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# A Tale of Two Rivers: An Analysis of Different Approaches to Proving Intent for CERCLA Arranger Liability

by Chris Dow

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*Summary*

Courts have grappled with the scope of CERCLA arranger liability ever since the U.S. Supreme Court's 2009 decision in *Burlington Northern & Santa Fe Railway Co. v. United States*. Two opposite decisions on nearly identical facts illustrate the variety of approaches. In the first, a manufacturer's actions related to the sale of PCB-laden scrap paper did not show the requisite intent to dispose; in the second, evidence gleaned from documents and expert testimony was the primary basis for holding the same manufacturer liable as an arranger. The latter outcome suggests the importance of circumstantial evidence in these cases, and counsel should seek discovery of such evidence at an early stage.

## I. Introduction

The Lower Fox River runs through Wisconsin from Lake Winnebago into Green Bay and Lake Michigan. Historically the river has been, and remains today, a major hub for paper production, a water-intensive process. Companies founded along the river produce widely used paper products with brand names such as Quilted Northern and Charmin. To the south and east, across Lake Michigan, lies the Kalamazoo River. It too has a history as a center for paper production.

From approximately 1954 to 1971, NCR Corp. took part in a paper manufacturing process that, in addition to producing a popular consumer paper product, also generated byproduct scrap paper containing polychlorinated biphenyls (PCBs). This scrap paper was purchased by recycling paper mills located along both rivers. The mills recycled the scrap to manufacture various new paper items and, as a result, released wastewater that contained PCBs into the Lower Fox and Kalamazoo Rivers. PCBs are known to cause cancer and other adverse health effects in animals, and are a potential carcinogen in humans.[1]

Largely due to this PCB contamination, both rivers are currently the focus of cleanup enforcement actions by the U.S. Environmental Protection Agency (EPA).[2] Litigation concerning who should pay for cleanup, and to what extent, is pending between NCR and the recycling paper mills.[3] The mills have argued that NCR, by either directly or indirectly supplying them with PCB-containing scrap paper, arranged for the disposal of a hazardous substance and thereby assumed "arranger" cleanup liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.[4] NCR has disagreed with the recycling mills' characterization of the disposition of this scrap paper, and countered with CERCLA's judicially fashioned "useful product defense" to arranger liability, arguing the PCB-containing scrap paper was not disposed of, but rather sold as a useful prod-

*Editors' note: The author was an attorney on the Fox River case from 2008-2010, representing one of the paper mill-recycling defendants. He was involved in the trial court decision mentioned in footnote 7. The author was not involved in the Fox River arranger liability trial or decision discussed in this Article.*

1. For more information on the health hazards of PCBs, visit the U.S. Environmental Protection Agency's (EPA's) PCB web page, http://www.epa.gov/osw/hazard/tsd/pcbs/pubs/effects.htm (last visited May 28, 2015).
2. For more information on the Lower Fox and Kalamazoo River enforcement actions, respectively, visit the U.S. Department of Justice web page, www.justice.gov/enrd/3643.htm; and EPA's Region 5 Superfund web page, www.epa.gov/region5/cleanup/kalproject/index.htm (last visited May 28, 2015).
3. The cases are *Appvion, Inc. v. P.H. Glatfelter Co.*, No. 08-C-16, filed in the Eastern District Court of Wisconsin, and *Georgia-Pacific Consumer Products, L.P. v. NCR Corp.*, No. 1:11-cv-00483, filed in the Western District Court of Michigan.
4. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.

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uct to recycling mills that used the scrap to manufacture new paper products.

Within the last few years, two different federal district courts have reached opposite conclusions on the question of whether NCR is liable as an arranger under CERCLA for the ultimate disposition of PCBs into rivers as a result of paper mills' recycling of scrap paper. In *Appleton Papers, Inc. v. George A. Whiting Paper Co.*, a 2012 decision concerning PCBs released into the Lower Fox River and Green Bay, the Eastern District of Wisconsin found that NCR was not a CERCLA arranger because, notwithstanding its knowledge regarding the potential environmental hazards of recycling PCB-laden scrap paper, it took no action to dispose of the scrap paper that was ultimately sold to the recycling mills for reuse.[5] About nine months later, in *Georgia-Pacific Consumer Products v. NCR Corp.*, where PCBs released into the Kalamazoo River were at issue, the Western District of Michigan concluded that NCR was a CERCLA arranger because it knew the scrap paper contained harmful PCBs, but chose not to disclose this fact to the recycling mills and others, and took no action to remove PCBs from the production processes that created the PCB-laden scrap until years after the company learned of the harm.[6]

The Wisconsin district court found that NCR lacked the intent to dispose because the evidence did not show that the company itself took any action to dispose of the scrap paper. Conversely, the Michigan district court found that NCR possessed the intent to dispose based on what the corporation knew of the scrap, and what it failed to do to avert the harm posed by the scrap. Interestingly (and, as we will see below, instructively), many of the same facts upon which the Michigan court found NCR liable as a CERCLA arranger under CERCLA §107's liability scheme were used by the Wisconsin court in a 2009 grant of summary judgment to the recycling mills, finding that NCR was not entitled to CERCLA §113 equitable contribution from the mills for PCB cleanup costs that it continues to incur on the Lower Fox River.[7]

The arranger liability decisions of the Eastern District of Wisconsin and the Western District of Michigan both involve NCR, the same industrial processes and hazardous substance, and additional same or similar facts and events. Nevertheless, the decisions reached opposite conclusions on the issue of NCR's CERCLA arranger liability. For these reasons, the decisions illustrate some key considerations for the CERCLA practitioner.

First, in the wake of the U.S. Supreme Court's 2009 decision in *Burlington Northern & Santa Fe Ry. Co. v. United States*,[8] under CERCLA, the intent to dispose by a potentially responsible party (PRP) can not only be proved by direct evidence showing what the PRP did, but also can be inferred from circumstantial evidence showing what the PRP knew and deliberately failed to do in view of that knowledge. As the *Appleton Papers* decision demonstrates, direct proof of knowledge of disposal and intent to dispose, such as eyewitness testimony, may not be available or reliable in cases where the polluting events are often many decades in the past. Therefore, premising CERCLA arranger liability instead on circumstantial evidence, as demonstrated in the *Georgia-Pacific* decision, can be preferable.

Second, evidence of knowledge and intent traditionally presented for determining the equitable allocation of cleanup costs among PRPs in a CERCLA §113 contribution action now can be crucial to proving the knowledge of disposal, and intent to dispose, necessary for arranger liability under CERCLA §107. This development carries implications for discovery in a CERCLA action.

## II. Factual and Legal Backgrounds of the Two Cases

### A. *Factual Backdrop: NCR's Manufacture of Carbonless Copy Paper*

The *Georgia-Pacific* and *Appleton Papers* cases both find their origin in NCR's manufacture of carbonless copy paper (CCP) during a production period from 1954 to 1971, when the formulation for CCP included Aroclor 1242, a PCB mixture.[9] As the name reveals, carbonless copy paper allows for the transfer of an ink impression, such as a signature, from a top sheet of paper to a bottom sheet directly behind it without the use of an intervening sheet of carbon paper.

Both the *Georgia-Pacific* and *Appleton Papers* decisions summarize the production process for CCP. NCR sold an emulsion containing Aroclor 1242 to the Appleton Coated Paper Co. (ACPC), which would use the emulsion to coat paper and then sell the coated paper back to NCR as bulk CCP.[10] In turn, NCR would sell the CCP to customers who would convert it into business forms such as receipts and airline tickets.[11] The CCP manufacturing process inevitably generated "broke" or "trim," terms for

5. Appleton Papers, Inc. v. George A. Whiting Paper Co., No. 08-C-16, 2012 WL 2704920, at *12, 42 ELR 20150 (E.D. Wis. July 3, 2012), *aff'd*, NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682 (7th Cir. 2014).
6. Georgia-Pacific Consumer Prods. v. NCR Corp., 980 F. Supp. 2d 821, 834-35 (W.D. Mich. 2013).
7. *See* Appleton Papers, Inc. v. George A. Whiting Paper Co., No. 08-C-16, 2009 WL 5064049 at **2, 13-15 (E.D. Wis. Dec. 16, 2009), *vacated and remanded*, 768 F.3d 682, 699-703 (7th Cir. 2014). While the U.S. Court of Appeals for the Seventh Circuit found no issue with the district court's extensive factual findings in determining the parties' summary judgment motions relative to CERCLA §113 equitable contribution rights, the circuit court nonetheless vacated the district court's denial of NCR's contribution rights, and remanded for further proceedings, due to the court's failure to consider relevant equitable factors other than the parties' respective knowledge of the hazards of PCBs. Appleton Papers, Inc. v. George A. Whiting Paper Co., 768 F.3d 682, 699-703 (7th Cir. 2014).
8. 556 U.S. 599, 39 ELR 20098 (2009).
9. *See Appleton Papers*, 2012 WL 2704920, at *1; *Georgia-Pacific*, 980 F. Supp. 2d at 826-27.
10. *See Appleton Papers*, 2012 WL 2704920, at *1; *Georgia-Pacific*, 980 F. Supp. 2d at 827.
11. *See id.*

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paper that was damaged or discarded in the coating or form-making process.[12]

While the broke was useless to NCR and ACPC, it was sold via an established secondary recycling market to paper mills that viewed the broke as valuable.[13] The paper mills recycled the broke in the necessarily water-intensive paper manufacturing process, using the paper fibers from the broke in the production of new consumer paper while discharging much of the non-paper constituents, including the ink and Aroclor 1242, into adjacent water bodies.[14] In *Appleton Papers*, the recycling mills discharged into the Lower Fox River,[15] while in *Georgia-Pacific*, the Kalamazoo River was the receiving water body for the Aroclor 1242 contamination.[16]

In addition to the manufacturing process for CCP, each court had before it documents detailing NCR's realization by the late 1960s that PCBs may pose adverse effects on the environment, specifically some forms of animal life, and NCR's decision to take no action to address this problem unless the media disclosed its paper to be a source of the pollution.[17] Each court also had before it a document showing that a meeting was held among NCR, Monsanto Corp. (which supplied NCR with PCBs), and NCR's European licensee where the attendees concluded that there was no effective way to prevent PCBs from being disposed into the environment as a result of recycling the CCP broke; and evidence following this meeting of NCR's continued insistence to its licensee that its paper not be revealed to government authorities as a source of PCBs in the environment.[18] However, only the *Georgia-Pacific* court focused on these facts when determining the issue of NCR's arranger liability; the *Appleton Papers* court considered these facts primarily when adjudicating the CERCLA equitable contribution rights of NCR, the recycling mills, and other parties.

### B. *Legal Backdrop: CERCLA Arranger Liability and the Useful Product Defense*

Environmental attorneys who have either pursued or defended a PRP in CERCLA litigation are likely familiar with the "useful product doctrine" or "useful product defense" to CERCLA arranger liability. Arranger liability means liability for hazardous substances contamination attaching to:

> 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.[19]

Under the useful product doctrine, a PRP will not be held liable as a CERCLA arranger if it can show that its transfer of hazardous substances to another party was incidental to the sale of a useful product, and not the disposal of hazardous substances.

Thus, a manufacturer of electrical transformers selling its product to a utility company will not be held liable as an arranger when the transformers are ultimately taken out of service and resold by the utility to a scrap metal dealer that, as the result of its salvaging process, contaminates property with hazardous substances contained in the transformers.[20] On the other hand, a company *is* a CERCLA arranger when it sells a used hazardous substance in 55-gallon drums labeled "scrap" and "waste," gives away the substance to employees, disposes of the substance in landfills and a river, and knows that its main customer for the substance finds much of it contaminated and unusable—but the company makes no effort to retrieve or clean up the contaminated drums.[21]

The vast majority of arranger liability cases are not nearly as clear as the transformer manufacturer and the waste drum seller; instead, most arranger liability cases lie somewhere between these two bookends.[22] As the Supreme Court stated in *Burlington Northern*, its 2009 application of the useful product doctrine,[23]

> these are the cases in which the seller has some knowledge of the buyers' planned disposal or whose motives for the "sale" of a hazardous substance are less than clear. In such cases, courts have concluded that the determination whether an entity is an arranger requires a fact-intensive inquiry that looks beyond the parties' characterization of the transaction as a disposal or a sale and seeks to discern whether the arrangement was one that Congress intended would fall within the scope of CERCLA's strict-liability provisions.[24]

12. *Appleton Papers*, 2012 WL 2704920, at **1-2; *Georgia-Pacific*, 980 F. Supp. 2d at 827.
13. *Id.*
14. *Appleton Papers*, 2012 WL 2704920, at *1; *Georgia-Pacific*, 980 F. Supp. 2d at 825.
15. *Appleton Papers*, 2012 WL 2704920, at *1.
16. *Georgia-Pacific*, 980 F. Supp. 2d at 825.
17. *See* Appleton Papers, Inc. v. George A. Whiting Paper Co., No. 08-C-16, 2009 WL 5064049 at **7, 11 (E.D. Wis. Dec. 16, 2009), *vacated and remanded*, 768 F.3d 682, 699-703 (7th Cir. 2014); Georgia-Pacific Consumer Prods. v. NCR Corp., 980 F. Supp. 2d 821, 832 (W.D. Mich. 2013).
18. *Appleton Papers*, 2009 WL 5064049, at *8; *Georgia-Pacific*, 980 F. Supp. 2d at 833.
19. CERCLA §107(a)(3), 42 U.S.C. §9607(a)(3) (2015).
20. Florida Power & Light Co. v. Allis Chalmers Corp., 85 F.3d 1514, 1519-20, 26 ELR 21440 (11th Cir. 1996).
21. United States v. General Elec. Co., 670 F.3d 377, 385-90, 42 ELR 20051 (1st Cir. 2012).
22. *See* Burlington Northern & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 610, 39 ELR 20098 (2009) (stating that, on the one hand, CERCLA liability attaches "if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance," but, on the other hand, "an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination"; and stating that "[l]ess clear is the liability attaching to the many permutations of 'arrangements' that fall between these two extremes").
23. It bears mentioning that the Supreme Court in *Burlington Northern* never uses the phrase "useful product doctrine" or "useful product defense," simply stating that the Court must determine "whether Shell may be held liable as an arranger." *Burlington Northern*, 556 U.S. at 609.
24. *Id.* at 610.

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While the inquiry into whether a given transaction is an arrangement for disposal or merely the sale of a useful product is fact-intensive, the central focus of the inquiry must be a determination of the alleged arranger's intent; that is, the finder of fact must determine if the alleged arranger took "intentional steps to dispose of a hazardous substance."[25]

Standing alone, knowledge that a hazardous substance will be spilled or leaked or otherwise emitted is not enough to prove that an alleged arranger intended to dispose of a hazardous substance.[26] Rather, the alleged arranger also must enter the transaction with the intent that some amount of the hazardous substances will be disposed.[27] A CERCLA arranger, therefore, is a party that both *knows* its hazardous substances will be spilled or leaked, and *intends* that spills or leaks (disposal) of hazardous substances will be the result of the transaction. In view of this rule, the Supreme Court found no arranger liability despite Shell Oil Co.'s knowledge that minor spills and leaks were occurring on the property of an agricultural chemical supplier when Shell transferred pesticide product from a railcar to the supplier by pipeline, because Shell did not *intend* these spills and leaks to occur.[28] Shell's lack of intent to dispose was evidenced by its history of taking precautions against spills and leaks and offering financial incentives to the supplier to prevent same.[29]

Recognizing that determination of the intent to dispose of a hazardous substance can be a fact-intensive exercise encompassing a myriad of scenarios, *Burlington Northern* allows for intent to dispose to be proved in at least two ways. First, and most obviously, a court can look to a PRP's actions to determine intent.[30] Second, in some cases, a court can infer intent to dispose from a PRP's knowledge.[31] In fact, one of the first federal district court cases to apply *Burlington Northern* denied a defendant's motion to dismiss a CERCLA arranger claim for relief against it based on allegations of negligent and accidental disposal of hazardous substances over a period of years via a sewer system.[32] One implication of this 2009 decision by the District of Maine is that knowledge of negligent or accidental spills, coupled with the failure to do anything to curtail them, can amount to the intent to dispose necessary for CERCLA liability.[33] In 2012, in *United States v. General Electric Co.*, the U.S. Court of Appeals for the First Circuit found a company to be an arranger based in part on its inaction in cleaning up contamination of which it had knowledge.[34]

Both the Western District of Michigan in *Georgia-Pacific* and the Eastern District of Wisconsin in *Appleton Papers* set forth and analyzed the rule of *Burlington Northern* before addressing the issue of NCR's alleged arranger liability under CERCLA.[35] But each court resolved the issue of the company's intent in a different way. In *Appleton Papers*, NCR avoided liability based on a finding that it took no actions demonstrating an intent to dispose. Conversely, in *Georgia-Pacific*, NCR's intent to dispose was inferred from what it knew about the potential environmental harms posed by PCB-laden scrap paper, and its failure to take any timely action to curtail the harm.

## III. The Decisions

### A. *Appleton Papers: Regardless of What NCR Knew, It Was Not a CERCLA Arranger Where It Was Not the Seller of the Broke*

In *Appleton Papers*, the Wisconsin district court noted that the papermaking and recycling and other defendants' argument regarding NCR's arranger liability "was a late addition to the trial" that the court permitted due to the absence of prejudice to NCR.[36] Perhaps for this reason, the bulk of the court's CERCLA arranger analysis instead concerned knowledge of disposal and intent to dispose on the part of ACPC, the company that used NCR's emulsion to coat the paper.[37] As to NCR's knowledge and intent, the defendants argued that the corporation was liable as an arranger because it knew that the broke resulting from the CCP coating process at ACPC would be reprocessed by the recycling defendants and that the PCB-containing emulsion would be removed (disposed of into the environment) in the process.[38]

The court found that even assuming NCR was aware that the recycling defendants' papermaking processes would result in the discharge of PCBs into the Lower Fox River, this knowledge standing alone was not enough to hold NCR liable as an arranger under *Burlington Northern*, because there was no intent by NCR to dispose of hazardous substances.[39] The Wisconsin district court reasoned that NCR possessed no intent because, in sending its emulsion to ACPC, the corporation was merely selling a useful product that ACPC applied to paper and then sold back

25. *Id.* at 611.
26. *Id.* at 612.
27. *Id.*
28. *Id.* at 612-13.
29. *Id.* at 613.
30. *See id.* at 611 (stating that "under the plain language of the statute, an entity may qualify as an arranger under §9607(a)(3) when it takes intentional steps to dispose of a hazardous substance").
31. *See id.* at 612 (stating that "it is true that in some instances an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes").
32. Frontier Communications Corp. v. Barrett Paving Materials, 631 F. Supp. 2d 110, 114 (D. Me. 2009).
33. *See id.*
34. United States v. General Elec. Co., 670 F.3d 377, 390, 42 ELR 20051 (1st Cir. 2012).
35. *See* Appleton Papers, Inc. v. George A. Whiting Paper Co., No. 08-C-16, 2012 WL 2704920, at **7-8, 42 ELR 20150 (E.D. Wis. July 3, 2012), *aff'd*, NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682 (7th Cir. 2014); Georgia-Pacific Consumer Prods. v. NCR Corp., 980 F. Supp. 2d 821, 830-31 (W.D. Mich. 2013).
36. *Appleton Papers*, 2012 WL 2704920, at *12.
37. *See id.* at **8-12 (analysis of ACPC's arranger liability).
38. *Id.* at *12.
39. *Id.*

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to NCR as carbonless copy paper.[40] The court found that NCR itself engaged in no act of disposal.[41]

The defendants next argued that NCR did have the requisite intent to dispose of the broke because NCR and ACPC were parties to a toll manufacturing agreement by which NCR, and not ACPC, controlled ACPC's processes from front to back, including the selling of the broke either indirectly or directly to the recycling defendants.[42] Nevertheless, the court found "no evidence" that NCR "had anything whatsoever to do with the disposal of ACPC's broke" and that "[s]elling the broke was something that was strictly within ACPC's purview."[43] While the court acknowledged that "the Defendants have persuasively argued that NCR understood the potential risks of PCBs, especially during the final years of the Production Period,"[44] and in a prior opinion stated that NCR possessed data showing an appreciable risk that its PCB-containing emulsion was being discharged into the Lower Fox River as the result of broke recycling activities,[45] the court found no evidence to support the intent-to-dispose requirement where NCR itself took no action in disposing of ACPC's broke.

As for ACPC, in holding that it had no arranger liability, the court determined that ACPC employees had no knowledge that the broke contained hazardous substances or was otherwise harmful, and therefore could not possess the requisite knowledge of disposal or intent to dispose of the broke under *Burlington Northern*.[46] The court stated that it "seems doubtful that a defendant can *ever* be found to be an arranger if he did not know the substance in question is hazardous."[47] The court also identified factors that led it to a conclusion that ACPC did not intend to dispose of the broke, but rather sold the broke as a useful product.[48] The court found that ACPC "invested money and labor in treating, sorting and selling" the broke; "always sold the broke, rather than sometimes sending it to a landfill or otherwise disposing of it"; "sold the broke through brokers in a well-established secondary market"; and "treated the broke, for accounting and other purposes, as an asset that was integral to its business model."[49] While the court acknowledged that subjectively, from ACPC's perspective, the broke was a waste insofar as it was an unwanted byproduct of the coating process that ACPC tried to minimize, the company's efforts to gather the broke and prepare it for sale distinguished the case from the "typical 'disposal' case."[50]

Ultimately, the *Appleton Papers* court's findings concerning the useful product doctrine left the papermaking and recycling defendants with no recourse against NCR or ACPC under the arranger liability provision of CERCLA §107(a)(3) for the hazardous substance cleanup costs those defendants incurred from their recycling of PCB-laden CCP broke. The court found that neither NCR nor ACPC possessed *both* the requisite knowledge of disposal and the intent to dispose required by *Burlington Northern*. Assuming that NCR had knowledge that PCBs were harmful to the environment and would be deposited in the Lower Fox River as a result of the recycling of CCP broke, the court found no evidence of actions that could lead it to conclude NCR had intent to dispose of the broke. That result was due to the fact that all activity that could arguably be characterized as disposal of waste was found to be within the sole purview of ACPC, and was actually carried out by ACPC. Meanwhile, even assuming for the sake of argument that ACPC's actions to gather and sell a waste byproduct of its production process evidenced intent to dispose, the company's lack of knowledge that the broke contained an environmentally hazardous substance negated the knowledge of disposal necessary for a finding of arranger liability under *Burlington Northern*.

The *Appleton Papers* decision demonstrates how difficult it can be to prove CERCLA arranger liability with direct evidence; that is, proof and testimony that goes directly to a PRP's knowledge of disposal and intent to dispose of hazardous substances. The court stated that the recycling mills' and other defendants' efforts to prove that specific individuals at the coating company ACPC "had knowledge that effluent from the broke recycling process would end up in the [r]iver were hamstrung by the passage of time," as "more than forty years had passed" and "most of the individuals involved in ACPC's broke during the production period have either died or have faded memories of that time period."[51] The court noted that live testimony of one of ACPC's product managers during the production period "may have been clouded" as a result of "[a]ge and a serious accident."[52]

The Wisconsin district court also noted that the recycling mills and other defendants had more success in attempting to prove ACPC's knowledge through circumstantial evidence, that is, inferences of what ACPC employees "could or would" have known based on the expert testimony of a paper industry consultant with 50 years of experience.[53] The utility of building a CERCLA arranger case primarily upon inferences made from such

40. *Id.*
41. *Id.*
42. *Id.* at *13.
43. *Id.*
44. *Id.* at *1.
45. Appleton Papers, Inc. v. George A. Whiting Paper Co., No. 08-C-16, 2009 WL 5064049, at *14 (E.D. Wis. Dec. 16, 2009), *vacated and remanded*, 768 F.3d 682, 699-703 (7th Cir. 2014). While the Seventh Circuit vacated and remanded the 2009 summary judgment decision determining that equity precluded NCR from seeking contribution from defendants under CERCLA §113, it stated "[g]iven the district court's caution in drawing its factual conclusion about NCR's knowledge in the period between 1964 and 1971, we find nothing in the record to bring its findings into dispute." Appleton Papers, Inc. v. George A. Whiting Paper Co., 768 F.3d 682, 700 (7th Cir. 2014).
46. Appleton Papers, Inc. v. George A. Whiting Paper Co., No. 08-C-16, 2012 WL 2704920, at *11, 42 ELR 20150 (E.D. Wis. July 3, 2012), *aff'd*, NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682 (7th Cir. 2014).
47. *Id.*
48. *Id.* at *12.
49. *Id.*
50. *Id.* at *9.
51. *Id.* at *4.
52. *Id.*
53. *Id.* at *6.

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circumstantial evidence, as opposed to direct proof or testimony, is demonstrated in the Kalamazoo River case, where Georgia-Pacific prevailed on the issue of NCR's CERCLA arranger liability.

### *B. Georgia-Pacific: NCR Was a CERCLA Arranger Where It Knew of, but Did Nothing to Ameliorate, the Environmental Hazards*

In the case in the Western District of Michigan, plaintiff Georgia-Pacific focused less on NCR's overt actions in its attempt to prove the company's intent to dispose. It instead emphasized NCR's state of knowledge regarding the hazards of CCP, including whether or not these hazards could be ameliorated, as its primary means to show NCR's intent to dispose. The district court posed the issue thus: "[T]he question is whether and when NCR's sale of CCP broke—a waste in the production of CCP—moved from the sale of a useful product to paper recyclers to an arrangement for disposal of PCB-contaminated waste that no fully informed recycler would ever use."[54] As to the question of *whether*, the court answered yes; as to the question of *when*, the court found that to have occurred no later than 1969, when "NCR understood the CCP broke and trim was no longer anything but waste and was no longer useful to any paper recycler who understood the true facts as NCR did."[55]

The court reached this conclusion largely based on circumstantial evidence, primarily documents generated during the production period by NCR, its affiliates, and Monsanto, from which the court could infer that NCR knew of the environmental hazards in recycling PCB-containing CCP, and also intended to dispose of the CCP.[56] As to NCR's knowledge that PCB-containing CCP broke posed hazards to the environment when recycled, the court cited an internal NCR memorandum stating that in the late 1960s, evidence indicated that PCBs may have an adverse affect on animal life, and a meeting memorandum wherein Monsanto informed NCR that PCBs are toxic to certain aquatic organisms.[57] Another document showed that Monsanto personnel gave NCR higher-ups an article linking wildlife health problems in the San Francisco area with the environmental dispersal of PCBs.[58]

The court inferred NCR's intent to dispose of its PCB-laden CCP from other production period documents, including one showing that NCR and its licensees discussed "non-treatment" options to prevent PCBs from entering the environment when CCP broke was recycled, but ultimately concluded no option would curtail PCBs from entering the environment.[59] The court inferred that NCR viewed PCB broke as a waste to be disposed of, based on a document showing that the company proposed incinerating the broke, but rejected the idea after determining that the process would be too costly and that PCBs undergo little decomposition when incinerated.[60] In addition, based on expert testimony introduced by Georgia-Pacific, the court found that NCR could not have reasonably believed that recyclers' treatment of the wastewater generated from recycling PCB broke would prevent PCBs from entering the environment.[61]

As to NCR's argument that it could not be a CERCLA arranger because CCP broke was a useful product, the Western District of Michigan, reiterating the evidence outlined above, concluded that "no one with NCR's knowledge of the situation could have believed that CCP broke was a useful product."[62] The fact the recyclers were willing to pay for the broke did not change the court's conclusion that NCR was arranging for the disposal of a hazardous waste where documents showed that "NCR deliberately attempted to conceal from them—and everyone else—the toxic nature of CCP broke."[63]

## IV. Proving Intent to Dispose

### *A. Georgia-Pacific Found Intent to Dispose Both From NCR's Purposeful Inaction and Its Actions*

In *Appleton Papers*, NCR avoided arranger liability because the Wisconsin district court found no evidence that NCR itself sold PCB-laden broke to recyclers.[64] In *Georgia-Pacific*, NCR was found liable as an arranger, and the Michigan district court cited facts showing that NCR itself "spent time and money preparing their broke for sale either to brokers or directly to paper recycling mills."[65] Indeed, in the course of its opinion, the court references NCR's sales of broke no fewer than four times.[66] Was the presence or absence of direct evidence of NCR's delivery of PCB-containing broke to recyclers the main factor that led to NCR being found a CERCLA arranger in one case but not the other? This question cannot be answered definitively. But beyond NCR's own sales of broke to recyclers, clearly the *Georgia-Pacific* court assigned arranger status to NCR for continuing to manufacture CCP and encouraging recyclers to use CCP broke in their paper-making operations even after learning of the environmental hazards associated with such use.[67]

The *Georgia-Pacific* court only delves into the details of NCR's delivery of broke to recyclers to show that the broke did in fact reach the Kalamazoo River, thus satisfy-

54. Georgia-Pacific Consumer Prods. v. NCR Corp., 980 F. Supp. 2d 821, 831 (W.D. Mich. 2013).
55. *Id.*
56. *Id.* at 832-34.
57. *Id.* at 832.
58. *Id.*
59. *Id.* at 833.
60. *Id.*
61. *Id.*
62. *Id.* at 834.
63. *Id.* at 834-35.
64. Appleton Papers, Inc. v. George A. Whiting Paper Co., No. 08-C-16, 2012 WL 2704920, at *13, 42 ELR 20150 (E.D. Wis. July 3, 2012), *aff'd*, NCR Corp. v. George A. Whiting Paper Co., 768 F.3d 682 (7th Cir. 2014).
65. Georgia-Pacific Consumer Prods. v. NCR Corp., 980 F. Supp. 2d 821, 827 (W.D. Mich. 2013).
66. *Id.* at 831-35.
67. *Id.* at 824 & 834.

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ing CERCLA's causal nexus requirement, and not to demonstrate NCR's intent to dispose.[68] When NCR argued in *Georgia-Pacific* that the finding of its non-liability in *Appleton Papers* should have preclusive effect, the court did not mention that the *Appleton Papers* court had no evidence before it indicating NCR was directly involved in broke sales.[69] Rather, the Michigan district court stated that "the question of whether NCR intended to dispose of PCBs in *manufacturing and marketing CCP* and CCP broke was never resolved" by the Wisconsin court.[70] Thus, while the *Georgia-Pacific* court had before it evidence of NCR directly selling broke to recyclers, the court appeared equally, if not more, concerned about NCR knowingly manufacturing and promoting a product whose byproduct is toxic to the environment, actively keeping this fact from the press and governmental authorities, and doing nothing to remedy the situation while the manufacture of CCP continued unabated.

### B. *The Nature of a CERCLA Action Lends Itself to Proof of Intent Through Circumstantial Evidence*

For CERCLA attorneys, the challenge of proving a level of knowledge and intent traditionally reserved for, as one example, tort liability determinations, under a remedial statute generally and correctly understood to impose strict liability (i.e., liability without regard to fault) can be not only an unfamiliar task, but also a daunting one. The challenge stems in large part from the fact that unlike a civil tort action, where the statute of limitations generally runs from the time an injury arises, the statute of limitations for a CERCLA §107 cost recovery action runs from the time that removal of hazardous waste from a site is completed, or from the time that an interim remedial action at a site is commenced.[71] The statute of limitations applicable to a §113 contribution action runs three years from: (1) the date of judgment in a civil action brought for recovery of cleanup costs or damages; (2) the entry of a judicially approved settlement for such costs or damages; or (3) the date of a CERCLA administrative cleanup order.[72]

Given these limitations periods, in the vast majority of cases, government enforcement or private-party actions concerning the cleanup of a site do not commence until many decades after the hazardous waste is actually deposited. Accordingly, CERCLA practitioners often find themselves in the unenviable position of trying to prove knowledge of disposal and intent to dispose based upon witnesses recollecting events decades after the fact, and on an often-incomplete record of ancient documents (assuming all relevant documents were not entirely lost or destroyed before the site became an issue for government authorities). *Georgia-Pacific* illustrates how this challenge for counsel can be lessened through the use of circumstantial evidence, because courts will allow inferences made from such evidence to serve as the primary basis for a finding of CERCLA arranger liability.[73]

### C. *Facts to Prove Knowledge and Intent Should Be Gathered Early in CERCLA Discovery*

In the years prior to *Burlington Northern*, the home circuits of the *Appleton Papers* and *Georgia-Pacific* district courts (the U.S. Courts of Appeals for the Seventh and Sixth Circuits, respectively) were no strangers to analyzing knowledge and intent to determine whether a CERCLA PRP was liable as an arranger.[74] Still, *Burlington Northern* represents a considerable change in arranger liability analysis, because it requires *all* federal courts to place a new, or at least a renewed and more focused, emphasis on determining knowledge of disposal and intent to dispose. This requirement ostensibly leaves no room for lower courts to consider prior legal standards that allowed for a finding of arranger liability in the absence of knowledge and intent.[75]

Therefore, discovery in a CERCLA case involving arranger liability should be structured differently than it sometimes has been in the past. Previously, in at least one federal circuit (the U.S. Court of Appeals for the Eighth Circuit), facts of intent and knowledge were only relevant in the analysis of factors determining equitable allocation among PRPs in the contribution phase of a CERCLA action,[76] and had no relevance in the liability phase.[77] That is no longer the case. The *Georgia-Pacific* court, in deciding NCR's liability for disposal of hazardous substances, applied much of the same evidence that the *Appleton Papers* court used to determine equitable contribution rights and cleanup allocation among NCR, the recycling mills, and other PRPs in the Lower Fox River matter. Therefore, discovery in the liability phase of a CERCLA case should now include discovery of knowledge and intent facts where the case potentially involves arranger liability issues.

68. *Id.* at 835.
69. *Id.* at 836.
70. *Id.* (italics added).
71. CERCLA §113(g)(2)(A)-(B), 42 U.S.C. §9613(g)(2)(A)-(B) (2015).
72. CERCLA §113(g)(3)(A)-(B), 42 U.S.C. §9613(g)(3)(A)-(B) (2015).
73. *Georgia-Pacific*, 980 F. Supp. 2d at 829.
74. *See* Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751, 23 ELR 21363 (7th Cir. 1993); United States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1231, 27 ELR 20441 (6th Cir. 1996).
75. *See, e.g.*, United States v. Aceto Agr. Chems. Corp., 872 F.2d 1373, 1380-81, 19 ELR 21038 (8th Cir. 1989) (stating that arranger liability can be found regardless of a PRP's knowledge or intent). For an analysis suggesting that *Aceto* may survive *Burlington Northern*, see Aaron Gershonowitz, *Does the Supreme Court's Burlington Northern Decision Require Reconsideration of the Aceto Line of "Arranger" Liability Cases?*, 40 U. Balt. L. Rev. 383 (2011).
76. *See* Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 935, 25 ELR 21378 (8th Cir. 1995) (stating that among the factors relevant to equitable allocation of CERCLA cleanup costs among PRPs is "the degree of care exercised by the parties with respect to the hazardous waste concerned"). In determining degree of care, courts typically look to a PRP's knowledge and actions. *See, e.g.*, Lockheed Martin Corp. v. United States, 35 F. Supp. 3d 92, 135-37 (D.D.C. 2014) (examining a PRP's knowledge and actions in determining degree of care).
77. *See Aceto*, 872 F.2d at 1380-81.

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## V. Conclusion

Although the cases involved different midwestern rivers, the *Appleton Papers* and *Georgia-Pacific* decisions concerned the same NCR manufacturing processes, products, byproducts, recycling processes, environmental contaminant, and other facts. In the former action, the Eastern District of Wisconsin found that direct evidence of NCR's actions in relation to the sale of broke did not show the company possessed the requisite intent to dispose. In the latter action, circumstantial evidence gleaned from documents and expert testimony was likely the primary basis upon which NCR was found to possess the intent necessary for CERCLA arranger liability. As shown above, many of the facts that led the Michigan district court to hold NCR liable as a CERCLA PRP in *Georgia-Pacific* had been presented in an earlier *Appleton Papers* case in the Eastern District of Wisconsin, and at that time had been the basis for denying NCR equitable contribution rights under CERCLA.

These results reveal a few key considerations for the CERCLA litigator. First, the requisite intent in an arranger liability case can be proved not only through the overt actions of the alleged arranger, but also in some circumstances by proof of the defendant's purposeful inaction despite its knowledge of disposal of the hazardous substance. Second, circumstantial evidence of intent to dispose of hazardous substances can carry the day in CERCLA arranger liability cases where direct evidence may be incomplete, unreliable, or nonexistent. Finally, the same evidence regarding knowledge of disposal and intent to dispose, sometimes limited to use in the equitable allocation phase of a CERCLA action, is now always relevant to the liability phase where the action involves arranger liability issues. Therefore, counsel should seek discovery of such evidence early in a CERCLA action.