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Pneumo Abex Corp. v. High Point, Thomasville & Denton Railroad, and CERCLA "Arranger Liability"

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PNEUMO ABEX CORP. V. HIGH POINT, THOMASVILLE & DENTON RAILROAD, AND CERCLA "ARRANGER LIABILITY"

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601– 9696 (2000),[1] imposes liability on – among others – "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances . . .".[2] CERCLA liability is often not inexpensive. Certainly any rational corporate decision-maker will take measures to avoid responsibility for a contaminated site. One obvious way to achieve this goal is to characterize a transaction in which waste or hazardous materials change hands as a sale rather than a contract for treatment or disposal.

However, courts recognize this trick and display a willingness to pounce on transactions unable to live up to their label. Indeed, cases reveal that such a characterization meets with success if and only if the court is convinced that the transaction is actually a sale.[3] Thus, the obvious question presents itself: How does one convince a court that the transaction in question was indeed a sale and not a contract for the disposal or treatment of hazardous substances? One finds no easy answer. As a number of courts have pointed out, there is no "bright-line" test to delineate between a legitimate sales contract and a contract for disposal or treatment under CERCLA.[4] Rather, courts employ a variety of factors to analyze the specific facts of each case.[5] This variance can cause the search for a bright line to wind up in quite murky waters.

This Comment examines the recent Fourth Circuit decision on this issue in *Pneumo Abex Corp. v. High Point, Thomasville &*

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[1] 42 U.S.C. §§ 9601-9696 (2000).

[2] *Id.* § 9607(a)(3).

[3] *See* United States v. Petersen Sand and Gravel, Inc., 806 F. Supp. 1346, 1354 (N.D. Ill. 1992); *see also* United States v. Pesses, 794 F. Supp. 151, 156 (W.D. Pa. 1992).

[4] Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 775 (4th Cir. 1998) (quoting United States v. Petersen Sand and Gravel, Inc., 806 F. Supp. 1346, 1354 (N.D. Ill. 1992)).

[5] *Pneumo Abex Corp.*, 142 F.3d at 775, *with Pesses*, 794 F. Supp. at 156, *and* California v. Summer del Caribe, Inc., 821 F. Supp. 574, 581 (N.D. Ca. 1993), *and* United States v. Cello-Foil Prod., Inc., 100 F.3d 1227, 1231-32 (6th Cir. 1996).

Denton R.R.[6] ("*Pneumo Abex*"). Part II explains the particular facts, procedural history, and legal issues of *Pneumo Abex*. Part III presents aspects of the broad concept of "arranger liability" under CERCLA that are relevant to an understanding of the *Pneumo Abex* decision. Part IV discusses the Fourth Circuit's analysis of the facts of the *Pneumo Abex* case. Finally, part V of this Comment serves two functions: First, it places the *Pneumo Abex* decision in the context of other decisions in the Untied States in an attempt to glean from the case the principles that relieved the defendants of liability; second, it examines the *Pneumo Abex* court's treatment of the "useful product" defense.

II. PNEUMO ABEX CORPORATION'S OPERATION, RESULTING POLLUTION, AND QUEST FOR INDEMNIFICATION

A. Pneumo Abex Operations and Pollution

The predecessor to Pneumo Abex Corporation ("Pneumo Abex"), Abex Corporation ("Abex"), operated a railroad parts foundry in Portsmouth, Virginia, from 1927 to 1978.[7] At this site, Abex processed used journal bearings[8] into new journal bearings, pursuant to conversion agreements made with various railroads.[9] In exchange for shipping their used bearings to the foundry, the railroads received credit toward the purchase of new bearings equal to the weight of the used bearings, less any weight attributed to dirt or grease.[10]

After receiving the used bearings, Abex melted them down to "'sweat off' dirt, grease, and any impurities to separate the back from the lining."[11] During the melting process, impurities rose to the top where Abex employees skimmed them off. This material, known as "slag," was collected from the furnaces and ultimately deposited on the back lot of the Abex foundry property. Additionally, Abex collected the dust generated by this process and placed it in drums eventually deposited on the back lot. Abex then used the molten metal to create new bearings that it would later sell.[12]

Following the closing of the foundry in 1978, the EPA sampled the soil on the back lot and discovered elevated levels of

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[6] *Pneumo Abex Corp.*, 142 F.3d at 775.

[7] *See id.* at 772.

[8] *Id.* at 772-73. ("Journal or wheel bearings are used on railroad cars to hold lubricating oil against the axle to reduce friction. They are comprised of a lead lining ('babbitt') and a bronze or brass 'back'."). *Id.*

[9] *Id.* at 773.

[10] *Id.*

[11] *Pneumo Abex Corp.*, 142 F.3d. at 773. *Id.*

[12] *Id.*

lead, zinc, copper, tin, and antimony; the elements used in creating new bearings.[13] The EPA declared the premises a Superfund Site and in 1986 Abex began response activities. Estimates from the EPA put the total cost of the remedy at a minimum of $21 million.[14]

B. Procedural Posture

The EPA contacted the Defendants (as part of a larger class of 'potentially responsible parties'[15] under CERCLA) for contribution to the clean-up effort.[16] While others cooperated with the EPA, the Defendants refused, denying responsibility for the response costs.[17] Pneumo Abex then sued the Defendants under sections 107 and 113 of CERCLA.[18] The District Court dismissed the section 113 action as redundant and allocated responsibility under section 107.[19] The Defendants appealed the decision of the District Court, specifically challenging the finding of liability, the standing of Pneumo Abex to sue under section 107, the propriety of a suit for contribution by Pneumo Abex under section 107, and the allocation of response costs.[20]

The Fourth Circuit reviewed *de novo* the issues of liability and dismissal of the section 113 claim, and reviewed for abuse of discretion the issues of standing and equity of the award.[21] The court reversed the decision on the issue of liability of the defendants and remanded the case back to the District Court to apportion response costs among the remaining parties under section 113.[22] Section 113, the court pointed out, "must be used by parties who are themselves potentially responsible parties," a category within which the court indicated Pneumo Abex fell.[23]

III. RELEVANT ASPECTS OF "ARRANGER LIABILITY"

In an action for contribution under CERCLA, a plaintiff must establish four elements. First, the site in question must be a "facility" as defined in CERCLA section 101(9). Second, a plaintiff must show that a "release" (or "threatened release") of any "hazardous

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 773 n.2 ("While CERCLA does not define 'potentially responsible party', the courts have understood it to refer to a party who may be covered by the statute ...").

[16] *Pneumo Abex Corp.*, 142 F.3d.at 773.

[17] *Id.* at 773.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Pneumo Abex Corp.*, 142 F.3d. at 773.

[22] *Id.* at 776.

[23] *Id.* at 776.

substance" from the facility has occurred.[24] Third, such release must have caused the plaintiff to incur necessary response costs. Fourth, the defendant must fall "within one of the four classes" of covered persons in section 107(a).[25]

Section 107(a) defines four categories of "covered persons" subject to response cost liability. The so-called "arranger liability," defined in section 107(a)(3), creates liability in the following category of persons:

> (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, [26]

CERCLA does not define the "disposal" or "treatment,"[27] but rather references the definitions given to those terms in the Solid Waste Disposal Act ("SWDA").[28] SWDA defines "treatment" as " . . . any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste non-hazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume."[29]

"Disposal" under SWDA means:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or

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[24]Stevens Creek Assoc. v. Barclays Bank of Cal., 915 F.2d 1355, 1358 (9th Cir. 1990); *see also Summer del Caribe, Inc.*, 821 F. Supp. at 578; G.J. Leasing Co., Inc., 854 F. Supp. 539, 557-58 (S.D. Ill. 1994).

[25]*Stevens Creek Assoc.*, 915 F. Supp. 2d at 1358.

[26]42 U.S.C. § 9607(a)(3) (2000).

[27]*See id.* § 9601(29).

[28]*Id.* § 6901– 6992(k).

[29]*See id.* § 6903(34).

> discharged into any waters, including ground waters.[30]

The intent of CERCLA is not to punish those who sell useful products that contain hazardous substances, rather it is to impose liability on those who attempt to dispose of hazardous substances by disguising the disposal transaction as a sale to avoid liability.[31] Thus, when the question of arranger liability arises in the context of an alleged sale, courts will look beyond the characterization of the transaction as a sale, and determine the true nature of a transaction. A bona fide sale will not give rise to CERCLA liability. However, an arrangement that is actually one for disposal or treatment of hazardous substances will lead to a finding of liability.[32]

As numerous courts have noted, no "bright-line" exists to distinguish a sale of goods from an arrangement for treatment or disposal.[33] Rather, courts rely on an examination of the facts of the particular case to determine the true nature of the transaction. A survey of case law reveals a non-uniform variety of factors to which courts turn in order to make the all-important distinction.

For example, in *United States v. Pesses*,[34] the court used the following factors to establish liability in the alleged sale of hazardous substances: the "'crucial decision' on how its substances are disposed of or treated;" retained ownership of the substances and the authority to control the way the substances are disposed of or treated; and knowledge that the buyer will dispose of the substances there.[35] However in *Florida Power & Light Co. v. Allis Chambers Corp.*,[36] the Eleventh Circuit, in rejecting a "per se" rule of liability, held that "even though a manufacturer does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed, the manufacturer may be liable."[37]

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[30] *See id.* § 6903(3).

[31] Dayton Indep. School Dist. v. U.S. Mineral Prod. Co., 906 F.2d 1059, 1065 (5th Cir. 1990).

[32] *See Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1354; *Pesses*, 794 F. Supp. at 156; *Pneumo Abex Corp.*, 142 F.3d at 775 (quoting *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1354); *Summer del Caribe, Inc.*, 821 F. Supp. at 581; *Cello-Foil Prod., Inc.*, 100 F.3d at 1231-32.

[33] *See Pneumo Abex Corp.*, 142 F.3d at 775 (quoting *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1354).

[34] 794 F. Supp. 151 (W.D. Pa. 1992).

[35] *Id.* at 156, *accord* Chesapeake & Potomac Tel. v. Peck Iron & Metal Co., 814 F. Supp. 1269, 1274-75 (E.D. Va. 1992) (holding defendants liable as arrangers for treatment and disposal of clean up costs because they made the decision to sell spent lead acid batteries to the operator of the contaminated site).

[36] 893 F.2d 1313 (11th Cir. 1990).

[37] *Id.* at 1318, *accord* United States v. Summit, 805 F. Supp. 1422 (N.D. Ohio 1992) (holding sellers of used equipment at "blind auction" to scrap dealers liable).

The Eighth Circuit, however, dispenses with any control requirement where the defendant retains ownership of the contaminants.[38] In the Sixth Circuit, it has been held that the "requisite inquiry is whether the party intended to enter into a transaction that included an 'arrangement for' the disposal of hazardous substances."[39] The Sixth Circuit considers its approach consistent with the Seventh Circuit's "intentional action" requirement,[40] which construes the phrase "arranged for" as implying intentional action. [41] As is discussed more fully below, the Fourth Circuit in *Pneumo Abex* resorted to the following factors: whether the parties intended to reuse the products entirely, the value of the materials sold, and the utility of the materials in their present condition.[42]

Another important concept in "arranger liability" that is subject to differing applications is the "useful product" defense.[43] Some courts formulate this to apply only to "new and useful" products.[44] Other courts give this concept a more liberal application by not requiring that the product in question be new.[45] For example, in *G.J. Leasing Co. v. Union Electric Co.*,[46] the court said, "[t]he sale of a useful product, even though the product contains a hazardous substance, does not constitute a 'disposal' subjecting the seller to CERCLA liability . . . Moreover, even if the 'product' is not used for the purpose originally intended but can be used for some collateral purpose, liability will not be imposed..."[47]

IV. ANALYSIS OF THE *PNEUMO ABEX* COURT

Of the four requisite factors that a plaintiff must prove to establish a defendant's liability,[48] the Fourth Circuit faced only one: whether the defendant fell within one of the four classes of covered persons in section 107(a).[49] In this case, the plaintiff attempted to

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[38]United States v. Vertac Chem. Corp., 966 F. Supp. 1491, 1501 (E.D. Ark. 1997) (citing United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1375-82 (8th Cir. 1989)).

[39]*Cello-Foil Prod., Inc.*, 100 F.3d at 1231.

[40]*Id.* at 1232.

[41]*Id.*

[42]*Pneumo Abex Corp.*, 142 F.3d at 775.

[43]*Summer Del Caribe, Inc.*, 821 F. Supp. at 581.

[44]*See id.* ("The 'sale of a useful product defense' applies when the sale is of a new product, manufactured specifically for the purpose of the sale, or of a product that remains useful for its normal purpose in its existing state."). *Id.*

[45]*See, e.g.*, United States v. Wedzeb Enter. Inc., 809 F. Supp. 646, 656-57 (S.D. Ind. 1992); *see also*, Ashland Oil, Inc. v. Sonford Prod. Corp., 810 F. Supp. 1057, 1061 (D. Minn. 1993).

[46]854 F. Supp. 539 (S.D. Ill. 1994), *aff'd*, 54 F.3d 379 (7th Cir. 1995).

[47]*Id.* at 560.

[48]*See* cases cited *supra* note 24.

[49]*Pneumo Abex Corp.*, 142 F.3d at 774.

establish arranger liability under section 107(a)(3).[50] Specifically at issue was whether the defendant railroads arranged for the treatment of hazardous material by entering the conversion agreements.[51]

The plaintiff's argument rested on the essential premise that arranger liability attaches to parties who arrange for treatment of hazardous materials whether or not those materials are also waste.[52] The Fourth Circuit rejected this assertion as a reading of the statute that was too broad.[53] In looking at the definition of "treatment" as provided by SWDA, the court determined that it presupposes discard.[54] It pointed out that if the CERCLA authors did not intend to incorporate the presupposition of discard into the statute, they had the ability to, and indeed would have adopted their own definition.[55] However, since the legislature declined to adopt a definition without the inherent SWDA presupposition, the court could not adopt another definition.[56]

Having established that treatment presupposes discard, the Fourth Circuit next referenced a number of factors that other courts had relied on in determining whether a transaction constituted a discard of hazardous substances or a sale of valuable materials.[57] The list included the following: the intent of the parties as to whether the materials were to be reclaimed and reused, or reused entirely; the materials value; and the usefulness of the materials at the time of sale based on their condition.[58] Noting, however, that no "bright line" test existed to distinguish between the two types of transactions, the court commenced a "fact-specific inquiry" into the true nature of the transaction.[59] First, the Fourth Circuit examined the particular process of creating new wheel bearings from used wheel bearings. The court found particularly important the fact that the pollution resulting from the creation of new bearings occurred regardless of whether the foundry melted down used bearings or virgin materials.[60] The removal of dirt and grease was incidental to the bearing creation

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Pneumo Abex Corp.*, 142 F.3d at 774.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 775.
[58] *Id.*
[59] *Id.*
[60] *Id.* While the melting of the bearings did in fact result in the production of dust and slag that were later dumped on the back lot, removal of slag was necessary when using virgin materials. Thus, the court found that the underlying purpose of the case was distinguishable from that involved in Cadillac Fairview v. United States, 41 F.3d 562 (9th Cir. 1994), where the transaction was consummated for the purpose of removing contaminants from styrene used in the production of rubber. *Pneumo Abex Corp.*, 142 F.3d at 775.

process, rather than the central purpose of the conversion agreements.[61]

Secondly, the hazardous materials were not the dirt and grease, but rather the metal in the bearings themselves.[62] The Fourth Circuit likened this to cases involving a sale of a material contained when sold, but becomes hazardous in use.[63] The court cited as an example the case of *AM International Inc. v. International Forging Equip. Corp.*[64] In that case, the Sixth Circuit held that a seller of chemicals in drums did not arrange for disposal where the buyer allowed the building containing the drums to deteriorate, causing the release of hazardous materials.[65] As in *AM Int'l*, here this case involved metal contained when sold.[66]

Third, the court found the parties intended reuse of the used wheel bearings in their entirety to create new wheel bearings.[67] The agreements provided that the foundry pay the railroads for the bearings, not that the railroads pay the foundry to dispose of the metal.[68] The credit that the foundry granted to the railroads in exchange for the used bearings was proportional to the weight of the metal in the bearings.[69] The foundry deducted from the credit an amount for the weight of dirt and grease; however, this deduction represented the weight of the impurities, not a fee for reclamation.[70] The Fourth Circuit concluded that the parties contemplated that the bearings constituted a "valuable product for which the foundry paid a competitive price."[71] Thus, the railroads were parties to sales contracts, and not arrangers subject to CERCLA liability.[72]

Finally, the court remanded the case with instructions to apportion liability under CERCLA section 113[73] rather than section 107.[74] Section 107 provides that "any person" can recover all response costs from any responsible parties, whose liability is usually joint & several.[75] On the other hand, section 113 allows recovery from "any other person" who is or may be liable.[76] Parties who are themselves potentially liable under CERCLA must use the latter

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[61] *Pneumo Abex Corp.*, 142 F.3d at 775.
[62] *Id.*
[63] *Id.*
[64] 982 F.2d 989 (6th Cir. 1993).
[65] *Id.* at 999.
[66] *Pneumo Abex Corp.*, 142 F.3d at 775.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Pneumo Abex Corp.*, 142 F.3d at 775-76.
[72] *Id.* at 776.
[73] 42 U.S.C. § 9613 (2000).
[74] *Id.* § 9607.
[75] *Id.*
[76] *Id.* § 9613.

section.[77] Since the plaintiffs in this case were potentially liable, the Fourth Circuit held that section 113 was the proper vehicle for apportioning liability.[78]

V. THE IMPACT OF THE *PNEUMO ABEX* DECISION

Liability, in "arranger liability" cases, involving alleged sales of products is usually based on inquiries into the true nature of the transaction. Thus, the result reached by the Fourth Circuit may not establish a precedent that is applicable to a variety of fact patterns. Moreover, since it is not a United States Supreme Court decision, the influence of the Fourth Circuit's decision may be limited to the extent that other federal circuits adhere to differing rationales. However, this decision provides a sound limitation on "arranger liability"and an insight into which factors are key to a finding of no liability.

The Fourth Circuit's determination that "treatment," as defined in SWDA, presupposes discard[79] provides the foundation for the rest of the opinion. Through this determination, the distinction between a sale of valuable property and an arrangement for treatment or disposal takes on great significance; a sale of a valuable commodity by definition cannot be a discarding of material. In rejecting the plaintiff's claim that "arranger liability" attaches regardless of whether the substance is waste,[80] the *Pneumo Abex* court reached a result consistent with the Northern District of Ohio in *United States v. Summit Equip. & Supplies, Inc.*[81] In *Summit*, the District Court employed a different line of reasoning to reach the same result. The court first noted the conscious legislative choice to use the word "substance" instead of "waste" in section 107.[82] From this, the District Court deduced a "desire to prevent a manufacturer of hazardous substances from one day disposing of its excess inventory and then arguing that since the 'substances' had many other uses they were not 'waste', and therefore no liability should attach."[83] The negative implication of this reasoning is the conclusion reached by the *Pneumo Abex* court: That when there is no element of disposal or discard, the seller will not face CERCLA liability.

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[77] *Pneumo Abex Corp.*, 142 F.3d at 776.
[78] *Id.*
[79] *Id.* at 774.
[80] *Id.*
[81] 805 F. Supp. 1422 (N.D. Ohio 1992).
[82] *Id.*
[83] *Id.* at 1432.

A. Comparison to Cases Involving Sales of Similar Substances

With this groundwork laid, the "fact-specific inquiry" of the court, placed in perspective with other decisions on this subject, reveals essential principles that can work to relieve a defendant from arranger liability. Two cases involving similar factual situations are *California v. Summer del Caribe, Inc.*[84] and *United States v. Pesses*.[85] In both cases, the courts imposed CERCLA liability on parties dealing with materials of a similar nature to the bearings in *Pneumo Abex*, and under similar arrangements as well. While these cases involve many of the same elements found in *Pneumo Abex*, several distinguishing points existed which led the Fourth Circuit to properly conclude that the railroads were not "arrangers." First, the court relied on the fact that the foundry reused entirely the same material involved in *Pneumo Abex* without any reclamation processes.[86] Secondly, the court placed great weight on the fact that the bearings were useful to the foundry in their existing state and did not require any additional processing.[87]

1. *California v. Summer Del Caribe, Inc.*

In *California v. Summer Del Caribe, Inc.*,[88] the Northern District of California held a manufacturer of cans liable for arranging for the treatment or disposal of solder dross, a by-product of the can manufacturing process.[89] The defendant sold the solder dross to a metal reclamation facility that would process the material to recover the reusable portion.[90] The facility stored the unusable portion in on-site drums.[91] These drums, some of which had been buried, corroded and permitted the solder dross to leak onto the site, causing contamination of dangerous levels of zinc and lead.[92] The court held that the melting process to recover the reusable portion constituted a change in the physical character of the solder dross, and thus was "treatment" within the meaning of the statute.[93] Furthermore, the burying of the unusable portion of the solder dross constituted a "disposal."[94]

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[84]821 F. Supp. 574 (N.D. Ca. 1993).

[85]794 F. Supp. 151 (W.D. Pa. 1992).

[86]*Pneumo Abex Corp.*, 142 F.3d at 775.

[87]*Id.*

[88]821 F. Supp. 574 (N.D. Ca 1993).

[89]*Id.* at 582.

[90]*Id.* at 577. Only one-third of the solder dross could be reclaimed and reused. The remaining two-thirds contained high levels of lead and zinc and was unusable.

[91]*Id.*

[92]*Id.*

[93]*Id.* at 580.

[94]*Summer del Caribe, Inc.*, 821 F. Supp. at 580.

The Court of the Northern District of California also rejected the defendant's contention that it was selling a useful product, not disposing of waste by-products.[95] The court stated that the defense only applied to new products manufactured specifically for the purpose of the sale, or a product still useful for its normal purposes in its present form.[96] Citing the *Pesses*[97] decision, among others, the court pointed out that where, as here, the transaction is the sale of an otherwise useless waste or by-product, courts have consistently declined to apply the "useful product" defense.[98]

However, *Summer Del Caribe* is distinguishable from *Pneumo Abex* despite both cases involving the use of melting processes that led to the generation of hazardous materials later contaminating the respective sites. While the processing of the solder dross necessarily produced substantial waste,[99] the waste at issue in *Pneumo Abex* consisted of dust incidental to the manufacturing process itself. First, the dust resulted regardless of whether the foundry used virgin materials or used bearings.[100] Secondly, the amount of dust did not represent a substantial percentage of the total weight of the bearings.[101] This illustrates the importance of the factor of "intent of the parties to the contract as to whether the materials were to be reused entirely or reclaimed and then reused."[102] In situations of the nature of these two cases, *Pneumo Abex* suggests that where the treatment/processing/use of the materials sold involves reclamation, a stronger case exists for "arranger liability" under CERCLA.

This conclusion is consistent with a majority of arranger liability case law involving reclamation.[103] Notable among these is the Eastern District of Virginia case, *Chesapeake and Potomac*

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[95] *Id.* at 581.

[96] *Id.*

[97] 794 F. Supp. 151 (W.D. Pa. 1992).

[98] *Id.*

[99] *See id.* at 577.

[100] *See* text accompanying note 60.

[101] While dust was produced from the melting process, no deduction from the credit given to the railroads was taken for dust. By contrast, a deduction was taken for the weight of the "slag" (dirt, grease and other impurities) that was skimmed off of the molten metal. *Pneumo Abex Corp.*, 142 F.3d at 773. Furthermore, this slag was not the hazardous material in question, "the metals themselves were." *Id.* at 775.

[102] *Id.*

[103] *See, e.g.*, Gould, Inc. v. A & M Battery and Tire Serv., 954 F. Supp. 1020 (M.D. Pa. 1997) (holding broker of used batteries sold to lead reclamation facility as responsible person subject to arranger liability under CERCLA), *cf.* Catellus Dev. Corp. v. United States, 34 F.3d 748 (9th Cir. 1994) (holding that sale of spent car batteries to lead reclamation plant was arrangement for treatment). *But see*, RSR Corp. v. Avanti Dev. Inc., 68 F. Supp. 2d 1037 (S.D. Ind. 1999) (holding lead plate reclaimer who contracted with secondary lead smelter to remove and deliver lead from spent batteries responsible as seller of useful product, not arranger for further treatment or disposal of spent batteries).

Telephone Co. v. Peck Iron & Metal Co.[104] The facts of that case are representative of battery reclamation cases. C & R Battery ran a "battery sawing and shredding facility" that reclaimed lead from spent car, truck, and commercial vehicle batteries.[105] C & R purchased batteries in bulk from the various defendants in the case.[106] The usual practice of the defendants was to collect batteries until they accumulated such an amount to make it efficient to sell batteries to a battery reclaimer, such as C & R.[107] Upon delivery from the defendants, the employees of C & R Battery would break the batteries, drain the battery acid into an "acid pond" and remove the lead plates. The lead plates were stored on-site until they could be sold to a secondary smelter.[108]

The *Chesapeake and Potomac* court held that the defendants "arranged for the treatment and disposal of the lead" and thus "fell well within the ambit of Section 107(a)."[109] The court declined to fit this case within the "useful product" line of cases, noting that the defendant brought to its attention no cases holding that an otherwise spent product containing hazardous substances was a useful product because the buyer could reclaim a hazardous substance from it.[110] The *Chesapeake and Potomac* court further pointed out that the defendant's useful product argument[111] would have merit if it sold still usable batteries to an entity which used them in its own operations.[112] However, the court concluded, "[t]he batteries were dead; their sale to C & R Battery can only realistically be characterized as an attempt to 'get rid of them.'"[113] The court cited *United States v. Pesses*[114] as confirming the validity of this conclusion.[115]

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[104]814 F. Supp. 1269 (E.D. Va. 1992).

[105]*Id.* at 1271.

[106]*Id.*

[107]*Id.* at 1272.

[108]*Id.*

[109]*Id.* at 1275-76.

[110]*Chesapeake and Potomac,* 814 F. Supp. at 1275.

[111]The defendants' argument was that the "mere sale of raw materials, commodities or products used in another company's manufacturing processes, generally does not constitute 'arranging for disposal.' The Recycler Defendants sold useful, valuable material to C & R Battery." *Id.*

[112]*Id.* This situation would not involve reclamation; rather, the buyer of the useful batteries would be purchasing a product useful as a whole. Thus the court is concluding that it would be a "useful product."

[113]*Id.*

[114]794 F. Supp. 151 (W.D. Pa. 1992).

[115]The court quotes the language of *Pesses*, stating that the scrap materials "could not be used productively without processing." The significance of this statement is discussed below. *See infra* notes 121-123.

2. *United States v. Pesses*

United States v. Pesses[116] involved an owner and operator of a contaminated site in the business of obtaining scrap material unusable for its intended purpose and processing the material to make it productive.[117] The defendants in the case allegedly arranged for the disposal or treatment of hazardous materials by sending their materials to the site.[118] However, the defendants contended that they sold valuable scrap material to the site that was used by the operator either in his manufacturing processes or for resale.[119] The defendants further asserted that since they did not retain ownership or control over the materials, and since the processing of the materials was not "treatment," they did not arrange for the disposal or treatment of the materials.[120]

The court of the Western District of Pennsylvania disagreed, finding that the flow of monetary consideration was not dispositive of the issue.[121] Furthermore, it found that the materials sent to the operator of the site could not be used for their intended purpose, nor for any productive purpose absent processing.[122] In the court's view, such processing constituted both "treatment" under CERCLA[123] as well as "disposal" since the incidental wastes generated from the processing were dumped on the land.[124]

Pesses presents a scenario strikingly similar to that of *Pneumo Abex.* Neither the scrap in *Pesses,* nor the bearings in *Pneumo Abex* were useful for their originally intended purposes.[125] However, the *Pesses* court also found that the scrap could not be "productively used" without undergoing what the court held to be treatment as defined under CERCLA.[126] This provides perhaps the subtle, but key distinction from the *Pneumo Abex* decision. Unlike the scrap in *Pesses*, the wheel bearings could be productively used by the Abex foundry without any extra treatment in the creation of new

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[116]794 F. Supp. 151 (W.D. Pa. 1992).

[117]*Pesses*, 794 F. Supp. at 154. The scrap materials received at this site included "used or discarded parts and equipment, waste sludges, metallic by-products from industrial operations," as well as nickel cadmium batteries. *Id.*

[118]*Id.* at 155.

[119]*Id.*

[120]*Id.*

[121]*Id.* at 156.

[122]*Pesses*, 794 F. Supp. at 156-57.

[123]*Id.* at 157. The court held that the "melting, shearing, cleaning, crushing, sawing, banding, drilling, tapping, briquetting, and baling" of the materials fit within the SWDA definition of "treatment."

[124]*Id.*

[125]In *Pesses*, the operator of the site testified that it was his business to obtain scrap that was not usable for its intended purpose. *Id.*

[126]*Id.*

bearings.[127] Melting down bearings to use in the manufacturing process involved no additional effort and no more increased resulting pollution than using virgin materials.[128] This difference illustrates the importance of the usefulness of the bearings in their existing state. If there had been a need for additional "melting, shearing, cleaning, crushing, sawing, banding, drilling, tapping, briquetting, [or] baling"[129] of the bearings before they could be incorporated into a new product, the *Pneumo Abex* court might have been more willing to find the requisite discard element of "treatment."

To summarize, when compared to similar cases from other federal circuits, two factors emerge from the *Pneumo Abex* decision as particularly important in avoiding "arranger liability." First, where the transaction contemplates reusing a product in its entirety rather than reclaiming a component of a dangerous product, there exists a stronger case for non-liability. Second, although a product being sold may no longer be useful for its intended purpose, liability may still be avoided if it can be put to some use without any additional processing.

B. "Useful Product" Defense

The Fourth Circuit's ultimate determination of whether the conversion agreements between the Abex foundry and the railroads were arrangements for disposal or treatment, or sales of useful products, represents a broader view of the "useful product" defense. As noted above, many jurisdictions limit its application to cases involving products considered new and useful.[130] Of course, in *Pneumo Abex*, the railroads sold worn out wheel bearings not useful for their intended purpose.[131] However, as to the purpose of casting new wheel bearings, their worth was virtually on par with that of similar virgin materials. Thus, one party considered the bearings useful (the foundry), but the other party did not (the railroads). This raises two questions left unanswered by the court. First, does the

[127]The District Court's opinion from this case helps clarify this. The bearings were first heated to remove the impurities and then melted. Pneumo Abex Corp. v. Bessemer & Lake Erie R.R. Co., 921 F. Supp. 336, 340 (E.D. Va. 1996). However, as the Fourth Circuit found, both the removal of impurities and the melting of the metal to be molded into new bearings would have been necessary if virgin materials had been used. *Pneumo Abex Corp.*, 142 F.3d at 775.

[128]*Pneumo Abex Corp.*, 142 F.3d at 775.

[129]*Pesses*, 794 F. Supp. at 157.

[130]*Summer del Caribe, Inc.*, 821 F. Supp. at 581.

[131]The lower court's opinion is enlightening on this. "The Association of American Railroads ("AAR") established specifications for journal bearings. Railroad inspectors determine when railroad companies need to replace journal bearings because they are broken or worn." Pneumo Abex Corp. v. Bessemer & Lake Erie R.R. Co., 921 F. Supp. 336, 339-40 (E.D. Va. 1996). Therefore, the railroads would accumulate old bearings no longer fit for use on the railroad cars.

Fourth Circuit subscribe to the broader application of the "useful product" doctrine? Secondly, when evaluating the merits of a party's useful products defense, from whose perspective is "useful" considered?

As to the first question, the court of the Southern District of Indiana in the case of *RSR Corp. v. Avanti Dev., Inc.*, recognized the *Pneumo Abex* decision as part of an emerging trend to apply "useful product" more broadly as "new and useful" construction.[132] There, the court stated that the trend in the Eighth Circuit employs the "more appropriate" analysis involving evaluating a product's marketability, and the consumer demand for the good, not just its functionality.[133] As it related to the scrap metal in controversy in that case, the court said, "[t]he question therefore is not whether the lead plates were still useful as originally intended, but whether they were a commercially valuable product at the time of sale."[134]

Assuming that the *Avanti* court provides the correct answer to the first question, it follows that the answer to the second question is that if the product is useful to either party to the transaction, then the transaction is properly considered a sale of a useful product. One must wonder if an expansion of the "use product" defense can be consistent with the broad liability of CERCLA, which holds liable all persons along the causal chain.[135] Under this trend, could proper drafting of sales contracts allow parties to contract out of CERCLA liability? Could the useful product defense to arranger liability subsume the rule of arranger liability itself? Or, will the fact-specific inquiry preserve the integrity of arranger liability? It appears to be too early to know. Until a pronouncement is made by the United States Supreme Court, only the treatment of the *Pneumo Abex* decision by future courts will provide the answers.

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[132]*RSR Corp.*, 68 F. Supp. 2d at 1045 (S.D. Ind. 1999).

[133]*Id.*

[134]*Id.*

[135]OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1578 (5th. Cir. 1997) (citing B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d. Cir. 1992)).