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## Do Polluters Truly Pay? A Chip in the "Potentially Responsible Parties" Analysis for Hazardous Waste Cleanup. *Celanese Corporation v. Martin K. Eby Construction Company, Inc.*

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## Do Polluters Truly Pay? A Chip in the “Potentially Responsible Parties” Analysis for Hazardous Waste Cleanup

*Celanese Corporation v. Martin K. Eby Construction Company, Inc.*<sup>1</sup>

### I. INTRODUCTION

In 2009, the Supreme Court decided the landmark case of *Burlington Northern and Santa Fe R.R. Co. v. U.S.*,<sup>2</sup> and introduced an element of intent into what had traditionally been a strict liability provision for allocating responsibility for the cleanup of hazardous waste.<sup>3</sup> The Fifth Circuit had the opportunity to follow this new precedent explicitly in the case presented here, *Celanese v. Eby*. Despite unanimous agreement that the defendant was the proximate cause of the harm, the court was forced to find the defendant not liable for this harm due to a lack of intent. This note analyzes the history of hazardous waste liability for potentially responsible persons and determines whether the Supreme Court’s new precedent has created a loophole for responsible parties to escape liability. Furthermore, potential solutions are presented for analysis and to determine if this is a problem in need of further attention.

### II. FACTS AND HOLDING

The plaintiff–appellant, Celanese Corporation (“Celanese”) is a global leader in the chemicals industry headquartered in the state of Texas.<sup>4</sup> It owns and operates an underground pipeline transporting the chemical methanol between its plants in Harris County, Texas.<sup>5</sup> In 1979, the Coastal Water Authority of Texas (“CWA”) contracted with

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<sup>1</sup> 620 F.3d 529 (5th Cir. 2010).

<sup>2</sup> 129 S. Ct. 1870 (2009).

<sup>3</sup> *Id.* at 1879–80.

<sup>4</sup> Celanese Corp., *Company Profile*, [http://www.celanese.com/index/about\\_index/company-profile.htm](http://www.celanese.com/index/about_index/company-profile.htm) (last visited Nov. 5, 2011).

<sup>5</sup> *Celanese Corp. v. Coastal Water Auth. (“Coastal Water”)*, 2009 WL 981717, \*1 (S.D. Tex. 2009).

defendant-appellee Martin K. Eby Construction Company (“Eby”) to install an underground water pipeline to supply industrial plants in Harris County with water.<sup>6</sup> This pipeline had to cross many other underground pipelines, including the pipeline owned by Celanese.<sup>7</sup> In order to install a new pipeline amidst this maze of other lines, Eby first excavated an area to uncover other pipelines, and then ran its pipeline underneath all existing pipelines.<sup>8</sup> After installing each segment, Eby would then “backfill” the area and move on to the next segment.<sup>9</sup>

During this installation procedure, an Eby employee struck and damaged the Celanese pipeline with a backhoe.<sup>10</sup> The damaged portion was neither exposed nor in plain view prior to the backfilling procedure.<sup>11</sup> Thus, the employee did not know what he had struck<sup>12</sup> and there was no report filed with Eby or any of the other companies involved in the construction.<sup>13</sup> No one at Eby knew that their work on the CWA pipeline had caused damage to the Celanese pipeline.<sup>14</sup>

Over the years, this dented pipe deteriorated due to stress corrosion cracking.<sup>15</sup> This led to a crack penetrating the wall of the pipe, subsequently allowing methanol to leak from the pipe.<sup>16</sup> The leak was not discovered until October 1, 2002, at which point Celanese fixed the pipe and worked to clean up the site and prevent any contamination of nearby

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<sup>6</sup> *Celanese Corp. v. Eby* (“*Celanese*”), 620 F.3d 529, 530 (5th Cir. 2010).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Coastal Water*, 2009 WL 981717, at \*2.

<sup>12</sup> Evidence was given at trial as to whether an average employee would be able to tell the difference between striking a heavy rock or striking metal. This evidence was inconclusive. *Id.* at \*2–\*3.

<sup>13</sup> *Celanese*, 620 F.3d at 530.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Stress corrosion cracking is a term used to describe a slow mechanical failure in the form of a crack that results from the combined influence of mechanical stress and a corrosive environment. See RUSSELL H. JONES, STRESS-CORROSION CRACKING, MATERIALS PERFORMANCE AND EVALUATION 1 (ASM Int’l, 1992).

<sup>16</sup> *Celanese*, 620 F.3d at 530.

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groundwater.<sup>17</sup> At least 232,000 gallons of methanol have been removed from the subsurface at the site but it is unknown exactly how much methanol was released over the years.<sup>18</sup>

Celanese sued Eby under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)<sup>19</sup> and the Texas Solid Waste Disposal Act (“SWDA”)<sup>20</sup> in order to recover cleanup costs by claiming that Eby was liable as an “arranger” under both acts.<sup>21</sup> Whether Eby was liable hinged on the statutory definition of an arranger for both acts.<sup>22</sup>

The parties tried the case in the United States District Court for the Southern District of Texas, using a jury as the finder of fact on the SWDA issues and the judge as the finder of fact regarding the CERCLA claims.<sup>23</sup> Both the judge and the jury<sup>24</sup> found that “[t]he release at the Site would not have occurred but for the 1979 damage to the Celanese methanol line.”<sup>25</sup> However, the trial court held that Eby was not liable as an arranger under either statute because Eby had no knowledge that it had damaged the Celanese pipeline.<sup>26</sup> As a result, the trial court declined to make any further findings or conclusions regarding damages for Celanese’s claims.<sup>27</sup>

Celanese filed a motion to amend or alter the judgment, which the district court denied.<sup>28</sup> Subsequently, Celanese appealed this final judgment contending, “the common law of negligence, industry custom

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 531.

<sup>19</sup> 42 U.S.C. § 9607(a)(3) (2006).

<sup>20</sup> Tex. Health & Safety Code § 361.344 (2010).

<sup>21</sup> *Celanese*, 620 F.3d at 531.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 530.

<sup>24</sup> Under the Texas statute, a party has the right to have a jury act as the fact finder. In a CERCLA case, however, a jury’s findings can only be advisory. See *R.R. Street & Co. Inc. v. Pilgrim Enter., Inc.*, 166 S.W.3d 232, 237 (Tex. 2005).

<sup>25</sup> *Celanese*, 620 F.3d at 531.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* Texas courts refer to this as a “take nothing judgment” because the plaintiff walks away with nothing.

<sup>28</sup> *Id.*

and practice, and Eby's contract with the CWA 'imposed on Eby the obligation to investigate what it hit in a pipeline corridor and rectify any damage.'"<sup>29</sup> Celanese argued that by failing to investigate the incident, Eby consciously disregarded this obligation and should be held liable under CERCLA and SWDA.<sup>30</sup>

The United States Court of Appeals for the Fifth Circuit, reviewed this question of arranger liability *de novo* as the only question was whether the district court erred as a matter of law.<sup>31</sup> As an initial matter, the court made it clear that Celanese could not raise a new legal argument that it had not argued before the trial court.<sup>32</sup> Therefore, Celanese unintentionally waived its "conscious-disregard" argument by failing to argue it at trial.<sup>33</sup> In addition, the court determined that even if the argument had not been waived, Eby would still remain free from liability as an arranger under both statutes because "it did not plan or take any intentional steps to release methanol from the Celanese pipeline."<sup>34</sup> Accordingly, the Fifth Circuit affirmed the decision of the district court.<sup>35</sup>

### III. LEGAL BACKGROUND

#### A. *History and Purpose of CERCLA*

In the wake of large-scale and highly publicized environmental disasters,<sup>36</sup> Congress enacted the Comprehensive Environmental

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Celanese*, 620 F.3d at 531.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 534.

<sup>36</sup> See "Love Canal" disaster in Niagara Falls, New York where chemicals seeped in the ground from abandoned hazardous waste sites and coincided with a high incidence of health problems in the area. The residents of Love Canal tried to force those responsible to cleanup the sites and to provide damages for the injuries caused, but they were unable to do so. President Carter had to declare a state of emergency in the neighborhood, and the EPA commissioned a study to determine how many other waste sites might exist in the U.S. This study led to the proposal and passage of CERCLA. Elizabeth A. Glass,

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Response, Compensation, and Liability Act (“CERCLA”).<sup>37</sup> The purpose of this statute is to facilitate immediate identification and cleanup of hazardous waste sites, to properly allocate these cleanup costs to those responsible for the problems, and to deter and prevent pollution in general.<sup>38</sup> Under § 9607 of CERCLA, the statute imposes joint and several strict liability for hazardous waste cleanup costs on defined “potentially responsible parties” (“PRPs”).<sup>39</sup> There are four categories of PRPs:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) 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, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response cost.<sup>40</sup>

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*The Modern Snake in the Grass: An Examination of Real Estate and Commercial Liability under Superfund and SARA and Suggested Guidelines for the Practitioner*, 14 B.C. ENVTL. AFF. L. REV. 381, 382–83 (1987).

<sup>37</sup> Richard M. Weinstein & Sally A. Aiello, *Bringing a Cost Recovery Action Under CERCLA § 107*, 2-17 TOXIC TORTS GUIDE § 17.13(1) (2011).

<sup>38</sup> *Id.* (citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986), *U.S. v. Fleet Factors Corp.*, 901 F.2d 1550, 1553 (11th Cir. 1990)).

<sup>39</sup> *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1878 (2009).

<sup>40</sup> 42 U.S.C. § 9607(a) (2006).

This statutory language boils down to assigning strict liability for the cost of hazardous waste cleanup to anyone who currently owns or operates the vessel/facility, who owned it at the time of the spill, who arranged for the disposal of the waste, or who accepted the waste for transport. The statute creates a right for the government to sue a private entity falling within the above categories, and has been construed to create a cause of action allowing a private party to recover the costs of cleaning up hazardous wastes from other responsible parties.<sup>41</sup>

In order to recover costs under CERCLA, the plaintiff must prove the following factors.<sup>42</sup> First, the site of the hazardous waste must be a facility as defined in 42 U.S.C. § 9601(9).<sup>43</sup> Second, there must have been a release or a threatened release of a hazardous substance at the site as stated in 42 U.S.C. § 9601(22).<sup>44</sup> Third, this release or threatened release must have created response costs in cleaning up or preventing a spill.<sup>45</sup> Finally, the plaintiff must show the defendant is a “covered person” or responsible party under one of the four categories explained above.<sup>46</sup> The statute has been interpreted to impose strict liability for cleanup costs.<sup>47</sup> Accordingly, the plaintiff need not show the defendant actually caused harm to the environment, but merely that costs were incurred and the defendant is one of the statutorily defined “potentially responsible parties.”<sup>48</sup> While there are defenses to liability provided by the statute, these defenses are limited to: “an act of God, an act of war,” or an act or

<sup>41</sup> 2-17 TOXIC TORTS GUIDE § 17.13(1); *see* U.S. v. Chem-Dyne Corp., 572 F. Supp 802, 805 (S.D. Ohio, 1983) (interpreting the statute’s language of “shall be liable” to signify a strict liability standard).

<sup>42</sup> 2-17 TOXIC TORTS GUIDE § 17.13(2)(a).

<sup>43</sup> 42 U.S.C. § 9601(9) (2006). The statute defines facility to include any iteration of a building or structure, or any area where hazardous substances have “come to be located.”

<sup>44</sup> 42 U.S.C. § 9601(22). “Release” includes spilling, leaking, pumping, pouring, etc.

<sup>45</sup> 2-17 TOXIC TORTS GUIDE § 17.13(2)(a). *See* Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995) (“Under CERCLA, if a responsible party . . . releases hazardous materials into the environment, and that release ‘causes the incurrence of response costs,’ then the party is liable.” (quoting 42 U.S.C. § 96-7(a) (2006)).

<sup>46</sup> 42 U.S.C. § 9607(a).

<sup>47</sup> *See* TOXIC TORTS GUIDE, *supra*, note 41.

<sup>48</sup> 2-17 TOXIC TORTS GUIDE § 17.13(3).

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omission of a party other than the defendant whose act or omission does not relate to a contractual relationship with the defendant.<sup>49</sup>

### B. Defining “Arranger”

CERCLA § 9607(a)(3) imposes strict liability on “any person who by contract, agreement, or otherwise arranged for disposal or treatment” of hazardous substances.<sup>50</sup> However, nowhere in the statute is the term “arranged” defined. Thus, it has been left to the courts to fashion this category and determine when an entity is liable for costs as an arranger.

In interpreting this statute, courts have deduced two different types of arranger liability: a “traditional” arranger and a “broader category” of arranger culpability.<sup>51</sup> Under the direct or traditional notion of arranger liability, a party becomes a PRP if they were to “enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance.”<sup>52</sup> However, the courts have determined that where the transaction is merely a sale of an item from one party to another, arranger liability does not attach.<sup>53</sup>

#### 1. “Broad” Category of Arranger Liability: *U.S. v. Aceto*

For many years, the standard for arranger liability was found in the case of *United States v. Aceto Agricultural Chemicals Corp.*<sup>54</sup> In *Aceto*, the government sought to recover costs from cleaning up a pesticide

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<sup>49</sup> 42 U.S.C. § 9607(b).

<sup>50</sup> *Id.* § 9607(a)(3).

<sup>51</sup> *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 948 (9th Cir. 2007) (“Accordingly, we have recognized, in addition to ‘direct’ arranger liability, a ‘broader’ category of arranger liability . . . in which disposal of hazardous wastes is a foreseeable byproduct of, but not the purpose of, the transaction giving rise to PRP status.”).

<sup>52</sup> *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1878 (2009).

<sup>53</sup> *See Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990) (“If a party merely sells a product, without additional evidence that the transaction includes an ‘arrangement’ for the ultimate disposal of a hazardous substance, CERCLA liability would not be imposed.”).

<sup>54</sup> 872 F.2d 1373 (8th Cir. 1988).

formulation facility operated by the Aidex Corporation.<sup>55</sup> Hazardous waste had leaked from deteriorating containers into the surface soil and groundwater.<sup>56</sup> The EPA wanted to recover costs not only from Aidex (who was liable as an "owner" under CERCLA), but from the eight pesticide manufacturers who did business with Aidex.<sup>57</sup> The EPA argued that six of the eight manufactures were liable as arrangers due to their relationship with Aidex.<sup>58</sup> Aidex used technical grade pesticide<sup>59</sup> ingredients supplied from the manufactures and formulated it to create commercial grade product.<sup>60</sup> The crux of the EPA's argument was that the generation of the hazardous waste was inherent in the process of forming the pesticides.<sup>61</sup> Because of this, Aidex could not have mixed the manufacturers' pesticides without disposing of a portion of them.<sup>62</sup> Additionally, the EPA argued that because the defendant manufactures owned the technical grade pesticide, the work in process, and the commercial grade product, they also had control over Aidex's operations.<sup>63</sup> Thus, by contracting with Aidex, the manufacturers also "arranged for" the disposal of the waste.<sup>64</sup> The Eighth Circuit rejected the notion that control over disposal is required to show "arranger" status<sup>65</sup> and determined that a broad reading of CERCLA was consistent with the goals of the statute and its "polluter pays" principle.<sup>66</sup> Authority to control

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<sup>55</sup> *Id.* at 1375.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1376.

<sup>59</sup> Pesticide manufacturers create a "technical grade pesticide" that must be mixed with other substances in order to create a "commercial grade pesticide" that can then be sold to the public. The pesticide manufactures provide "active" ingredients to a "formulator" like Aidex who then mixes the technical grade pesticide with specific materials to create the commercial grade pesticide. During this process, the mixture is referred to as the "work in process." *Id.* at 1375.

<sup>60</sup> *United States v. Aceto Agric. Chemicals Corp.*, 872 F.2d 1373, 1375 (8th Cir. 1989).

<sup>61</sup> *Id.* at 1375-76.

<sup>62</sup> *Id.* at 1379.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1382.

<sup>66</sup> *United States v. Aceto Agric. Chemicals Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989).

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the disposal process is a much bigger factor when it can be shown that the company does not actually own the hazardous substance.<sup>67</sup> Because the manufacturers were owners of the substance, the control argument failed. Thus, the facts alleged by the EPA were sufficient to defeat a motion to dismiss for failing to state a claim.<sup>68</sup>

Following this case, numerous other circuits continued to refine and detail the definition of “arranger” liability.

### 2. Application of *Aceto* to Other Cases

In the 1992 case of *General Electric v. AAMCO Transmissions, Inc.*,<sup>69</sup> General Electric (“G.E.”) attempted to hold various oil companies liable for cleanup costs due to the fact that these companies sold oil to the filing stations that directly arranged for the disposal of waste oil to the affected site.<sup>70</sup> G.E. argued that due to the broad purpose of CERCLA, any party who had “the *ability or authority* to direct or control the disposal of hazardous wastes, even though they never participated in the actual decision of how or where to dispose of them” should be liable as an arranger.<sup>71</sup> The Second Circuit agreed that arranger liability can attach to parties who do not exhibit active involvement “regarding the timing, manner or location of disposal.”<sup>72</sup> However, for liability to attach, there must be some “nexus” between the alleged responsible party and the actual disposal.<sup>73</sup> This nexus is based on traditional notions of duty and

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<sup>67</sup> *Id.* at 1383.

<sup>68</sup> *Id.* at 1382.

<sup>69</sup> 962 F.2d 281 (2d Cir. 1992).

<sup>70</sup> *Id.* at 282. Between 1975 and 1980, defendant Wray transported various hazardous waste from G.E.’s facilities to a storage site. The waste leaked into the groundwater at the site. G.E. settled the suit and agreed to fund the cleanup, but retained the right to pursue a subsequent contribution action against other potential defendants. Subsequently, G.E. filed suit against individual service stations that had arranged for the disposal or transport of waste oil at the storage site and also added the oil companies such as Shell based on the fact that they leased the service station facilities and sold the oil to the service station defendants. *Id.* at 282–83.

<sup>71</sup> *Id.* at 284.

<sup>72</sup> *Id.* at 286.

<sup>73</sup> *Id.*

obligation.<sup>74</sup> Thus, arranger liability may fall on a party who has the “obligation to exercise control over hazardous waste disposal,” but not a party who has the “mere ability or opportunity to control.”<sup>75</sup> Because the oil companies had no obligation to exercise control over how the filing stations disposed of the waste oil, these companies were not liable under CERCLA as an arranger.<sup>76</sup>

From the late 1980s until 2009, most courts engaged in a fact-intensive inquiry to determine whether a party could be deemed an arranger and be liable for costs under CERCLA.<sup>77</sup> Factors influencing this process were: whether the party owned or possessed the hazardous substance at issue at any point in the process;<sup>78</sup> whether a party had knowledge that the substance would or could be released;<sup>79</sup> or whether a party had exercised control over the process by which the release occurred or had some type of involvement in the disposal or decision to dispose of the hazardous substance.<sup>80</sup> Eventually, this notion of arranger status was clarified and narrowed by the United States Supreme Court.

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<sup>74</sup> *Id.*

<sup>75</sup> *General Elec. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2nd Cir. 1992).

<sup>76</sup> *Id.* at 287–88.

<sup>77</sup> *See Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990) (“Whether an ‘arrangement for’ disposal exists depends on the facts of each case.”), *United States v. Gordon Stafford, Inc.*, 952 F.Supp. 337, 340 (N.D. W.V. 1997) (“the Court believes that the statutory language and purposes of CERCLA require adoption of the ‘totality of the circumstances’ approach . . . Each case in which ‘arrangement for disposal’ is to be construed must be decided by reviewing the totality of the circumstances, on a case-by-case basis.”).

<sup>78</sup> *See Briggs & Stratton Corp. v. Concrete Sales & Servs., Inc.*, 990 F.Supp. 1473, 1479 (M.D. Ga. 1998) (“Generally speaking, to be found liable as an arranger a party must have either been in actual or constructive ownership or possession of the hazardous wastes.”).

<sup>79</sup> *See GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 446 (6th Cir. 2004) (While parties require some intent to make preparations for the disposal of hazardous waste, “that intent goes to the matter of disposing waste generally, not to disposing of it in a particular manner or at a particular location.”).

<sup>80</sup> *See United States v. Fleet Factors Corp.*, 821 F.Supp. 707, 724 (S.D. Ga. 1993) (Arranger liability may be established “by showing actual involvement in the decision to dispose or by showing an obligation to control the hazardous substance.”).

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### 3. *Burlington Northern* and its Effects on Arranger Liability

In 2009, the Supreme Court decided the case of *Burlington Northern and Santa Fe RR Co v. US*,<sup>81</sup> which looked to clarify the definition of arranger liability.<sup>82</sup> Brown & Bryant (“B&B”), an agricultural chemical distribution company, purchased pesticides and other chemicals from many suppliers, including Shell Oil Company.<sup>83</sup> One of the main pesticides B&B bought from Shell was the pesticide D-D.<sup>84</sup> When B&B would order this pesticide, “Shell would arrange for delivery by common carrier.”<sup>85</sup> During the delivery and transfer process, leaks and spills of this pesticide often occurred.<sup>86</sup> When Shell became aware of these spills, it tried to take action to cut down and prevent them.<sup>87</sup> Additionally, both B&B and the “common carrier” would try to catch the spills and prevent the pesticide from going into the ground.<sup>88</sup> Eventually, the Department of Toxic Substances Control investigated B&B<sup>89</sup> and the EPA had to step in and undertake cleanup efforts at the site.<sup>90</sup>

The EPA subsequently sued Shell, claiming that Shell was an arranger under CERCLA and should be liable for a portion of the cleanup

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<sup>81</sup> 129 S. Ct. 1870 (2009).

<sup>82</sup> *Id.* at 1877–78. *Burlington Northern* not only addressed the scope of arranger liability, but also set new precedent for the proper way to apportion cleanup costs among multiple defendants. *Id.*

<sup>83</sup> *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1874 (2009).

<sup>84</sup> *Id.* at 1875.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (“Shell . . . provided detailed safety manuals, . . . instituted a voluntary discount program for distributors that made improvements in their” handling [of the hazardous materials and] “required distributors” to have a “qualified engineer” inspect the facilities and show “compliance with applicable laws and regulations.”).

<sup>88</sup> *Id.* (They used “buckets to catch spills from hoses and gaskets connecting the tanker trucks to its bulk storage tank.” However, these buckets were sometimes knocked over or overflowed.)

<sup>89</sup> CAL. DEPT’ OF TOXIC SUBSTANCE CONTROL, *DTSC: Who We Are and What We Do*, [http://www.dtsc.ca.gov/InformationResources/DTSC\\_Overview.cfm](http://www.dtsc.ca.gov/InformationResources/DTSC_Overview.cfm) (2007) (The Department of Toxic Substances Control (“DTSC”) is a California agency designed to protect the state and its citizens from exposures to hazardous wastes).

<sup>90</sup> *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1876 (2009).

costs.<sup>91</sup> The Ninth Circuit found that while Shell was not a “traditional” arranger because it had not directly contracted to dispose of hazardous material, Shell could still be liable under a “broader category of arranger liability if the disposal of hazardous wastes was a foreseeable byproduct of, but not the purpose of, the transaction giving rise to arranger liability.”<sup>92</sup> Because CERCLA defined “disposal” to include “leaking” and “spilling,” the Ninth Circuit ultimately decided that intention to dispose was not required in order for an entity to be found to have “arranged for disposal.”<sup>93</sup>

In an 8-to-1 decision, the Supreme Court overturned the Ninth Circuit.<sup>94</sup> Looking to Merriam-Webster’s Dictionary for guidance, the Court determined the word “arrange” implied action directed to a specific purpose.<sup>95</sup> Consequently, to qualify as an “arranger” under CERCLA, an entity must take intentional steps to dispose of a hazardous substance.<sup>96</sup> The Court further concluded that “knowledge alone is insufficient to prove that an entity ‘planned for’ the disposal.”<sup>97</sup> In order for Shell to qualify as an arranger, the Court stated that at the outset of the transaction for D-D, Shell must have intended that at least a portion of D-D would be disposed of during the transfer to B&B.<sup>98</sup> Because the facts did not support this version of events, the Court found that Shell was not liable as an arranger and thus not required to help with the cleanup costs.<sup>99</sup>

Due to this Supreme Court decision, arranger liability no longer attaches based upon mere knowledge, control, and possession, but instead requires a more specific showing of actual intent to dispose of hazardous material.

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1877 (internal quotations omitted).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1883–84.

<sup>95</sup> *Id.* at 1879 (citing Merriam-Webster’s Collegiate Dictionary 64 (10th ed. 1993)).

<sup>96</sup> *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1879 (2009).

<sup>97</sup> *Id.* at 1880.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

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### IV. INSTANT DECISION

Judge Elrod for the Fifth Circuit Court of Appeals found the issue in this case to be whether Eby is liable as an “arranger” under the CERCLA statutes and the Texas Solid Waste Disposal Act.<sup>100</sup> The court reviewed this case de novo as the law regarding arranger liability status was the only question.<sup>101</sup> At the outset of its discussion, the court found Celanese was attempting to make an argument on appeal that it had not raised at the trial court level.<sup>102</sup> The court stated that per the general rules of the court, an argument not raised at the district court level are thus waived and will not be considered on appeal.<sup>103</sup> Since Celanese had argued at trial that Eby had actually known and covered up the damage to the pipe, instead of its new conscious disregard theory, the court found the latter argument to have been completely waived.<sup>104</sup>

Alternatively, the court analyzed the case under this conscious disregard theory and still found it to be lacking in plausibility.<sup>105</sup> For starters, the court gave a brief history of the CERCLA statute and how it imposes strict liability for environmental contamination for parties that fall within one of the four categories.<sup>106</sup> Because “arrange” is not defined in the statute, the court next looked to the recent U.S. Supreme Court case of *Burlington N. & Santa Fe Ry. Co v. United States*.<sup>107</sup> In *Burlington*, the Court addressed the meaning of “to arrange for disposal” and when a party is liable for cleanup costs as an arranger.<sup>108</sup> The *Burlington* Court held that the plain language of “arrange” implies action directed to a specific purpose and thus, to be an arranger, a party must have taken intentional steps or planned for the disposal of a hazardous substance to be liable.<sup>109</sup>

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<sup>100</sup> Celanese v. Eby, 620 F.3d 529, 530 (5th Cir. 2010).

<sup>101</sup> *Id.* at 531 (citing Cox v. City of Dallas, 256 F.3d 281, 288 (5th Cir. 2001)).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 532.

<sup>106</sup> Celanese v. Eby, 620 F.3d 529, 532 (5th Cir. 2010).

<sup>107</sup> 129 S. Ct. 1870 (2009).

<sup>108</sup> Celanese, 620 F.3d at 532.

<sup>109</sup> *Id.* at 533.

Applying this rule to the facts of this case, the Fifth Circuit found the record did not support the finding that Eby took intentional steps or planned to release methanol from the Celanese pipeline.<sup>110</sup> Celanese's argument that consciously disregarding a duty to investigate was "tantamount" to an intentional act was completely rejected by the court, which held that negligence does not equal intention.<sup>111</sup> Furthermore, the court believed the defendant Shell Oil Company in *Burlington* had a more culpable *mens rea*,<sup>112</sup> yet despite this, the Supreme Court there still found no arranger liability. The court reasoned, "[g]iven that there was no arranger liability under those circumstances, we fail to see how we can impose such liability here when Eby did not even know that it had struck the Celanese pipeline."<sup>113</sup>

After deciding that Eby was not liable as an arranger under CERCLA, the court analyzed whether Eby was liable under the Texas SWDA statute.<sup>114</sup> Because the Texas Supreme Court had not considered SWDA liability in light of the new *Burlington* changes, the Fifth Circuit had to determine how the Texas Supreme Court might now interpret arranger liability.<sup>115</sup> The Fifth Circuit found detailed instructions in Texas Supreme Court precedent that federal case law be the guide for interpretation of the term "otherwise arranged."<sup>116</sup> Thus, the Fifth Circuit felt comfortable in predicting the Texas Supreme Court would apply *Burlington* to these facts and under the same reasoning applied to the CERCLA claim, Eby would also not be liable as an arranger under the

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* Shell Oil had actual knowledge that the transportation of the hazardous waste was resulting in some spillage. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1875 (2009).

<sup>113</sup> *Celanese v. Eby*, 620 F.3d 529, 533 (5th Cir. 2010).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 534.

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SWDA.<sup>117</sup> Accordingly, the court affirmed the district court's judgment that Eby was not liable as an arranger under either statute.<sup>118</sup>

### V. COMMENT

A glaring issue with CERCLA is the mounting tension between its language and purpose. On one hand, the Supreme Court has logically and clearly interpreted the category of potentially responsible parties.<sup>119</sup> On its face, equating “to arrange for disposal” with “taking intentional steps to dispose of” does not seem like an unfair interpretation. However, the other hand shows a very clear purpose and intent within the CERCLA statute to transfer the burden of paying for hazardous cleanup costs from the government and taxpayers to the parties responsible for creating and causing the harm. While this tension is not always apparent in the majority of CERCLA cases, the fact pattern detailed in *Celanese* brings it to light.

As explained above, both the judge and the jury agreed that the Eby corporation was the “but for” cause of the damage to the pipe and subsequent leak of methanol which required many millions of dollars of cleanup.<sup>120</sup> Yet in determining whether Eby should be forced to contribute to the cleanup costs, the clearly defined statutory categories assigned no liability. An oft repeated purpose of CERCLA and other cleanup statutes is to ensure the polluter pays. Unfortunately, some polluters are allowed to slip through the cracks.

In the majority of CERCLA cases, the responsible polluters fit neatly into the predetermined categories of PRPs and can be held liable without any problem. However, while the *Celanese* case presents a slightly novel scenario, it is still situation that may arise again and this should be reflected in the law. One solution to this problem would be to amend CERCLA to create a fifth category of PRP to include those who had some type of duty or obligation with respect to the hazardous material.

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1879–80 (2009).

<sup>120</sup> *Celanese v. Eby*, 620 F.3d 529, 531 (5th Cir. 2010).

Another solution would be to merely include a negligence section within a separate section of CERCLA, distinct from the PRP categories. Yet a third option for plaintiffs seeking remedies from contributors would be to use state common law claims such as negligence.

With respect to the first solution, amending the statute to create an entire new category of PRPs would be the most radical of moves. After almost thirty years' worth of understanding and interpretation, creating a new category of responsible parties for hazardous cleanup sites would upend the environmental world. Industry practices would have to change. Issues with retroactivity would surface and potentially create a barrage of litigation over spills already dealt with. Additionally, a key point to the PRP structure is that "causation" is not necessary. Introducing language such as "duty" and "obligation" would necessitate a breach of this "duty" or "obligation;" this in turn introduces an element of causation that must be proven before a party can be found liable. Requiring causation completely contravenes CERCLA's incentive to settle disputes quickly through a less fault-intensive process.

With regard to the second solution mentioned, many of the same problems would arise as with the first suggestion. Changing a statute that has been around, been interpreted, and been understood to forego proof of causation would not be a small amendment. Even if the amendment did not alter the category of PRPs and instead merely created a "catch-all" exception, such a change would still completely upend the meaning of CERCLA as it is presently understood. Regardless of the impact, the realistic possibility of adding such a big factor into a statute merely to fix a rare occurrence does not seem likely.

This leaves us with the third suggestion of using state tort negligence law. In *Celanese*, Celanese attempted this route but was barred by the state statute of limitations that had begun to run once the damage to the pipe was discovered.<sup>121</sup> Regardless of whether competent attorneys would realize the need to file a tort claim, this example still begs the question of whether state tort law could properly compensate for the millions of dollars that can be spent when it comes to cleaning up hazardous waste sites. Many states limit the amount of damages allowable

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<sup>121</sup> *Celanese Corp. v. Coastal Water Auth.*, 475 F.Supp.2d 623, 638 (S.D. Tex. 2007).

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to the value of the land. For example, if the cleanup costs were going to be around \$1 million, but the value of the land would only be \$500,000 after cleanup and a state court could restrict the actual damages to the value of the land. So even in a case of actual negligence, the responsible party might not be on the hook for the full cost of that party's actions. However, this style of damages limitation typically only applies when the party owning the land desires to sell it. The rationale behind this is that the courts do not want to allow a landowner to receive a windfall based on manipulation of the judicial system.

Another issue with using state negligence law is an attorney or party might not realize this is the proper avenue to take. Because CERCLA has been around for close to thirty years, many companies who deal with hazardous waste know and understand CERCLA. Thus if a spill were to occur, a company could conceivably delay hiring an attorney and initiating a lawsuit under the mindset that whatever costs incurred in cleaning up the spill could later be shared once the other responsible parties are found. In this instance, CERCLA becomes almost a security blanket. It creates the incentive to clean up now, and apportion liability later. However, under this notion, one party might believe it has a right to hold another liable for consciously disregarding a duty not to spill, proceed to clean up the spill, and then discover that it alone bears the burden of cleaning costs under CERCLA. In this unlikely hypothetical, it is possible the statute of limitations for negligence could have passed, leaving the party who took the initiative to clean responsible for the entire cleanup cost.

Looking at the options, it is hard to determine where a different line could be drawn. Introducing the low standard of negligence into the CERCLA statute could produce a result where a negligent driver crashes into a gas station and finds himself drawn into federal court and sued for an exorbitant amount. However, requiring a very specific notion of intent in order to be held liable as an arranger has effectively excluded parties who deal with hazardous waste, have a duty not to spill it, yet have no way for this duty to be enforced using the federal structure. It will be interesting to see how future courts handle this problem.

VI. CONCLUSION

In conclusion, there appears to be a disconnect between the intention and purpose of CERCLA and the further narrowing of liability rules by the courts. The judiciary has traditionally defined "arranger" liability using broad interpretations in order to further the "polluter pays" principle. With *Celanese v. Eby*, the Fifth Circuit diligently and meticulously followed the Supreme Court's new precedent, yet the result is unsatisfactory. Perhaps a future court will find that contrary to the Fifth Circuit, intentionally and consciously disregarding a duty to inform of a spill can in fact be equated with actual intent to disperse. This case should also present a warning to companies and attorneys to make sure and check all other options before relying on a federal statute. Hopefully, those truly responsible for spills and harm to the environment will not be able to escape liability so easily in the future.

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