enough to prove intent to dispose. Justice Brennan in *Pennsylvania v. Union Gas Co.* expounded upon the broad liability standard that courts embraced prior to *Burlington Northern*: “The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.”¹⁴⁶ Recent decisions have subverted this broad liability standard, moving the statute back to its common law roots, where stringent causation requirements allow defendants to escape liability.

¹⁴² The court found that none of these three things had occurred. *See id.* at 386.

¹⁴³ *See id.* at 384–91.

¹⁴⁴ *See In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 897 (5th Cir. 1993) (“CERCLA, as a strict liability statute . . . can be terribly unfair in certain instances in which parties may be required to pay huge amounts for damages to which their acts did not contribute.”).

¹⁴⁵ *See cases cited supra* note 17.

¹⁴⁶ 491 U.S. 1, 21 (1989) (plurality opinion). This case was overruled by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), but this subsequent ruling dealt with the Eleventh Amendment issue and was not a CERCLA case, so Justice Brennan's language is still relevant.

Criticism of CERCLA for this liability-at-any-cost standard can be easily found in past cases.¹⁴⁷ Since *Burlington Northern*, courts in the useful product arena have relied on prior disapproval of CERCLA's draconian nature and have welcomed a more permissive approach, providing greater leniency for defendants. Courts' use of the intent element has had the greatest impact on CERCLA liability. In doing so, courts may believe that they are focusing on ensuring that the parties truly responsible for the worst parts of the contamination are responsible for funding the cleanup and that less directly responsible parties, like arrangers selling arguably useful products, escape the liability net.

However, by imposing a much higher standard of intent, courts are actively subverting the original intention of CERCLA to avoid liability loopholes based on difficult-to-prove, subjective criteria.¹⁴⁸ One of the animating factors behind the major environmental statutes was the need to develop causes of action that would serve as effective stand-ins for the common law causes of action that courts had previously relied upon in the environmental context.¹⁴⁹ Claims of trespass, nuisance, and negligence dominated early environmental cases.¹⁵⁰ One of the main challenges of using common law causes of action was establishing causation between the harm and the defendant's conduct.¹⁵¹ Given the complicated nature of environmental contamination, direct causation was difficult to prove and often depended on the amorphous notions of "fault" and "state of mind"

¹⁴⁷ Nagle, *supra* note 23, at 1446 ("Criticisms of CERCLA as substantively inequitable, harsh, or unfair fill the reported cases. . . . CERCLA's imposition of strict, joint and several, and retroactive liability without regard to causation has been the target of countless complaints.").

¹⁴⁸ See Lannetti, *supra* note 31, at 280 (arguing that CERCLA's legislative history and the plain language of the statute itself indicate that Congress intended to hold arrangers strictly liable).

¹⁴⁹ See Richard A. Epstein, *From Common Law to Environmental Protection: How the Modern Environmental Movement Has Lost Its Way*, 23 SUP. CT. ECON. REV. 141, 149 (2015) ("The advent of statutes changed [the common law] regime. . . . [T]he legislature intervened in order to set explicit standards of conduct that major enterprises. . . . had to comply with in order to undertake their activities. There are all sorts of good reasons for imposing these statutory duties. The harms in question could be quite serious and perhaps irreparable. The actors may not have the resources to pay damages. The needed safeguards are easy to understand and in most cases to implement.").

¹⁵⁰ See COLL. OF AGRIC. & LIFE SCIS. AT N.C. STATE UNIV., COMMON LAW ENVIRONMENTAL REMEDIES 1, https://www.cals.ncsu.edu/course/are309b/Common_Law_Environmental_Remedies.pdf [<https://perma.cc/J74H-HT6S>].

¹⁵¹ Common law causes of action like nuisance that attempt to balance the interests of the two parties face difficulty with environmental actions because the natural resources involved do not have a market and therefore cannot be concretely valued. C.A. ULIBARRI & K.F. WELLMAN, NATURAL RESOURCE VALUATION: A PRIMER ON CONCEPTS AND TECHNIQUES 43 (1997), http://www.environmentalmanager.org/wp-content/uploads/2008/04/valuation_primer_from_doe.pdf [<https://perma.cc/V4KK-ETBJ>] ("Natural resource and environmental valuation is difficult, even when there is relative certainty over prevailing economic and environmental conditions.").

that were difficult to quantify and could be easily manipulated by the parties.¹⁵²

CERCLA set out to replace the unwieldy and ineffective common law causes of action with something more concrete that could effectively impose liability on parties that may not be directly tied to the contamination but are nevertheless responsible in some manner.¹⁵³ Instead of direct causation, CERCLA only requires a party show that there is a release or threatened release of a hazardous substance at a facility and that the defendant falls into one of the four categories of liability.¹⁵⁴ This attenuated causation requirement was a response to the difficulties of proving causation under common law. It widened the liability net to include many parties who would not otherwise be liable under a common law standard. While parties who fall outside the reach of common law may argue that they are not directly responsible for releases, CERCLA addressed the complexity and expense of cleanups and the need for all players involved in a contamination to be on the hook for the cost. CERCLA eschewed the constraints of common law causes of action and provided the government and private parties with a more efficient mechanism to facilitate cleanups and to recover costs associated with these actions.¹⁵⁵

Instead of upholding CERCLA's purpose as a vehicle that can facilitate cleanups and cost recovery by providing a concrete statutory framework to impose liability on polluters, recent courts in the useful product context have begun to reinsert common law elements of fault and state of mind.¹⁵⁶ In doing so, they are pulling CERCLA in the direction of

¹⁵² *Missouri v. Illinois*, 200 U.S. 496 (1906), reveals the difficulties with causation in early common law cases. In this case, Missouri sued Illinois for dumping sewage into the Mississippi River causing a typhoid outbreak. *Id.* at 523. However, Missouri could not effectively connect the increase in deaths from typhoid in their state to Illinois' dumping of sewage. *Id.* The Court was skeptical, pointing to possible intervening causes and the lack of direct evidence connecting Illinois's specific actions to the outcome in Missouri. *Id.*

¹⁵³ For example, CERCLA imposes liability on current owner/operators, even if they were not the owner or operator at the time of the disposal. See 42 U.S.C. § 9607(a) (2012).

¹⁵⁴ *Id.*; see also Suzanne C. Baskin & Phillip D. Reed, "Arranging For Disposal" Under CERCLA: *When Is a Generator Liable?*, 15 ENVTL. L. REP. 10160, 10161 (1985) ("The government has won every battle . . . on its theory that CERCLA requires only limited proof of causation.").

¹⁵⁵ See Alexandra B. Klass, *CERCLA, State Law, and Federalism in the 21st Century*, 41 SW. L. REV. 679, 683 (2012).

¹⁵⁶ Such considerations, however, should not matter under CERCLA. See Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 635 (1993) ("CERCLA imposes strict liability; considerations of fault or blameworthiness are, by definition, irrelevant under its terms.").

requiring proof of direct causation and away from the attenuated causation scheme that Congress intended it to be.

III. A REAL IMPACT: HOW THE SHIFT WILL AFFECT SUPERFUND

This shift away from broad liability in the useful product arena will have a real impact on the landscape of Superfund litigation.¹⁵⁷ This Part will examine the impact that this shift will have on the major players in the Superfund world: the PRPs, the EPA, and the environment. It will argue that this shift conclusively favors defendant arranger PRPs, will have a dampening effect on agency enforcement action, and a corresponding negative effect on Superfund cleanup efforts, ultimately wreaking havoc on human and environmental health.

PRPs who are being pursued as arrangers will now have the upper hand in this area. PRPs being sought as owners or operators of contaminated properties will be more reticent to pursue arrangers in contribution actions given the changing landscape of useful product litigation. Additionally, the EPA will be similarly wary when it comes to backing these arranger liability actions brought by owners and operators by issuing orders against arrangers that might support a contribution suit. These high litigation risks will act to shield arrangers from being held liable under CERCLA.

The increasing focus on circumstantial evidence to prove intent benefits arrangers. The incentive for arrangers to escape the liability net is great; many millions of dollars are at stake. For example, in the litigation around the Fox River, settlements totaled about \$55 million.¹⁵⁸ Since *Burlington Northern*, PRPs have benefitted from courts examining the holistic landscape of the transaction. Arranger PRPs and the attorneys representing them will focus on building a narrative around their liability using circumstantial evidence. While the useful product standard is not so low that courts will simply accept the PRPs' characterization of the transaction as either a sale or disposal, courts are more willing to look at

¹⁵⁷ EPA's Superfund program, created in 1980, identifies and responds to contaminated sites, environmental emergencies, and natural disasters. See CENTER FOR HEALTH, ENVIRONMENT & JUSTICE, SUPERFUND: POLLUTERS PAY SO CHILDREN CAN PLAY 4 (2015), <http://chej.org/wp-content/uploads/Superfund-35th-Anniversary-Report1.pdf> [<https://perma.cc/7NQ2-FNF4>]; *Superfund*, EPA, <https://www.epa.gov/superfund> [<https://perma.cc/ZGZ4-PAUA>] (last updated June 21, 2016). Congress allocates funds to the Superfund program each year, but the program is also funded by contributions from polluters responsible for contamination. See CENTER FOR HEALTH, ENVIRONMENT & JUSTICE, *supra*, at 5.

¹⁵⁸ *Lower Fox River*, *supra* note 3. This number does not include attorney's fees or other litigation related costs. See *id.*

other factors than they were prior to *Burlington Northern*.¹⁵⁹ Circumstantial evidence such as the value of the material and how the material was managed prior to sale can be preserved such that a good story can be told that will support the contention that the material at issue is a useful product.¹⁶⁰ Forward-thinking counsel may even take steps to encourage clients to handle materials more like a useful product and less like waste in anticipation of possible litigation.

While the shift to a permissive application of the useful product doctrine will result in lenience for arranger PRPs, this shift will negatively impact the EPA's enforcement strategy. One problem with the expansion of the useful product exception to liability is that at some Superfund sites, the primary responsible actor has been identified but may be defunct or otherwise lack the ability to pay.¹⁶¹ Because of this, the agency has to find creative ways to fund cleanups. These include the pursuit of multiple arrangers to fund a cleanup in cases where the major players cannot do so.¹⁶² In these cases, arrangers are often the only actors who both contributed to the contamination *and* are readily identifiable as viable financiers for cleanup.¹⁶³ In other cases, a smaller site, such as a battery salvage and lead recovery site,¹⁶⁴ could be impacted greatly by the useful

¹⁵⁹ See, e.g., *United States v. Dico, Inc.*, 808 F.3d 342, 350–51 (8th Cir. 2015) (considering the value of the contaminated buildings as part of the useful product inquiry); *Consolidation Coal Co. v. Ga. Power Co.*, 781 F.3d 129, 153–54 (4th Cir. 2015) (considering the handling of the transformers prior to sale as part of the useful product inquiry).

¹⁶⁰ Cf. Chris Dow, *A Tale of Two Rivers: An Analysis of Different Approaches to Proving Intent for CERCLA Arranger Liability*, 45 ENVTL. L. REP. 10699, 10705 (2015).

¹⁶¹ An EPA guidance document states: “In some instances, companies have moved or changed names, requiring several service attempts, or the company may turn out to be bankrupt or defunct.” EPA, GOWANUS CANAL SUPERFUND SITE POTENTIALLY RESPONSIBLE PARTY (PRP) SEARCH STATUS 1 (2012), http://www3.epa.gov/region02/superfund/npl/gowanus/pdf/potentially_responsible_party_prpsearch_jan2012.pdf [https://perma.cc/9JF3-VLYM].

¹⁶² See David D. Cooke & Robert D. Wyatt, *Supreme Court Decision Provides Framework for Limiting Superfund Cleanup Liability*, ALLEN MATKINS (May 4, 2004), http://www.allenmatkins.com/Publications/Legal-Alerts/2009/05/08_05_2009_Supreme-Court-decision-provides-framework-for-limiting-Superfund.aspx [https://perma.cc/49D5-ZXK4] (stating that one implication of *Burlington Northern* would be “the risk that more ‘orphan shares’—shares of cleanup costs allocated to parties that are dead, defunct or insolvent—will be unfunded”).

¹⁶³ Hundreds of lead smelting facilities operated in the United States from 1930 to 1969, and while these facilities are now largely defunct, they have left behind high levels of lead contamination. *Ghost Factories*, SCI. AM. (Oct. 4, 2013), <http://www.scientificamerican.com/article/ghost-factories/> [https://perma.cc/F76E-8YNQ]. Lead smelters typically received products containing varying amounts of lead from manufacturers and then would smelt them to recover the lead. See *Cal. Dep’t of Toxic Substances Control v. Alco Pac., Inc.*, 508 F.3d 930, 932–33 (9th Cir. 2007). These arranging manufacturers could potentially finance cleanups in cases where the lead smelter is defunct.

¹⁶⁴ See Salman Zafar, *The Problem of Used Lead-Acid Batteries*, ECOMENA (Nov. 20, 2014, 4:04 AM), <http://www.ecomena.org/managing-lead-acid-batteries/> [https://perma.cc/UY6W-ZGN3] (describing the process of recycling lead acid batteries and recovering the lead).

product doctrine as the majority of the actors contributing to contamination would be arrangers, potentially leaving no solvent party legally responsible for the cleanup.

The recent case law will likely discourage the pursuit of suits against arrangers because of the litigation risks and high costs of building a case against a potential arranger.¹⁶⁵ Consequently, the shift in the doctrine will discourage the EPA from issuing orders finding PRPs liable as arrangers as these orders may be reversed on appeal or complied with under protest because the arrangers may believe they have case law on their side. An arranger could also complete the cleanup and then sue Superfund for reimbursement,¹⁶⁶ arguing that it was not a PRP in the first place given the useful product case law. This more lenient approach to the useful product doctrine could also result in a reduced deterrent effect for arrangers. Arrangers may now be able to behave more recklessly as long as they are careful to act in such a way that they take advantage of the loopholes the courts have created.

The enforcement pressure placed on the EPA by the shift in the useful product doctrine will likely have an impact on the funding for Superfund as well. Even before *Burlington Northern*, there was already pressure on funding.¹⁶⁷ Between 2000 and 2010, the EPA allocated about \$243 million per year for Superfund cleanups, but estimated that between \$335 million and \$681 million would be needed annually in subsequent years.¹⁶⁸ Because of funding pressure, the National Remedy Review Board streamlines CERCLA cleanups.¹⁶⁹ If the liability net has shrunk because of the recent

¹⁶⁵ Litigation costs for building a CERCLA case are already high, and courts allow for fee shifting in very limited circumstances. See K. Jason Northcutt, *Reviving CERCLA's Liability: Why Government Agencies Should Recover Their Attorneys' Fees in Response Cost Recovery Actions*, 27 B.C. ENVTL. AFF. L. REV. 779, 782 (2000). The added complications of rebutting the circumstantial and often vague evidence around the sale of a useful product further increase costs.

¹⁶⁶ *Supreme Court Says "Yes," Private Parties Can Sue Under Superfund to Recover Voluntary Cleanup Costs*, SPENCER FANE (June 12, 2007), <http://www.spencerfane.com/supreme-court-says-yes-private-parties-can-sue-under-superfund-to-recover-voluntary-cleanup-costs-06-12-2007/> [<https://perma.cc/V2TP-JRDA>].

¹⁶⁷ Laurel Adams, *EPA Superfund Cleanup Costs Outstrip Funding*, CTR. FOR PUB. INTEGRITY (Feb. 22, 2011, 7:53 PM), <http://www.publicintegrity.org/2011/02/22/2121/epa-superfund-cleanup-costs-outstrip-funding> [<https://perma.cc/E6PX-EW8C>].

¹⁶⁸ *Id.*; U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-380, SUPERFUND: EPA'S ESTIMATED COSTS TO REMEDIATE EXISTING SITES EXCEED CURRENT FUNDING LEVELS, AND MORE SITES ARE EXPECTED TO BE ADDED TO THE NATIONAL PRIORITIES LIST (2010), <http://www.gao.gov/new.items/d10380.pdf> [<https://perma.cc/Z68Q-76JG>].

¹⁶⁹ *National Remedy Review Board (NRRB)*, EPA, <http://www.epa.gov/superfund/national-remedy-review-board-nrrb> [<https://perma.cc/PU3T-UPD6>] (last updated Aug. 15, 2016) (explaining that after the EPA adds Superfund sites to the National Priorities List, the NRRB reviews proposed cleanup

shifts in the useful product doctrine, the number of PRPs who can contribute to funding cleanups is also smaller.¹⁷⁰ Naturally, this will lead to further cuts in funding.

As mentioned above, the narrowing of arranger liability may mean that the owner and operator PRPs will pay more to clean up sites. However, at sites where there is no viable entity responsible for the contamination, the EPA pays for the cleanup.¹⁷¹ There is still a significant gap in funding for cleanups such that EPA-funded cleanup may not always be fiscally feasible.¹⁷² The EPA budget for 2016 allocated \$190.7 million for the Superfund Emergency Response and Removal program.¹⁷³ In addition to funding these emergency actions, the EPA also encourages PRPs to conduct removal actions.¹⁷⁴ While there is also funding for remedial cleanups, such funds are allocated to completing projects already in various stages of the response process, not to new cleanups.¹⁷⁵

All of these financial shortcomings culminate in the actual impact that this shift towards decreased liability will have on the environment itself—an impact that is potentially catastrophic. With the agency unable to flexibly enforce against arrangers, and owners and operators similarly constrained by litigation risks, there will simply be less ability to push through rapid cleanups for sites heavily impacted by arrangers. This raises the specter of real environmental harm as Superfund sites are allowed to languish for years without cleanup. The impact that Superfund sites can have on human and environmental health is demonstrated by current sites that have not been properly cleaned up.¹⁷⁶ A telling example of this is the

decisions for various criteria including cost effectiveness and ensures that all decisions “meet cost-based review criteria”).

¹⁷⁰ Superfund litigation was decreasing even before *Burlington Northern*. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-656, SUPERFUND: LITIGATION HAS DECREASED AND EPA NEEDS BETTER INFORMATION ON SITE CLEANUP AND COST ISSUES TO ESTIMATE FUTURE PROGRAM FUNDING REQUIREMENTS 7 (2009), <http://www.gao.gov/new.items/d09656.pdf> [<https://perma.cc/K9SS-JRJU>].

¹⁷¹ DAVID M. BEARDEN ET AL., CONG. RESEARCH SERV., RL30798, ENVIRONMENTAL LAWS: SUMMARIES OF MAJOR STATUTES ADMINISTERED BY THE ENVIRONMENTAL PROTECTION AGENCY 58–59 (2010).

¹⁷² See EPA, FY 2016: EPA BUDGET IN BRIEF 47–48 (2015), http://www2.epa.gov/sites/production/files/2015-02/documents/fy_2016_bib_combined_v5.pdf [<https://perma.cc/YB3X-U5CE>].

¹⁷³ This money is focused on emergency removal and response action. See *id.*

¹⁷⁴ See *id.* (“[T]he EPA will complete or oversee a total of 275 Superfund-lead and PRP-lead removal actions . . .”).

¹⁷⁵ See *id.* at 48.

¹⁷⁶ As of November 29, 2016, there were 1337 sites listed on the National Priorities List. *Superfund: National Priorities List (NPL)*, EPA, <http://www.epa.gov/superfund/superfund-national-priorities-list-npl> [<https://perma.cc/HH6V-G2YQ>] (last updated May 6, 2016). Languishing Superfund sites could also impede other redevelopment efforts as developers may not want to take on the burden of occupying and building on contaminated land.

Pearl Harbor Naval Complex in Hawaii, a site where PCBs, mercury, and volatile organic compounds have been found in the soil, and could eventually be released as harmful gases into the air.¹⁷⁷ The hazardous waste sources found below the ground surface at Pearl Harbor also pose possible groundwater contamination issues in an area where about 110,000 people get their drinking water from wells.¹⁷⁸ At the McCormick & Baxter Creosoting Company site in Stockton, California, a plant that treated utility posts and railroad ties with heavy metals, site-related toxins have been found in fish that are caught and consumed by the local population.¹⁷⁹ The contaminants at the aforementioned sites have been linked to various health problems, including cancer, birth defects, and damage to the liver, the kidneys, and the central nervous system.¹⁸⁰ These two sites are only a sampling of the many Superfund sites that have not been cleaned up across the country and continue to pose harm to human health and the environment.¹⁸¹

In the current climate, where courts have not held many arrangers liable under CERCLA due to a more permissive approach to the useful product doctrine, sites impacted chiefly by arrangers may also be treated as

¹⁷⁷ *Pearl Harbor Naval Complex*, EPA, <http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/ViewByEPAID/HI4170090076> [<https://perma.cc/W7QL-Y4GL>] (last updated Jan. 20, 2015); Kelly Zhou, *Red, White, and Deadly: 8 of the Worst American Superfund Sites*, TAKEPART (Feb. 22, 2013), <http://www.takepart.com/photos/worst-superfund-sites/super-filthy> [<https://perma.cc/D63R-8K99>].

¹⁷⁸ Zhou, *supra* note 177.

¹⁷⁹ *McCormick & Baxter Creosoting Co.*, EPA, <http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/ViewByEPAID/cad009106527?OpenDocument> [<https://perma.cc/5A5S-P3RP>] (last updated Apr. 29, 2015); Zhou, *supra* note 177.

¹⁸⁰ *Polychlorinated Biphenyls (PCBs) Toxicity: What Are Adverse Health Effects of PCB Exposure?*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (May 14, 2014), <https://www.atsdr.cdc.gov/csem/csem.asp?csem=30&po=10> [<https://perma.cc/B2T3-SZ94>]; *Reproductive Health and the Workplace*, CDC, <http://www.cdc.gov/niosh/topics/repro/heavymetals.html> [<https://perma.cc/EKM8-APRR>] (last updated Feb. 27, 2015); *Volatile Organic Compounds' Impact on Indoor Air Quality*, EPA, <https://www.epa.gov/indoor-air-quality-iaq/volatile-organic-compounds-impact-indoor-air-quality> [<https://perma.cc/GYL6-RUUX>] (last updated Sept. 7, 2016).

¹⁸¹ The 38,000 people living near the Duwamish River Superfund site in the South Park, Georgetown, and Beacon Hill neighborhoods of Seattle suffer from higher rates of asthma, diabetes, and colorectal cancer than the rest of King County. Carol Smith, *The High Health Costs of a Seattle's Superfund Site: It Can Take Years Off Your Life*, INVESTIGATEWEST (Mar. 20, 2011), <http://invw.org/2011/03/20/health-along-the-duwamish-a-superfund-runs-through-it/> [<https://perma.cc/9MGC-WLFE>]. There is also a higher infant mortality rate and lower life expectancy in these neighborhoods that has been linked in part to the proximity of the still contaminated site. *Id.* In Massachusetts, thirty-one sites pose an imminent health risk. Beverly Ford, *The Bay State's Toxic Legacy*, CTR. FOR PUB. INTEGRITY (May 24, 2011, 3:20 PM), <http://www.publicintegrity.org/2011/05/24/4723/bay-states-toxic-legacy-0> [<https://perma.cc/GN76-3JCC>]. At the New Bedford Harbor site, where seafood has been contaminated with PCBs, the EPA has classified the human exposure risk as “not under control.” *Id.* Residents near a site in Wilmington, Massachusetts are concerned that a cancer cluster is connected to toxins found in wells in 2002. *Id.*

a lower priority. In order to get cleaned up, Superfund sites must be evaluated by the National Remedy Review Board and be listed on the National Priorities List (NPL).¹⁸² Sites that are treated as lesser priorities may never be listed on the NPL or may simply languish there, stalled due to lack of funding.¹⁸³ However, sites impacted by arrangements for disposal are not less harmful to environmental or human health.¹⁸⁴ There are many current Superfund sites that could be impacted by this narrowed doctrine.¹⁸⁵

¹⁸² See *Basic NPL Information*, EPA, <http://www.epa.gov/superfund/basic-npl-information> [<https://perma.cc/8WKG-7HQJ>] (last updated May 4, 2016); *National Remedy Review Board (NRRB)*, *supra* note 169. A small subset of Superfund cleanups occur outside the NPL process. See *Superfund Alternative Approach*, EPA, <https://www.epa.gov/enforcement/superfund-alternative-approach> [<https://perma.cc/K6DK-GC5R>] (last updated Mar. 10, 2016).

¹⁸³ See Juliet Eilperin, *Lack of Funding Slows Cleanup of Hundreds of Superfund Sites*, WASH. POST (Nov. 25, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A11246-2004Nov24.html> [<https://perma.cc/AF2R-G4H8>].

¹⁸⁴ Consider residential neighborhoods impacted by defunct lead smelters. Lead exposure can do significant damage to human health, even in small amounts, leading to a wide range of serious physical and developmental problems. See *Ghost Factories*, *supra* note 163. Children are particularly vulnerable. See *id.* While not linked to a defunct lead smelter, the 2016 public health crisis in Flint, Michigan, where corrosive water caused lead from pipes to leach into the drinking water supply, highlights the very serious dangers that lead contamination can pose to human and environmental health. See Julie Bosman et al., *As Water Problems Grew, Officials Belittled Complaints from Flint*, N.Y. TIMES (Jan. 20, 2016), http://www.nytimes.com/2016/01/21/us/flint-michigan-lead-water-crisis.html?_r=0 [<https://perma.cc/TM6W-6435>]. Furthermore, Congress and the EPA are well aware of the dangers that arranger transactions can pose to both human and environmental health. The EPA warns of the hazards of these types of transactions:

Hazardous secondary materials stored or transported prior to recycling have the potential to present the same types of threats to human health and the environment as hazardous wastes stored or transported prior to disposal. In fact, EPA has found that recycling operations have accounted for a number of significant damage incidents. . . . [H]azardous secondary materials destined for recycling were involved in one-third of the first 60 filings under RCRA's imminent and substantial endangerment authority and in 20 of the initial 160 hazardous material sites listed for potential clean up under [CERCLA]. Congress also cited some damage cases which involve recycling Additional data . . . included in the rulemaking docket for today's rule corroborate the fact that recycling operations can and have resulted in significant damage incidents.

Definition of Solid Waste, 80 Fed. Reg. 1,694, 1,696 (Jan. 13, 2015) (internal citations omitted).

¹⁸⁵ Sites like the residential areas impacted by defunct lead smelters will be most seriously impacted by this narrowing of arranger liability. See *Ghost Factories*, *supra* note 163. The last lead smelter in the United States was closed in 2013, meaning that the majority of these entities are likely defunct and may not have parent companies to pursue in contribution actions. See Leah Thorsen, *Smelter's Closure Is End of an Era in Herculanum*, ST. LOUIS POST-DISPATCH (Dec. 15, 2013), http://www.stltoday.com/news/local/metro/smelter-s-closure-is-end-of-an-era-in-herculanum/article_021e81bb-43f0-52ba-aadf-fe36681a0ad0.html [<https://perma.cc/MD8H-BCWW>]. The EPA cites thirteen Superfund cleanups across the country that were impacted by historic smelting and mining activities as just a few examples of sites where lead testing needed to be performed on people in the area. See *Lead at Superfund Sites*, EPA, <http://www.epa.gov/superfund/lead-superfund-sites> [<https://perma.cc/XB4E-6C7H>] (last updated June 14, 2016). If arrangers cannot be sought to help finance cleanups of these types because of the current state of the case law and the main actors (the lead

The recent court decisions will not only impact the ability of the agency to enforce against the arranging PRPs, but will also slow down cleanups and have a negative impact on human health and the environment.¹⁸⁶

Lower courts should scale back this move towards leniency while respecting *Burlington Northern*. The Court's holding, while it did change the intent standard for arrangers, was so vague as to allow for different interpretations.¹⁸⁷ Lower courts in the useful product arena have taken a broad view of the case, using it as a jumping-off point to promote the permissive, pro-defendant trend that has emerged in recent cases. Because of *Burlington Northern's* flexibility, lower courts can revert back to some of the values of the pre-*Burlington Northern* world without disturbing Supreme Court precedent. They can do this in part by considering agency liability findings when making decisions about arranger liability, as discussed in the next Part.

IV. AN INDICATIVE SHIFT?

Judicial deference to agencies is a complex and difficult area of the law and likely only tells part of the story in the useful product arena.¹⁸⁸ However, there is some evidence that the shift away from wide-reaching liability in the useful product context is symptomatic of a larger trend in administrative law. Since *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁸⁹ the Court has attempted "to reassert the primacy

smelters) are unable to pay, the cost of the cleanup will fall to the agency, which will stretch the EPA's already strained Superfund budget and potentially stall the cleanup.

¹⁸⁶ Abandoned lead smelters illustrate the recent slowdown in cleanups. In April 2001, environmental scientist William Eckel compiled a list of 400 potential lead-smelting sites that had been abandoned and were unknown to regulators. See Alison Young, *Long-Gone Lead Factories Leave Poisons in Nearby Yards*, USA TODAY (Apr. 25, 2012, 2:06 PM), <http://usatoday30.usatoday.com/news/nation/story/2012-04-19/smelting-lead-contamination-government-failure/54399578/1> [https://perma.cc/5FBJ-YV33]. A USA Today investigation found that regulators had done little to address the danger posed by these sites. *Id.* As of 2012, only eighteen sites had received any sort of cleanup. *Id.* Any cleanups of these sites may end up being funded by taxpayers, in part because many lead smelters are now defunct and the recent developments in arranger liability have left these sites with no private party to pay for cleanup. See Alison Young, *Old Lead Factories May Stick Taxpayers with Cleanup Costs*, USA TODAY (Dec. 19, 2012, 9:43 AM), <http://www.usatoday.com/story/news/nation/2012/12/19/lead-smelter-cleanup-liabilities/1766747/> [https://perma.cc/W6WC-NSYJ].

¹⁸⁷ MARK MISIOROWSKI & JOEL D. EAGLE, AFTER THE SUPREME COURT'S *BURLINGTON NORTHERN* DECISION 17 (2009), http://www.thompsonhine.com/uploads/1228/doc/DRI_Burlington_Northern.pdf [https://perma.cc/L8TC-K5XT].

¹⁸⁸ The deference inquiry in this space is complicated by the fact that while CERCLA cases often involve agency actions, they do not always involve them, such as when a private party seeks to recover cleanup costs.

¹⁸⁹ 467 U.S. 837 (1984).

of the judiciary.¹⁹⁰ For example, in *United States v. Mead Corp.*,¹⁹¹ the Court expressly reduced the deference afforded to an agency when the interpretation at issue did not result from formal procedure.¹⁹² The *Mead* Court ultimately held that a tariff classification issued by the U.S. Customs Service did not carry the force of law and was not entitled to *Chevron* deference.¹⁹³ The *Mead* analysis is a threshold inquiry to determine whether an agency action receives *Chevron* deference. If Congress did not delegate authority to an agency to “make rules carrying the force of law,” no *Chevron* deference should be afforded.¹⁹⁴ Whether an agency action has the force of law is a complicated inquiry, but the Court emphasized that actions preceded by formal administrative processes such as formal adjudication or notice-and-comment rulemaking carry the force of law.¹⁹⁵ *Mead* and other similar cases challenging agency action demonstrate decreased deference and increased judicial involvement in evaluating agency decisions.¹⁹⁶ This represents a significant shift from the previous world order in which courts had given substantial deference to agency interpretations.¹⁹⁷

The shift in judicial application of the useful product doctrine correlates with this larger change from substantial deference to measured skepticism. The EPA finding of liability is an informal agency action that is not the result of notice-and-comment rulemaking or formal adjudication.¹⁹⁸ This agency finding serves as the basis of the government’s complaint against an arranger or is relied on by the PRP initiating a contribution

¹⁹⁰ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 190 (2006).

¹⁹¹ 533 U.S. 218 (2001).

¹⁹² David Marshall Coover, III, *Square Pegs and Round Holes: Why the Environmental Protection Agency’s New Section 111 Greenhouse Gas Regulations Do Not Fit in with Supreme Court Precedent or Congressional Intent in the Clean Air Act*, 45 TEX. ENVTL. L.J. 1, 7 (2015).

¹⁹³ 533 U.S. at 226–27. The Court held: “[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *Id.* Instead, the Court found that the customs classifications at issue are “best treated like ‘interpretations contained in policy statements, agency manuals, and enforcement guidelines’” and are therefore “beyond the *Chevron* pale.” *Id.* at 234 (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)).

¹⁹⁴ *Id.* at 226–27.

¹⁹⁵ See *id.* at 229–30; Giacomo Gallai, Note, *United States v. Mead Corp.: Will Administrative Transparency Survive the Increasing Demand for National Security?*, 30 PEPP. L. REV. 725, 728 (2003).

¹⁹⁶ See Sunstein, *supra* note 190, at 190.

¹⁹⁷ The dissent in *Christensen v. Harris County* emphasized the Court’s departure from the *Chevron* standard. See 529 U.S. at 595 (Stevens, J., dissenting) (“Because there is no reason to believe that the Department’s opinion was anything but thoroughly considered and consistently observed, it unquestionably merits our respect.”).

¹⁹⁸ See *Superfund Unilateral Orders*, *supra* note 29.

action as evidence of the arranger status of the PRP it is suing.¹⁹⁹ While these liability determinations warrant no formal judicial deference,²⁰⁰ the pre-*Burlington Northern* cases demonstrate unofficial deference to agency findings consistent with a pre-*Mead* world,²⁰¹ even if courts were not explicitly required to be deferential. The pre-*Burlington Northern* courts' narrow application of the useful product doctrine and more or less consistent findings that selling hazardous secondary materials constituted arranging for disposal, reflected a general willingness to accept EPA liability determinations in arranger cases.²⁰² In contrast, the cases post-*Burlington Northern* are consistent with the decreased deference to agency determinations after *Mead* in that courts are engaging in a far more searching inquiry into intent, and more often than not, finding for the defendant arranger.²⁰³

The increasing primacy of the judiciary²⁰⁴ is apparent in the useful product cases. Recent courts have engaged much more deeply with the useful product doctrine, considering circumstantial evidence ranging from the value of the material to how it was handled in determining the intent of the potential arranger.²⁰⁵ This more holistic inquiry indicates a decreased regard for the agency finding in support of defendant arranger liability. Admittedly, a change in attitude toward agency deference is not the only potential contributor to this shift. This shift could also be reflective of the judiciary's larger distrust of CERCLA in that it seeks to regulate activity

¹⁹⁹ This is codified in a Unilateral Administrative Order (UAO) issued under CERCLA § 106 that identifies liable parties and outlines facts supporting liability. See DON. R. CLAY, OFF. OF SOLID WASTE AND EMERGENCY RESPONSE, OSWER DIRECTIVE NO. 9833.0-1a, GUIDANCE ON CERCLA SECTION 106(a) UNILATERAL ADMINISTRATIVE ORDERS FOR REMEDIAL DESIGNS AND REMEDIAL ACTIONS 1, 7, 12–13 (1990). In useful product cases, the UAO would contend that the party arranged for disposal by sending hazardous materials to a third party that ultimately contaminated the environment. If the PRP refuses to assist with the cleanup despite the threats of treble damages and penalties, the EPA refers the case to DOJ, which then files suit, alleging that the EPA issued a valid UAO and the party is liable. See *id.* at 3–5; *Superfund Unilateral Orders*, *supra* note 29. Alternatively, the EPA could undertake the cleanup and refer the cost recovery claim to the DOJ. See CLAY, *supra*, at 3–5.

²⁰⁰ See *Kelley v. EPA*, 15 F.3d 1100, 1107–08 (D.C. Cir. 1994) (“Congress . . . designated the courts and not EPA as the adjudicator of the scope of CERCLA liability.”).

²⁰¹ See, e.g., *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 683–84 (3d Cir. 2003); *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 695 (9th Cir. 1992); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380–82 (8th Cir. 1989).

²⁰² See cases cited *supra* note 201.

²⁰³ See, e.g., *United States v. Dico, Inc.*, 808 F.3d 342, 350–51 (8th Cir. 2015); *Consolidation Coal Co. v. Ga. Power Co.*, 781 F.3d 129, 155 (4th Cir. 2015); *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 707 (7th Cir. 2014); *Team Enters., LLC v. W. Inv. Real Estate Tr.*, 647 F.3d 901, 911 (9th Cir. 2011).

²⁰⁴ See Sunstein, *supra* note 190, at 190.

²⁰⁵ See *supra* Section II.C.

that a layperson would not find objectionable,²⁰⁶ or even as part of a larger backlash against the perceived unfairness of the statute.²⁰⁷

The impact of *Mead* has already been documented in other environmental regulatory spaces. The Ninth Circuit in *Hall v. EPA* found that the EPA was not entitled to deference in its approval or denial of state revisions to air quality plans under the Clean Air Act.²⁰⁸ In *Catskill Mountains Chapter of Trout Unlimited, Inc., v. City of New York*, the Second Circuit denied deference to the EPA position that the Clean Water Act discharge permit requirements do not apply to dams.²⁰⁹ Scholars have identified other possible areas where *Mead* could overturn agency action, including the National Standard Guidelines promulgated by the National Marine Fisheries Service²¹⁰ and an Instruction Memorandum issued by the Bureau of Land Management.²¹¹ Courts in these areas have relied on *Mead* to deny *Chevron* deference to agency interpretations and have increased the primacy of the judiciary accordingly.

Even if courts are not required to defer to agency findings of liability in the useful product arena,²¹² courts should return to allowing some deference in practice, as occurred in the pre-*Burlington Northern* world. The *Mead* Court found that even if an agency decision was not entitled to *Chevron* deference, courts could consider the factors introduced in *Skidmore v. Swift & Co.*²¹³ in assessing how an agency's action should be weighed.²¹⁴ While no formal deference is due the EPA liability determinations under CERCLA, the *Skidmore* factors—care, consistency, formality, expertise, and persuasiveness—can still guide a court's decision

²⁰⁶ See Adam Babich, *A New Era in Environmental Law*, 20 COLO. LAW. 435, 444 (1991) (“EPA and the U.S. Justice Department clearly need reminding that a liability-based cleanup system will be acceptable to the public only if enforcement agencies learn to exercise a sense of fairness and a modicum of common sense.”).

²⁰⁷ See James M. Sweeney, *Opening the Front Door: The Argument for a Causal Requirement in Multisite CERCLA Litigation*, 46 UCLA L. REV. 1989, 2009 (1999) (“The nearly impossible burden placed on defendants within this framework creates a perception of CERCLA’s liability scheme as inequitable among both litigants and the judiciary.”).

²⁰⁸ 273 F.3d 1146, 1154–56 (9th Cir. 2001).

²⁰⁹ 273 F.3d 481, 490 (2d Cir. 2001).

²¹⁰ See Lindsay J. Nichols, Comment, *The NMFS’s National Standard Guidelines: Why Judicial Deference May Be Inevitable*, 91 CALIF. L. REV. 1375, 1397–99 (2003).

²¹¹ See Megan J. Anderson, *The Energy Policy Act and Its Categorical Exclusions: What Happened to the Extraordinary Circumstance Exception?*, 28 J. LAND RESOURCES & ENVTL. L. 119, 129–31 (2008).

²¹² See *Kelley v. EPA*, 15 F.3d 1100, 1107–08 (D.C. Cir. 1994).

²¹³ 323 U.S. 134 (1944).

²¹⁴ *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (“[C]ourts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.” (footnotes omitted) (citing *Skidmore*, 323 U.S. at 139–40)).

under the useful product doctrine.²¹⁵ In this context, courts should rely most heavily on the expertise of the agency in considering whether to defer to a defendant's colorable claim or to consider the EPA's finding of liability. Justice Scalia, dissenting in *Mead*, asserted that *Skidmore* deference to agency expertise is a "statement of the obvious: A judge should take into account the well-considered views of expert observers."²¹⁶ In the useful product context, liability determinations are technical, fact-specific, and complex.²¹⁷ Because of this complexity, it is unlikely that judges can apply the useful product doctrine as proficiently or consistently as the EPA.²¹⁸ For these reasons, the agency's finding of liability should be carefully considered in courts' decisionmaking process in useful product cases.

CONCLUSION

Today, communities along the Fox River are still grappling with how to deal with the legacy of the carbonless copy paper revolution. The river remains contaminated with PCBs. There has been a fish consumption advisory in place since 1976.²¹⁹ Remediation efforts have been costly and time-consuming, and they are not yet finished.²²⁰ Because NCR was able to escape arranger liability due to courts' new interpretation of the useful product doctrine, a source of funding for the cleanup has been eliminated. The responsibility for financing the remaining cleanup falls to a shrinking

²¹⁵ See *id.*

²¹⁶ *Id.* at 250 (Scalia, J., dissenting).

²¹⁷ CERCLA is a notoriously complex statute that combines nuanced legal judgments with complex technical determinations. Practitioners have described aspects of the statute as "prohibitively complicated" and "difficult." Allison B. Rumsey & Eric A. Rey, *Untangling CERCLA Divisibility and the Fox River Litigation*, ARNOLD & PORTER (Oct. 29, 2015), <http://www.apks.com/es/perspectives/publications/2015/10/untangling-cercla-divisibility-and-the-fox-river> [https://perma.cc/969T-NZKE]; Bruce Flushman, *And You Thought CERCLA Was Complicated Before . . . Just Wait!!!*, WENDEL ROSEN (Mar. 4, 2009), <http://www.wendel.com/knowledge-center/publications/2009/and-you-thought-cercla-was-complicated-before-just-wait-> [https://perma.cc/3KKF-NBW4].

²¹⁸ During internal deliberations over *Chevron*, Justice Stevens acknowledged both the complexity of environmental law as well as the expertise of the agency in making decisions when he said, "When I am so confused, I go with the agency." Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 272 (2014).

²¹⁹ U.S. DEP'T OF HEALTH & HUMAN SERVS., AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, PCB CONTAMINATED SEDIMENT IN THE LOWER FOX RIVER AND GREEN BAY NORTHEASTERN WISCONSIN 7 (2006), http://www.atsdr.cdc.gov/HAC/pha/FoxRiver/PCBinFoxRiver_GreenBayPHA031406.pdf [https://perma.cc/3CEV-5P38]; WIS. DEP'T OF NAT. RES., FISH CONSUMPTION ADVICE FOR GREEN BAY AND THE LOWER FOX RIVER AREA OF CONCERN (2012), <http://dnr.wi.gov/topic/fishing/documents/GreenBayFoxRiver2012.pdf> [https://perma.cc/2PJK-9ZH8].

²²⁰ The cleanup began in 2001, when the EPA and Wisconsin proposed a joint cleanup plan, which is currently scheduled to be completed by 2017. See *Lower Fox River*, *supra* note 3. The cleanup is estimated to cost \$1 billion. See Srubas, *supra* note 5.

number of PRPs and may ultimately shift the burden of funding the cleanup from the private sector to the public purse.

Although minor in terms of its lasting technological impact, as we approach the sixty-third anniversary of the invention of carbonless copy paper, the environmental damage of this novelty is not inconsequential. If success is measured by the number of sites cleaned up and the speed with which such sites are addressed, then the “polluters must pay” sentiment in CERCLA legislative history, the plain language of the statute itself, and the expert findings of the EPA should guide judicial decisionmaking. To rectify the damage that has already been done to the Fox River and to rectify similar damage that has been wrought by arrangers across the country, it is critical that courts begin to curb this trend of permissive arranger liability by walking back the lower court’s expansion of *Burlington Northern*’s already permissive rule and carefully considering agency liability determinations. In doing so, they will return to CERCLA’s statutory roots and facilitate cleanups by forcing the polluters responsible to bear the costs of the cleanup.

