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Environmental Law - Jones-Hamilton Co. v. Beazer Materials: Chemical Supplier "Arranges" for CERCLA Liability

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ENVIRONMENTAL LAW

JONES-HAMILTON CO. v. BEAZER MATERIALS: CHEMICAL SUPPLIER "ARRANGES" FOR CERCLA LIABILITY

I. INTRODUCTION

In *Jones-Hamilton Co. v. Beazer Materials & Services, Inc. (J-H)*,¹ the Ninth Circuit revisited the stormy seas of liability imposed under the authority of the Comprehensive Environmental Response, Compensation and Liability Act² (CERCLA or the Act). *J-H* forced the Ninth Circuit to grapple with a matter of first impression, the liability CERCLA imposes on a party arranging for the disposal of hazardous substances at a facility requiring cleanup.³ The Ninth Circuit found Beazer's supplying hazardous raw materials to *J-H* for formulation into marketable products constituted a disposal arrangement for which CERCLA liability attached. In evaluating this issue, the Ninth Circuit bridged an apparent split on the issue between two other circuits.⁴

Reviewing the district court's grant of summary judgment for the chemical supplier also forced the Ninth Circuit to reassess its holding in *Mardan Corp. v. C.G.C. Music Ltd.*,⁵ which upheld the validity of indemnity agreements between parties lia-

1. *Jones-Hamilton Co. v. Beazer Materials & Serv., Inc.*, 959 F.2d 126 (9th Cir. 1992) (per Fletcher, J.; the other panel members were Goodwin, J., and Brunetti, J.), *reh'g denied*, 973 F.2d 688 (9th Cir. 1992).

2. 42 U.S.C.A. § 9601 *et seq.* (West 1989).

3. *J-H*, 959 F.2d at 131.

4. The decisions in issue were *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989), and *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988). The divergence between these circuit judgments is discussed in section F, *infra*.

5. 804 F.2d 1454 (9th Cir. 1986).

ble under CERCLA.⁶ *Mardan* became the dominant interpretation of the effect of indemnity agreements on CERCLA liability,⁷ but an alternative perspective has been applied by federal district courts in the Sixth Circuit.⁸

A final issue addressed in this decision was the propriety, under California law, of awarding attorneys' fees for appellate costs incurred enforcing indemnity rights. In an earlier decision, the Ninth Circuit recognized a split of authority on the issue in state case law.⁹ Jones-Hamilton argued that a subsequent decision of a state appellate court clarified the matter to J-H's advantage. The Ninth Circuit found the cited authority was not controlling and followed its prior decision, partially upholding the awarding of attorneys' fees to Beazer.

The pervasive presence of hazardous substances in contemporary industrial and commercial undertakings ensures a broad interest in the outcome of this appeal. This note evaluates the appropriateness of this appellate decision in reference to CERCLA's legislative history and the Act's development as reflected in recent case law.

II. FACTS

In 1970, J-H, a chemical formulator, entered into an agreement with Wood Treating Chemicals Company, whose rights and liabilities were acquired by Beazer prior to the contract's termination in 1984.¹⁰ J-H agreed to formulate raw materials supplied by Beazer into wood preservation compounds, with Beazer retaining ownership of all materials and final products.¹¹ The agreement incorporated an allowance of up to two percent

6. In *Mardan*, the Ninth Circuit imposed the single limitation that both parties remain fully liable for any cost recovery action brought by a government agency despite any indemnity agreement between themselves. *Id.* at 1459.

7. Jane DiRenzo Pigott & Zemeheret Bereket-Ab, *Status of Indemnity Agreements Under CERCLA Section 107(e)*, 6 TOXICS L. REP. (BNA) 1351, 1352 (1992).

8. See, e.g., *CPC Int'l v. Aerojet-Gen. Corp.*, 759 F. Supp. 1269 (W.D. Mich. 1991); *AM Int'l v. International Forging Equip.*, 743 F. Supp. 525 (N.D. Ohio 1990) (discussed in some detail in section G, *infra*).

9. *Dewitt v. Western Pac. R.R. Co.*, 719 F.2d 1448 (9th Cir. 1983) (discussed in section H, *infra*).

10. *Jones-Hamilton Co. v. Beazer Materials & Serv. Inc.*, 959 F.2d 126, 127 (9th Cir. 1992), *reh'g denied*, 973 F.2d 688 (9th Cir. 1992).

11. *Id.* at 128.

loss by volume of material for spillage or shrinkage in any calendar month and a provision whereby J-H indemnified Beazer against all costs resulting from J-H's failure to comply with federal, state and local laws.¹²

An agent of Beazer was present at J-H's facility during the formulation process.¹³ The control or influence exercised over the formulation process by this agent was a matter of contention between the parties.¹⁴

Prior to forming the agreement, J-H received a permit from the California Regional Water Quality Control Board (the Board), restricting the chemicals J-H could discharge into its waste water containment ponds.¹⁵ Two of the restricted chemicals, for which CERCLA liability attaches,¹⁶ were among the raw materials provided by Beazer.¹⁷

At the Board's direction, J-H incurred costs of up to two million dollars cleaning up the waste water containment ponds.¹⁸ Following the cleanup, J-H brought an action against Beazer for contribution under CERCLA¹⁹ in federal court in the Northern District of California.²⁰

J-H argued that an indemnity agreement between the parties was counter to California public policy, was too limited in scope to apply to CERCLA liability, and was never intended to protect Beazer from the consequences of Beazer's own unlawful

12. *Id.*

13. *Id.*

14. *J-H*, 959 F.2d at 130. J-H asserted that Beazer's agent directed the formulation process. Beazer contended that their agent only reviewed the process to ensure quality control of the final products.

15. *Id.*

16. Among the substances supplied by Beazer were pentachlorophenol and tetrachlorophenol, both listed in 40 C.F.R. § 116.4 as regulated chemicals under the authority of 33 U.S.C. § 1321(b)(2)(A), which is incorporated by reference into CERCLA's definition of hazardous substances. CERCLA section 101(14); 42 U.S.C. § 9601(14) (West Supp. 1992).

17. *J-H*, 959 F.2d at 128.

18. *Id.*

19. Section 113(f); 42 U.S.C. § 9613(f) (authorizing a party incurring cleanup costs under CERCLA to claim a right of contribution from other liable parties).

20. *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022 (N.D. Cal. 1990), *aff'd in part, rev'd in part sub nom.*, *Jones-Hamilton Co. v. Beazer Materials & Serv. Inc.*, 959 F.2d 126 (9th Cir. 1992), *reh'g denied*, 973 F.2d 688 (9th Cir. 1992).

acts.²¹ The authority cited for J-H's first argument, *Widson v. International Harvester Co.*,²² concerned products liability. The district court held that though both CERCLA and California products liability law are strict liability regimes, the two were enacted by different legislative bodies and do not reflect identical public policies.²³ *Mardan* was cited by the court as authorizing parties to allocate CERCLA liability among themselves through the bargaining process.²⁴ The district court also rejected J-H's argument that the scope of the indemnity agreement did not extend to CERCLA liability. With special reference to the interpretation of indemnity agreements under California law, the court again cited *Mardan* to hold that an indemnity clause need not make specific reference to CERCLA-like claims as a condition for such claims falling within the agreement's scope of protection.²⁵

J-H's argument that the agreement did not extend to environmental response costs because CERCLA was not in existence at the time the contract was formed also failed to persuade the district court. Citing *City of Torrance v. Workers Comp. Appeals Board*²⁶ as authority, the district court held that "when an instrument specifically refers to the law, it refers not simply to the law at the time at which the parties entered into the agreement, but also the law at the time of enforcement."²⁷ The court emphasized that the Board's abatement order was issued under the authority of state law,²⁸ not CERCLA, that this order would

21. *Id.* at 1024.

22. 200 Cal. Rptr. 136 (Cal. App. 1984).

23. *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022 (N.D. Cal. 1990). The court explained further:

The California legislature has specifically provided that agreements which seek to indemnify a party for strict products liability are "void and unenforceable" because they are "against public policy" (citations omitted). To determine the public policies which underlie CERCLA, however, the court need not and should not examine the pronouncements of the California legislature with respect to products liability, but rather must determine the intent of Congress as expressed in the language of CERCLA itself.

Id. at 1025.

24. *Id.* at 1026.

25. *Id.* at 1027.

26. 185 Cal. Rptr. 645 (Cal. App. 1982).

27. *Kop-Coat*, 750 F. Supp. at 1028.

28. CAL. WATER CODE § 13304 (Deering Supp. 1991).

have been issued regardless of the existence of CERCLA, and that the federal Act merely provided J-H a means by which to pursue a private action for cost recovery.²⁹

Without regard to any alleged acts of "active negligence" on Beazer's part, the district court granted Beazer's motion for summary judgment based on the indemnity agreement between the parties.³⁰ A consideration such as an indemnitee's active negligence, the court stated, would only warrant evaluation if the indemnity protection claimed was implied rather than expressly granted.³¹ The issue of whether Beazer's supplying hazardous substances to J-H's facility and the subsequent control of the formulation process could provide a basis for CERCLA liability was not addressed by the district court.³² Subsequently, J-H appealed the summary judgment and the awarding of attorneys' fees to Beazer.³³

III. BACKGROUND

A. LEGISLATIVE HISTORY AND PURPOSE OF CERCLA

Since its enactment in 1980, CERCLA has been the subject of considerable criticism from courts and commentators.³⁴

CLEANUP OR ABATEMENT ORDER; ENFORCEMENT; PROMPT OR IMMEDIATE ACTION.

(a) Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up such waste or abate the effects thereof or, in the case of threatened pollution or nuisance, take other necessary remedial action.

Id.

29. *Kop-Coat*, 750 F. Supp. at 1028.

30. *Id.* at 1029.

31. *Id.*

32. *Id.* at 1024.

33. *J-H*, 959 F.2d at 126.

34. See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992) ("In keeping with its notorious lack of clarity, CERCLA leads us down a convoluted path . . ."); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) ("It is not surprising that, as a hastily conceived and briefly

CERCLA was enacted to address perceived inadequacies in the Resource Conservation and Recovery Act³⁵ (RCRA), which Congress conceived as a regulatory tool to ensure the proper management of hazardous wastes.³⁶ The legislation, however, failed to account for abandoned hazardous waste sites.³⁷ Another deficiency perceived in RCRA was the absence of a government funding source for addressing contaminated sites.³⁸ RCRA relied exclusively on the availability of a financially responsible owner.³⁹ Congressional action was spurred by 1979 estimates of the Environmental Protection Agency (EPA) that from 30,000 to 50,000 inactive hazardous waste sites existed throughout the United States, 1,000 to 2,000 of which were believed to present a serious risk to public health.⁴⁰

By enacting CERCLA, Congress intended to “establish a comprehensive response and financing mechanism to abate and control the vast problems with abandoned and inactive hazardous waste disposal sites.”⁴¹ The Act’s purpose was to ensure a rapid recovery of government funds expended in cleanup efforts and to induce persons responsible for creating contaminated sites to clean them up voluntarily.⁴² To effect this purpose, the legislation created a strict liability federal cause of action which

debated piece of legislation, CERCLA failed to address many important issues”); *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3rd Cir. 1988) (“CERCLA is not a paradigm of clarity or precision.”); *see also* *Chemical Waste Mgmt. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1293 (E.D. Pa. 1987) (“[I]t is debatable whether any provision of CERCLA is clear”).

35. 42 U.S.C. § 6901 *et seq.* (West 1989).

36. *94th Congress Wrap-Up: Much Accomplished, Many Issues Left for the 95th Congress*, 7 ENVTL. L. REP. (BNA) 10005, 10008 (1977); *see also* *The Environment — The President’s Message to the Congress*, 7 ENVTL. L. REP. (BNA) 50057, 50059 (1977) (“The Resource Conservation and Recovery Act, passed in 1976, gave the Environmental Protection Agency the authority it needs to regulate hazardous wastes and to assure the safe disposal of other residues.”).

37. H.R. No. 1016, 96th Cong. 2d Sess., (1980), *reprinted in* 5 U.S. CODE CONG. & ADMIN. NEWS 6119, 6125 (1980); *see also* Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 61-62 (1987) (“RCRA, which is intended to control hazardous waste from ‘cradle to grave,’ is a more focused piece of legislation than CERCLA. RCRA’s primary concern is with active solid waste facilities rather than hidden environmental contamination.”).

38. H.R. No. 1016, 96th Cong., 2d Sess., (1980), *reprinted in* 5 U.S. CODE CONG. & ADMIN. NEWS 6119, 6125 (1980).

39. *Id.*

40. *Id.* at 6120.

41. *Id.* at 6125.

42. *Id.* at 6120.

courts have construed as applying to both active and abandoned sites.⁴³

Under CERCLA, the President, usually acting through the EPA Administrator, is authorized to take necessary remedial actions at inactive hazardous waste sites that present unreasonable risks to public health or the environment.⁴⁴ The Act grants the President authority to order a responsible party to take remedial actions, establishes a cost recovery mechanism for government funds expended in the effort, and provides sanctions against a party refusing to comply with such orders.⁴⁵

The legislation created a so-called "Superfund" to finance cleanup operations.⁴⁶ In common parlance, CERCLA is known as the federal "Superfund Act" in recognition of this funding mechanism.⁴⁷ The Superfund is financed through a combination of appropriations, industry taxes, and cost recovery actions.⁴⁸

CERCLA is recognized as a remedial statutory scheme necessitating a liberal construction by interpreting courts.⁴⁹ The liability imposed is not intended to be punitive.⁵⁰ Among the Act's most important goals are the encouragement of voluntary

43. See *Chemical Waste Mgmt. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1290 (E.D. Pa. 1987) (emphasizing 42 U.S.C. § 9601(20)(A)'s inclusion of "abandoned" within the statutory definition of "owner or operator").

44. H.R. No. 1016, 96th Cong. 2d Sess., (1980), reprinted in 5 U.S. CODE CONG. & ADMIN NEWS 6119, 6131 (1980).

45. *Id.* at 6133; see also 2 KENNETH A. MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 50.51(3) (Matthew Bender 1992) "Although issuance of cleanup orders under CERCLA has to date been somewhat rare, the penalty for disobedience of such an order is severe — a fine of up to \$25,000 per day of violation. Furthermore, pre-enforcement judicial review of a cleanup order is generally prohibited by CERCLA [Section 113(h)]."

46. Section 101(11); 42 U.S.C. § 9601(11) (West 1989).

47. 2 KENNETH A. MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 50.51(1) (Matthew Bender 1992).

48. *Id.*

49. See, e.g., *Dedham Water Co. v. Cumberland Farms Dairy, Inc.* 805 F.2d 1074, 1081 (1st Cir. 1986) ("CERCLA is basically a remedial statute designed by Congress to protect and preserve public health and the environment. We are therefore obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes.").

50. DiRenzo Pigott & Bereket-Ab, *supra* note 7, at 1355; see also Note, *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1537 (1986) ("The purpose of the statute is not to punish defendants but to ensure that waste sites are cleaned up.").

cleanup efforts or, in the alternative, the reimbursement of government funds expended in addressing contaminated sites.⁵¹ The EPA views inducing voluntary cleanup actions as its primary goal.⁵² Courts applying CERCLA have cited two primary legislative purposes underlying the Act: to give governmental agencies the tools for prompt and effective responses to such problems and to force those responsible for creating the pollution to bear the costs of remedying the contamination.⁵³

CERCLA was enacted as a last-minute compromise between three competing bills.⁵⁴ The Act includes by reference within its statutory definition of hazardous substance a number of chemicals regulated under other federal environmental laws at the time of its enactment.⁵⁵ Courts have applied common law doctrine to fill gaps left in the Act's statutory framework.⁵⁶

51. DiRenzo Pigott & Bereket-Ab, *supra* note 7 at 1355; see also H.R. No. 1016, 96th Cong., 2d Sess., (1980) reprinted in 5 U.S. CODE CONG. & ADMIN. NEWS 6119, 6132 (1980) (emphasizing that the apportionment of costs among responsible parties will result in a more rapid cleanup response and preclude a party having to spend more funds to comply with a cleanup order than their ultimate liability would justify).

52. *Environmental Protection Agency Memorandum on Cost Recovery Action Under the Comprehensive Environmental Response, Compensation, and Liability Act (August 26, 1983)*, reprinted in 41 ENVTL. REP. FEDERAL LAWS (BNA) 2865 (1983) (EPA Memorandum).

53. *United States v. Aceto Agric. Chem. Corp.*, 699 F. Supp. 1384, 1387 (S.D. Ohio 1988), *aff'd*, 872 F.2d 1373 (8th Cir. 1989); accord *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).

54. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 365 n.8 (1986) (identifying the competing bills as H.R. 85, H.R. 7020 and S. 1480. The note provides a detailed description of the legislative process involved in integrating the three bills).

55. Section 101(14); 42 U.S.C. § 9601(14) (West 1989), states, in pertinent part:

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 *et seq.*] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

Id.

56. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3rd Cir. 1988) ("The meager legislative history available indicates that Congress expected the

B. THE SCOPE OF CERCLA LIABILITY

Courts have perceived the Act as “casting an exceedingly broad, strict-liability net.”⁵⁷ Facility owners,⁵⁸ prior owners,⁵⁹ successor corporations,⁶⁰ corporate officers who have been in a

courts to develop a federal common law to supplement the statute.”); *see also*, *United States v. Aceto Agric. Chem. Corp.*, 699 F. Supp. 1384, 1390 (S.D. Ohio 1988), *aff'd*, 872 F.2d 1373 (8th Cir. 1989) (“Where the statutory language and legislative history of CERCLA are inconclusive and the legislative history shows that the common law was intended to fill such gaps, the common law is a proper source of guidance.”).

57. *AM Int'l v. International Forging Equip.*, 743 F. Supp. 525 (N.D. Ohio 1990).

The scope of CERCLA liability serves to encourage private remedial initiative as to existing sites, to discourage careless disposition of toxic wastes, and not least, to ensure vigilance of those whose proximity to generators of toxic substances creates a potential for liability, who also occupy the most advantageous positions from which to monitor these entities.

Id. at 527.

58. *New York v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985).

59. *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285 (D. Minn. 1987); *see also* *Nurad Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992) (imposing liability on an equitable owner who had possessed the property for a short time and never used the leaking underground tanks that caused the contamination problem). The court stated:

We do not think, however, that the word “owned” is a word that admits of varying degrees. Such equitable considerations as the duration of ownership may well be relevant at a later stage of the proceedings when the district court allocates response costs among the liable parties, but we reject any suggestion that a short-term owner is somehow not an owner for purposes of [42 U.S.C. section] 9613(f)(1).

Id. at 844. The *Nurad* court emphasized that, “[A] defendant need not have exercised actual control of a facility to qualify as an operator under [section] 9607(a)(2), so long as the authority to control the facility was present.” *Id.* at 840.

60. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). Celotex acquired the interests of a company that had sold a contaminated property to the plaintiff prior to Celotex’s acquisition. Despite Celotex’s lack of operation or control of the contaminated facility, the court determined that corporate successors and survivors of corporate consolidations assume the debts and liabilities of the predecessor company, including the predecessor company’s CERCLA liability. The court stated, “The costs associated with cleanup must be absorbed somewhere. . . . Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost.” *Id.* at 91-92. *See also* *Chesapeake & Potomac Telephone Co. v. Peck Iron & Metal Co.*, No. 92-CV-506, 1992 WL 359959 (E.D. Va. December 3, 1992) (extending CERCLA liability to the inheritor of a sole proprietorship named in a suit for contribution), *but see* *United States v. Mexico Feed and Seed Co.*, No. 91-3085, 1992 WL 330397 (8th Cir. November 9th, 1992) (overturning CERCLA liability imposed on a successor corporation where the defendant and its predecessor were two distinct companies in competition with one another prior to the acquisition and where the predecessor failed to disclose the nature of its pending CERCLA liability prior to the transaction). In *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1991), *cert denied*, 111 S. Ct. 752 (1991), CERCLA liabil-

position to control waste disposal decisions,⁶¹ and those who have arranged for the disposal of hazardous substances at a given facility⁶² have confronted CERCLA liability. Courts readily impose joint and several liability when more than one potentially responsible party is involved and the contaminants for which each is responsible have commingled or cannot be addressed adequately on an individual basis.⁶³

Commentators ascribe numerous advantages to a broad interpretation of CERCLA liability.⁶⁴ Strict liability represents the best means of replenishing expended Superfund monies, encouraging the safer handling and disposal of wastes and facilitating the internalization of waste disposal costs within the industries that have reaped the financial benefits of using chemicals.⁶⁵ This enterprise liability rationale has been upheld by courts and the

ity was extended to a secured creditor with imputed authority to control the waste management practices of the debtor. The court stated;

[A] secured creditor may incur [42 U.S.C.] Section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor to actually involve itself in the day-to-day operations of the facility in order to be liable — although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous wastes. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chooses.

Id. at 1557-1558. Subsequent to *Fleet Factors*, the EPA issued a rule (57 Fed. Reg. 18,344 (April 29, 1992) codified in 40 C.F.R. § 300.1100) pertaining to the lender liability exemption of CERCLA (42 U.S.C. § 9601(20)(A) (West 1989) ("Owner . . . does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest . . ."). Under the EPA rule, participation in the management generally means that the holder is actually participating in the management or operational affairs of the debtor and does not extend to the mere capacity to exert influence. See 40 C.F.R. § 300.1100(b). See also Kurt Burkholder, *The Lender Liability Rule Under CERCLA*, 7 NAT'L ENVTL. ENFORCEMENT J. 3 (1992) (providing an in-depth discussion of the new EPA rule).

61. *United States v. Northeastern Pharmaceutical Chem. Co., Inc.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd*, 810 F.2d 726 (8th Cir. 1986).

62. *New York v. General Elec. Co.*, 592 F. Supp. 291 (N.D. N.Y. 1984).

63. See, e.g., *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

64. Note, *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1517 (1986).

65. *Id.*

EPA as comporting with the legislative intent underlying CERCLA.⁶⁶

The Superfund Amendment and Reauthorization Act (SARA) was enacted in 1986. It has been described as reaffirming the appropriateness of strict liability under CERCLA.⁶⁷ SARA accomplished this both explicitly, by embracing a decision imposing strict liability within the legislative history,⁶⁸ and implicitly, by fashioning several narrow-gauge exemptions to the emerging strict liability regime reflected in the case law.⁶⁹

C. COST RECOVERY ACTIONS UNDER CERCLA

CERCLA provides for recovery claims by either government agencies or private individuals who have incurred costs cleaning up contaminated sites.⁷⁰ Recoverable costs include any "not inconsistent with the National Contingency Plan"⁷¹ (NCP) for a

66. *United States v. Aceto Agric. Chem. Corp.*, 699 F. Supp. 1384 (S.D. Ohio 1988), *aff'd*, 872 F.2d 1373 (8th Cir. 1989).

67. 4 WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES*, § 8.13 West (1992).

68. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983).

69. RODGERS, *supra* note 67, § 8.13.

70. Section 107(a); 42 U.S.C. § 9607(a) (West 1989).

LIABILITY

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —

- (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 costs, of a hazardous substance, shall be liable

Id.

71. Promulgated by the EPA, the National Contingency Plan (NCP) is a set of regulations establishing procedures and standards for responding to releases of hazardous

government agency or Indian tribe claimant⁷² or any necessary costs incurred "consistent with the NCP" for private individuals.⁷³ The significance of this distinction is that a government claimant need only document that its expenditures were not inconsistent with the NCP,⁷⁴ while private parties bear the burden of both pleading and proving consistency with the NCP.⁷⁵ Despite the disadvantage private parties have in bringing CERCLA actions relative to government claimants, the private suit provisions of the Act serve to promote settlements and thereby conserve the resources of the Superfund which alone is inadequate to address a problem of national scope.⁷⁶ Hundreds of cost recovery actions have been filed since the Act's enactment in 1980.⁷⁷

substances. The Plan is codified in 40 C.F.R. § 300; 47 FED. REG. 31,180 (July 16, 1982).

72. Section 107(a)(A); 42 U.S.C. § 9607(a)(A) (West 1989) ("All costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; . . .").

73. Section 107(a)(B); 42 U.S.C. § 9607(a)(B) (West 1989) ("Any other necessary costs of response incurred by any other person consistent with the national contingency plan; . . .").

74. *EPA Memorandum*, *supra* note 52, at 2864; *Developments in the Law: Toxic Waste Litigation*, *supra* note 64, at 1501.

75. *See County Line Investment Co. v. Tinney*, 933 F.2d 1508, 1514 (10th Cir. 1991) The court upheld the dismissal of a claim for contribution against a former owner of a contaminated landfill. The plaintiff's failure to provide an opportunity for public comment on the response measures taken, as required by the NCP, negated any right to contribution from the former owner. In dicta, the court recognized the validity of an action seeking a declaratory right to contribution for future response costs, providing that such costs will be incurred in a manner consistent with the NCP. *Id.* at 1513. *See also* William B. Johnson, *Application of Requirement in § 107(a) of Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C.S. § 9607(a)) That Private Cost-Recovery Actions Be Consistent With The National Contingency Plan*, 107 A.L.R. Fed. 563 (1992) (providing an in-depth discussion of the issue).

76. *MANASTER & SELMI*, *supra* note 47, § 50.51(1)

[T]he Superfund is incapable of adequately addressing even the presently known waste sites. The \$8.5 billion [fund available] represents less than 3 percent of the \$300 billion that some sources estimate the cleanup of these sites will cost. Rather, the Superfund is designed chiefly as a standby mechanism in case a site is not addressed by those parties CERCLA designates as liable for the cleanup.

Id. *See also* Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 34 (1987) ("Unfortunately, \$8.5 billion will not put more than a modest dent in the contamination problem nationwide."); *Developments in the Law: Toxic Waste Litigation*, *supra* note 64, at 1497 n.69 (emphasizing that government savings in private party cleanups are realized primarily through the reduction in administrative costs and the increased time value of Fund money).

77. *RODGERS*, *supra* note 67, § 8.11(A) ("[B]illions of dollars in cleanup costs have changed hands and hundreds of billions of dollars in potential liabilities are rebounding

The elements of a CERCLA cost recovery action include:

- 1) the contaminated site fits within the definition of facility as stated in Section 101;
- 2) a release or threatened release of a hazardous substance has occurred at the facility;
- 3) the release or threatened release caused the claimant to incur response costs; and
- 4) the defendant falls within at least one of the four categories of liable persons described in Section 107(a).⁷⁸

The cost recovery provisions of CERCLA may provide a means of relief in states where no comparable right is available under state law. The California Hazardous Substance Account Act⁷⁹ is the state equivalent of CERCLA. This law however, does not provide for private cost recovery actions.⁸⁰

through the insurance system.”).

78. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1379 (8th Cir. 1989).

79. CAL. HEALTH & SAFETY CODE § 25300 *et seq.* (Deering 1988).

80. DANIEL P. SELMI, & KENNETH A. MANASTER, *STATE ENVIRONMENTAL LAW*, § 9.02(1)(C) (Clark, Boardman, Callaghan, 1991). As the district court assessing J-H's claim explained, CERCLA's private cost recovery right fills this gap. *Kop-Coat*, 750 F. Supp. at 1028. See also Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 65 (1987) (“Unlike the federal Superfund, there is no private right of action under the California Superfund Law. This omission has minimal practical impact on [Potentially Responsible Parties] however, because the federal Superfund provides a response cost recovery right for any site cleaned up under the state law.”)

Hingerty's blanket statement fails to consider two significant features of the state law: the broader scope of materials falling within the definition of “hazardous substance” under the state law and that the authority of the state law can only be initiated by a government agency. Section 25363(e) of the state Health & Safety Code (Code) grants a right to persons incurring response costs to join other responsible parties or, in the alternative, to bring a subsequent claim for contribution against other responsible parties. However, the claimant's liability must arise from an abatement order issued by the state Department of Health Services under the authority of Section 25358.3 of the Code.

The state act defines “hazardous substance” in Code Section 25316 which, in addition to the CERCLA definition, incorporates by reference Section 25117, the Code's definition of hazardous waste. Subsection (b) of Code Section 25117 states, “Hazardous waste includes, but is not limited to RCRA hazardous waste.” It is therefore possible for liability under the state act to attach for environmental contamination not subject to CERCLA liability. The significance of this disparity between the state and the federal laws is that a potentially responsible party subject to liability only under the state act has no incentive to pursue a voluntary cleanup with the expectation of receiving contribution from other responsible parties. Courts have recognized the value of this mechanism as furthering the goals of CERCLA. See, e.g., *County Line Investment Co. v. Tiney*, 937 F.2d 1508, 1513 (10th Cir. 1991). In his paper, Hingerty acknowledges the powerful force CERCLA's private cost recovery provision contributes toward achieving the Act's purpose by encouraging private environmental cleanups. See note 96 *infra*.

D. LIMITED STATUTORY DEFENSES UNDER CERCLA

As have other portions of the Act, the provisions regarding statutory defenses⁸¹ have received their share of criticism.⁸² CERCLA's strict liability scheme leaves little room for defensive maneuvering. The "third party defense,"⁸³ identified as the only one that matters in a practical way,⁸⁴ has been described as "nine parts loser."⁸⁵ The greatest limitation to CERCLA's statutory defenses is that they only apply if the intervening agent is the sole cause of the environmental harm.⁸⁶ Efforts by defendants to supplant the statutory defenses with those of an equitable nature such as "caveat emptor"⁸⁷ or "unclean hands"⁸⁸ have

81. Section 107(b); 42 U.S.C. § 9607(b) (West 1989)

DEFENSES

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by —

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

Id.

82. *AM Int'l v. International Forging Equip.*, 743 F. Supp. 525, 527 (N.D. Ohio 1990) ("The defenses given by Section 107(b) are as narrow as the liability provision is broad: . . ."); see also *RODGERS, supra* note 67, § 8.13(C) ("Defenses under CERCLA, like the rest of the Act, leave a great deal to imagination and taste.").

83. Section 107(b)(3); 42 U.S.C. § 9607(b)(3), see note 81 *supra*.

84. *RODGERS, supra* note 67, § 8.13(3).

85. *Id.* § 8.13(3)(a).

86. *Id.*; see also *United States v. Hooker Chemicals & Plastics Corp.*, 680 F. Supp. 546 (W.D. N.Y. 1988) (holding the third party defense unavailable to a defendant at least partially responsible for causing the contamination problem at Love Canal).

87. *Smith Land & Improvement Corp. v. Celotex Corp.* 851 F.2d 86 (3rd Cir. 1988).

88. *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563 (E.D. Pa. 1988).

met with limited success.⁸⁹ One commentator points to the absence of a right to injunctive relief within Section 107 as disfavoring equitable defenses.⁹⁰ Yet, some harmless equitable defenses have been proposed as more than any judge could stand to ignore: *res judicata*, payment, or accord and satisfaction.⁹¹ In addition, a claimant who fails to satisfy one of the *prima facie* elements or who filed beyond the statutory limitation period would presumably find his or her suit to be fatally flawed.⁹²

E. THE RIGHT TO CONTRIBUTION UNDER CERCLA

Though the Act's original framework did not explicitly provide for a right of contribution, Congress recognized that the apportionment of costs among liable parties would best achieve the legislation's goals.⁹³ In addition to the inherent unfairness of a party paying more than its proportionate share of cleanup costs, Congress believed that a more equitable distribution of costs would result in greater compliance with abatement orders.⁹⁴ The Act originally allowed a party paying a disproportionate share of costs to claim reimbursement from the Superfund.⁹⁵ To conserve

89. *See, e.g., Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 852, 857 (M.D. Pa. 1988) (finding the equitable defense of laches available because CERCLA cost recovery actions are essentially equitable claims for restitution); *see also Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049 (D. Ariz. 1984), *aff'd on other grounds*, 804 F.2d 1454 (9th Cir. 1986), *but see MANASTER & SELMI, supra* note 47, § 53.32 ("Even courts that have held that equitable defenses are not precluded by CERCLA have found alternative rationales for denying equitable defenses.").

90. RODGERS, *supra* note 67, § 8.13(2) ("Unlike Section 106, Section 107 authorizes no injunctive relief, which suggests that the ghost of the chancellor is not close at hand."), *but see New York v. General Elec. Co.*, 592 F. Supp. 291, 301 (N.D. N.Y. 1984) (recognizing that a CERCLA-based claim does not preclude injunctive relief if joined with pendent claims for which such relief is appropriate).

91. RODGERS, *supra* note 67, § 8.13(3); MANASTER & SELMI, *supra* note 47, § 53.32 ("Equitable defenses are often allowed on the issue of damages, even when they do not relieve the defendants of liability."); *see also United States v. Atlas Min. & Chem. Inc.*, 797 F. Supp. 411, 417 (E.D. Pa. 1992) (refusing to recognize equitable defenses to liability but noting that such defenses may be relevant during the apportionment phase of a proceeding resolving contribution claims); *accord Versatile Metals Inc. v. Union Corp.*, 693 F. Supp. 1563, 1572 (E.D. Pa. 1988).

92. RODGERS, *supra*, note 67, § 8.13(3).

93. H.R. No. 1016, 96th Cong., 2d Sess., (1980), *reprinted in* 5 U.S. CODE CONG. ADMIN. NEWS 6119, 6132 (1980).

94. *Id.*; *see also Developments in the Law: Toxic Waste Litigation, supra* note 64, at 1537 (arguing that a right of contribution secures the benefits of a larger defendant pool and therefore serves CERCLA's goals of fairness and efficiency).

95. H.R. No. 1016, 96th Cong., 2d Sess., (1980), *reprinted in* 5 U.S. CODE CONG. & ADMIN. NEWS 6119, 6132 (1980).

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Superfund monies, courts recognized an implied right of private parties incurring response costs consistent with the NCP to bring claims for contribution against those with whom they shared CERCLA liability.⁹⁶

The enactment of SARA in 1986 incorporated the right to bring an action in contribution explicitly within CERCLA's statutory framework.⁹⁷ Courts are expected to use appropriate equitable considerations in allocating response costs among liable parties.⁹⁸ This discretionary authority allows courts to consider the relative fault of joint parties in allocating liability, a consideration irrelevant to the limited statutory defenses provided by Section 107(b).⁹⁹ Courts use the flexibility granted by SARA to

96. See, e.g., *United States v. Ward*, 618 F. Supp. 884, 893 (E.D. N.C. 1985) (finding such a right in 42 U.S.C. § 9607(a)). CERCLA's provision for a private cause of action for cost recovery substantially increases the depth of the Act's effectiveness. See Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31 (1987), which states:

It is doubtful that the Environmental Protection Agency, with its national concerns and limited resources, would use the Superfund to clean up a site with only marginally hazardous amounts of contamination. However, a private right of action under CERCLA might be used to recover cleanup costs at more modestly contaminated sites cleaned up by private parties. Private parties have frequently used the private right of action to recover the costs of cleaning up contaminated sites that did not appear on the federal priorities list. The possibility of such private actions gives practical import to the broad definition of CERCLA facilities, despite the unlikelihood of a government action at many of these facilities otherwise.

Id. at 46. See also *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3rd Cir. 1992) (upholding the validity of CERCLA recovery actions based on response costs incurred in addressing *de minimis* levels of environmental contamination).

97. Section 113(f)(1); 42 U.S.C. § 9613(f)(1) (West 1989).

CONTRIBUTION

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

Id.

98. *Id.*

99. *AM Int'l v. International Forging Equip.*, 743 F. Supp. 525, 531 (N.D. Ohio 1990).

incorporate the Gore Amendment factors¹⁰⁰ into their cost allocation decisions despite the exclusion of these considerations from the final legislation.¹⁰¹

A complicating factor in regards to a right of contribution is presented by Section 113(f)(2)¹⁰² of the Act, which precludes ob-

100. See *United States v. A&F Materials Co. Inc.*, 578 F. Supp. 1249 (S.D. Ohio 1984) (providing an in-depth discussion of CERCLA's legislative history and the Gore Amendment incorporated into the House version of the bill in 1980). The Gore Amendment was an effort to soften the perceived harshness of imposing joint and several liability on parties liable under CERCLA without regard to relative culpability. The Amendment listed factors courts would consider in apportioning liability among parties. Included within these factors were:

- (i) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;
- (ii) the amount of the hazardous waste involved;
- (iii) the degree of toxicity of the hazardous waste involved;
- (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

Id. at 1256.

Despite its exclusion from the Senate version of the bill, courts apply the Gore Amendment factors under the authority of CERCLA section 113(f)(1) which requires the apportionment of liability based on equitable considerations. Some states have explicitly incorporated the Gore Amendment factors within their versions of CERCLA. See, e.g., CAL. HEALTH & SAFETY CODE § 25356.3(c) (West 1992).

101. RODGERS, *supra* note 67, § 8.13(B).

102. 42 U.S.C. § 9613(f)(2) (West 1989):

SETTLEMENT

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) PERSONS NOT PARTY TO SETTLEMENT

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United

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taining contribution from a party that enters a judicially approved settlement with either the EPA or a state. Presumably, such an agreement would arise only after an adequate level of cleanup was ensured. However, failing to coordinate with other interested parties in multi-party negotiations could result in an inequitable allocation of response cost liability. The advantages of this provision from the EPA's perspective are obvious.¹⁰³ Responsible parties have an incentive to settle quickly with the EPA as a means of protecting themselves against claims for contribution.¹⁰⁴ In addition, the potential animosity between responsible parties may thwart efforts to coordinate settlement negotiation strategies. Whether or not the EPA obtains a tactical negotiating advantage from the situation, if administrative costs are reduced and cleanup measures proceed more rapidly, the agency's goals are achieved.¹⁰⁵

F. ARRANGING FOR DISPOSAL UNDER CERCLA

Section 107(a)(3)¹⁰⁶ of the Act includes within the statutory definition of liable parties those who arrange for the disposal,

States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

Id.

103. Michael A. Brown, *U.S. v. Alcan: A Crack in the Wall of Joint and Severable Liability*, 24 CHEMICAL WASTE LITIG. REP. 306, 307 (1992) ("The steamroller effect on individual PRPs when other PRPs begin to settle creates a strong pressure to settle without reaching issues of proportionate liability. Volume and ability to pay become the only operative factors in these situations."). PRP is an acronym for "potentially responsible party." ENVIRONMENTAL ACRONYMS, ABBREVIATIONS AND GLOSSARY OF TERMS, Executive Enterprises, Inc. (1989).

104. *Developments in the Law: Toxic Waste Litigation*, *supra* note 64, at 1537.

105. *EPA Memorandum*, *supra* note 52, at 2865. In *Transtech Industries Inc. v. A & Z Septic Clean*, No. 90-2578 (D. N.J. November 2, 1992), reported in, 23 ENV'T REP. (BNA) 1869 (1992), a group of CERCLA-liable private parties formed a consent decree in which a number of *de minimis* parties agreed to contribute to cleanup costs on the condition of receiving a covenant not-to-sue from the parties facing more extensive liability. *De minimis* parties are potentially responsible parties with a relatively small share of cleanup costs. Such parties however, often sustain substantial transaction costs, such as legal fees and technical consulting costs during settlement negotiations. The *de minimis* parties were dismissed from the pending cost recovery litigation and received a limited indemnity against claims brought by third parties. The agreement appears to mark the first time a Superfund consent decree has been reached without the assistance or participation of government environmental officials.

106. 42 U.S.C. § 9607(a)(3) (West 1989).

treatment, or transportation of hazardous substances to any facility containing such substances. The Act's "arranger" provision is the result of legislative compromise¹⁰⁷ and has drawn its share of criticism.¹⁰⁸ There appears to be nothing inherently unfair about holding those responsible for arranging the disposal of hazardous substances liable for any resulting harm.¹⁰⁹ Asserting a lack of ownership or even possession of the materials will provide no defense to arranger liability.¹¹⁰ Courts have applied arranger liability against parties selecting a specific place or means of disposal¹¹¹ and against parties that contract for disposal services ignorant of the ultimate disposal site to be used.¹¹² Ar-

LIABILITY

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

Id.

107. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 n.8 (8th Cir. 1989).

108. *United States v. New Castle County*, 727 F. Supp. 854, 871 (D. Del. 1989) ("Congress did not, to say the least, leave the floodlights on to illuminate the trail to the intended meaning of arranger status and liability."); *see also* RODGERS, *supra* note 67, § 8.12(C) ("Like other important terms in CERCLA, an 'arranger' is undefined in the Act, and the omission has drawn predictable criticism that Congress did not help the cause of interpretation by leaving the 'floodlights' on or by fashioning an instructive legislative history.").

109. RODGERS, *supra* note 67, §8.12(C).

110. *Id.* ("One suspects that somebody who steals a truck, and later throws out drums of waste found in the back, will make little headway by arguing that he didn't 'own or possess' the wastes disposed of.").

111. *United States v. Northeastern Pharmaceutical & Chem. Co. Inc.*, 579 F. Supp. 823, 849 (W.D. Mo. 1984), *aff'd*, 810 F.2d 726 (8th Cir. 1986) (assigning personal liability to corporate officers who owned a controlling interest in the enterprise and possessed the authority to control the pollution-causing activities, discover discharges and take measures to abate any resulting damage).

112. *United States v. Ward*, 618 F. Supp. 884 (E.D. N.C. 1985) (finding the defendant arranged for disposal by contracting with an unlicensed hauler, for less than market rates, and not inquiring as to the ultimate disposal location); *but see* *United States v. Petersen Sand and Gravel, Inc.*, No. 91 C 5835, 1992 WL 293328 (N.D. Ill. October 7, 1992) (finding no arrangement for disposal absent a showing that the defendant arranged for disposal to take place at the facility in question).

The defendant in *Petersen*, an electrical utility, paid another company to dispose of its hazardous fly ash byproduct. Some segment of the fly ash was usable as raw material for incorporation into road-base products which the other party to the contract manufactured. The contract was termed a "Disposal Agreement" and both parties recognized that a proportion of the materials supplied by the utility company would not be suitable for manufacturing purposes and would require disposal. The price charged for the dispo-

ranger liability can attach to one who chooses a disposal facility, chooses a transporter, or by an even more remote decision that can predictably lead to the disposal of hazardous substances at a particular facility.¹¹³

In *New York v. General Electric Co.*,¹¹⁴ the defendant's assertion that used PCB-containing¹¹⁵ oil sold to a drag strip was a useful product became mired in CERCLA's arranger liability provision. The defendant argued that the oil was sold "in the ordinary course of business, for use as they see fit."¹¹⁶ The court focused on the defendant's knowledge, or imputed knowledge, that the drag strip would deposit the oil on the land surface for dust control purposes as a basis for characterizing the transaction as an arrangement for disposal.¹¹⁷ The court was unimpressed by the defendant's argument that the drag strip did not constitute a "facility containing a hazardous substance" within the definition of Section 107(a)(3).¹¹⁸ Such an interpretation, the court recognized, would frustrate Congressional intent and provide an incentive for dumping hazardous wastes in virgin areas.¹¹⁹

sal service varied on the basis of the usable quality of fly ash supplied. *Id.* at *7. The court found the transaction was not an arrangement for disposal, as per CERCLA, because the supplier provided useful material for a manufacturing process, and did not arrange for the ultimate disposal at the contaminated facility. The court stated, "[S]eller liability for the later misuse by the buyer of useful but hazardous ingredients in a manufacturing process was not intended by CERCLA's authors; such liability would chill permissible manufacturing." *Id.* at *8.

113. *Developments in the Law: Toxic Waste Litigation*, *supra* note 64, at 1516.

114. 592 F. Supp. 291 (W.D. N.Y. 1984).

115. Polychlorinated Biphenyl, a general category of chemicals consisting of two joined aromatic carbon rings to which a number of chlorine atoms are bound.

116. *General Elec.*, 592 F. Supp. at 297.

117. *Id.*

118. *Id.* at 296; *accord* *United States v. Ward*, 618 F. Supp. 884, 895 (D.C. N.C. 1985) (finding CERCLA's statutory definition of "facility" [42 U.S.C. § 9601(a)] sufficiently broad to encompass the North Carolina roadside sites where disposal took place).

119. *General Elec.*, 592 F. Supp. at 296 n.9. *See also* MANASTER & SELMI, *supra* note 47, § 53.22(4)(b) stating:

Courts have uniformly held that, for liability to attach, the waste generator need not have selected the final disposal site for the waste or know the final disposal site for its substances. The rationale behind these cases may be that CERCLA should not allow waste generators to escape liability for lack of knowledge of the disposal site. Such a rule would award companies for not keeping track of their waste disposal and for ignoring poor disposal practices.

Id.

Arranger liability was also found to apply in *United States v. A & F Materials Co. (A&F)*.¹²⁰ The A&F defendant sold used caustic oil to another company for use in an industrial process. The court found the transaction constituted an arrangement for disposal and declared the fact that the recipient paid the supplier for the material irrelevant.¹²¹ The meaningful inquiry was “*who decided to place the waste into the hands of the particular facility?*”¹²² The court emphasized that this transaction was precisely the type of decision CERCLA was intended to regulate.¹²³

Federal case law demonstrates a readiness to attach CERCLA liability for even the passive disposal of hazardous substances. In *Nurad, Inc. v. William E. Hooper & Sons, Co.*,¹²⁴ the court relied on the definition of “disposal” published in the Code of Federal Regulations¹²⁵ to find an arrangement for disposal when a property owner consciously decided to abandon underground storage tanks containing hazardous substances.¹²⁶ The court refused to consider the defendant’s argument that the “useful material” in the tanks was sold with the property to a subsequent owner.¹²⁷ A similar holding is found in *Sanford Street Local Development Corp. v. Textron, Inc.*,¹²⁸ where two

120. 582 F. Supp. 842 (S.D. Ill. 1984).

121. *Id.* at 845.

122. *Id.*

123. *Id.* See also *Santa Fe Pacific Realty Corp. v. United States*, No. CIV. S-90-361 EJM-JFM (E.D. Cal. July 16, 1992), reported in, 7 TOXICS L. REP. (BNA) 361 (1992). A property owner brought a claim for cost recovery against the United States government based on expenses incurred disposing of a large accumulation of hazardous substances by a sublessee. The hazardous substances had been purchased at an auction sponsored by the Defense Property Disposal Service, which at one time auctioned mixed lots, typically including solvents, coatings, adhesives, batteries, anodes and corrosive cleaning compounds. The plaintiff claimed the government thereby arranged for the disposal of these materials. Admitting no issue of law or fact, the parties agreed to a settlement where the government paid \$854,000 to the plaintiff and assumed responsibility for the disposal of a remaining drum of hazardous waste.

124. 966 F.2d 837 (4th Cir. 1992).

125. 40 C.F.R. § 261.2 (defining waste as any discarded material or material that has been abandoned).

126. *Nurad*, 966 F.2d at 847; *contra* *United States v. Petersen Sand and Gravel, Inc.*, No. 91 C 5835, 1992 WL 293328 (N.D. Ill. October 7, 1992) (arguing that the passive release of a hazardous substance does not constitute a disposal as per the statutory definitions of CERCLA or RCRA).

127. *Nurad*, 966 F.2d at 8472 (The court stated, “A defendant who has abandoned hazardous materials at a site cannot escape CERCLA liability by simply labelling a subsequent transfer of the property as a ‘sale of the hazardous waste.’”).

128. 768 F. Supp. 1218 (W.D. Mich. 1991).

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previous owners were found to have arranged for the disposal of PCB-containing¹²⁹ transformers in a facility by means of a property sales transaction.¹³⁰ The court cited the defendants' recognition of the disposal costs involved, efforts to salvage useful fixtures from the property prior to the sale and selling the property for a fraction of its market value as factors indicating an arrangement for disposal.¹³¹

The Eighth Circuit fused arranger and enterprise liability to construct an all-encompassing theory of liability in *United States v. Aceto Agricultural Chemicals Corp.*¹³² The circuit court's holding in this case has been described as "one of the more radical arguments for product responsibility ever advanced in the history of environmental law."¹³³ The defendants, an assortment of pesticide manufacturers, contracted with the same formulator to prepare market-grade products. The manufacturers retained ownership of the materials throughout the formulation process as well as the final products. The defendants received no protection from their asserted lack of control over the formulation process and were found to have arranged for the disposal of hazardous substances.¹³⁴

The *Aceto* court based its holding on common law doctrine¹³⁵ and interpretation of the statutory definitions provided in the Act.¹³⁶ The district court held that requiring an intent to dispose as a condition for assigning liability was contrary to the

129. See *supra* note 115.

130. *Textron*, 768 F. Supp. at 1222-23.

131. *Id.* See also *States v. BFG Electroplating and Mfg. Co.*, 31 ENVTL. REP. CASES (BNA) 1174 (W.D. Pa. 1989) (finding an arrangement for disposal in the sale of cinder blocks contaminated with heavy metals). The blocks had been contaminated due to chemical spills taking place over a prolonged period of time. The defendant had removed the blocks in order to address the contaminated soil beneath the blocks.

132. 699 F. Supp. 1384 (S.D. Iowa 1988), *aff'd*, 872 F.2d 1373 (8th Cir. 1989).

133. *RODGERS*, *supra* note 67, § 8.12(C).

134. *Aceto*, 699 F. Supp. at 1390.

135. *Id.* 1389 (quoting the RESTATEMENT (SECOND) OF TORTS § 427A (1965)). The court construed the parties to have been engaged in an abnormally dangerous activity. In justifying its reliance on common law doctrine the district court stated, "The Restatement provisions provide meaningful standards for resolving liability questions from the common law, the source which the sponsors of CERCLA considered appropriate for deciding questions Congress did not resolve in the Act itself." *Id.* at 1390.

136. *Aceto*, 699 F. Supp. at 1388 ("The legislative history of CERCLA is 'sparse and generally uninformative' with regard to specific questions concerning the interpretation of the Act's terms.").

Congressional purpose in enacting CERCLA.¹³⁷ To the *Aceto* court, engaging in an enterprise in which the generation of hazardous waste is an inherent risk is a sufficient basis for assigning CERCLA liability.¹³⁸

However, though expansive in scope, CERCLA arranger liability is not endless.¹³⁹ The *A&F* court distinguished its holding from that of *United States v. Westinghouse Electric Corp.*,¹⁴⁰ where arranger liability did not attach. The *Westinghouse* plaintiff brought an action for contribution against the manufacturer of PCBs¹⁴¹ used in electrical transformers. The plaintiff disposed of the transformers at the end of their commercial life and faced CERCLA liability stemming from the cleanup of the disposal site. The court held that the plaintiff, not the manufacturer, chose the place and means of disposal and possessed no right to contribution from the manufacturer.¹⁴²

In *Florida Power & Light Co. v. Allis Chalmers Corp.*,¹⁴³ the Eleventh Circuit assessed facts similar to those in *Westinghouse* and reached the same conclusion.¹⁴⁴ These decisions stand for the proposition that the manufacturer of a product that will eventually require disposal as a hazardous waste is not arranging such disposal by placing the product into the stream of commerce.¹⁴⁵ Courts are unwilling to assign arranger liability absent

137. The court explained:

In the literal sense, an arrangement seldom occurs accidentally . . . [A] definition — which would find an arrangement for disposal only if disposal of wastes was the desired result — focuses the Court's attention on the defendant's motives. This approach would be out of place in a regulatory scheme which is concerned primarily with what actually occurred rather than what was intended to occur . . . [T]he Court believes that an arrangement based on acquiescence to certain inevitable effects can be considered an arrangement for such effects.

Id.

138. *Id.*

139. *A&F*, 582 F. Supp. at 845 (“[I]t ends with that party who both owned the hazardous waste and made the crucial decision how it would be disposed of or treated, and by whom.”).

140. 22 ENVTL. REP. CASES (BNA) 1230 (S.D. Ind. 1983).

141. See *supra* note 115.

142. *Westinghouse*, 22 ENVTL. REP. CASES (BNA) at 1233.

143. 893 F.2d 1313 (11th Cir. 1990).

144. *Id.* at 1319.

145. *Id.* at 1318 (rejecting a per se rule regarding a manufacturer's liability under CERCLA); see also *General Electric Co. v. Aamco Transmissions, Inc.*, 962 F.2d 281 (2d

some affirmative act on the defendant's part, from which a material benefit is derived, that leads directly to the disposal decision.¹⁴⁶

In *Edward Hines Lumber Co. v. Vulcan Materials Co.*,¹⁴⁷ the Seventh Circuit found no arrangement for disposal when a chemical supplier provided raw materials for formulation into marketable products. Vulcan Materials, the chemical supplier, did not retain ownership of the final products which were marketed under Vulcan's trademark.¹⁴⁸ The supplier designed the formulation plant, instructed the formulator's employees in the operation of the facility, and, to protect its trademark interest, had a right of entry to the facility to observe the formulation process. The Seventh Circuit, though recognizing the public policy interest imposing CERCLA liability would instill in the marketplace,¹⁴⁹ found the chemical supplier met none of the statutorily defined categories subject to liability under the Act.¹⁵⁰ Unlike the Eighth Circuit in *Aceto* and other courts interpreting CERCLA,¹⁵¹ the Seventh Circuit refused to incorporate common

Cir. 1992) (finding the sale of virgin motor oil to gasoline stations is an inadequate basis on which to impose arranger liability for the eventual disposal of waste oil).

146. RODGERS, *supra* note 67, § 8.12(C); see also *Jordan v. Southern Wood Piedmont Co.*, Nos. CV191-108, CV191-063, 1992 WL 232362 (S.D. Ga. 1992) (refusing to perceive an arrangement for disposal when a chemical manufacturer, as required by federal law, supplies Material Safety Data Sheets with products to customers and encourages customer inquiries regarding the proper means of disposing of chemical products). The court stated:

[T]he imposition of liability upon a manufacturer on account of its dissemination of safety-related information is anathematic, even to the broad and salutary remedial purposes of CERCLA. . . [To impose arranger liability for such efforts] would discourage chemical manufacturers from offering expertise to those experiencing problems and thereby increase the risk of future hazardous waste incidents. Such a result is decidedly contrary to the intent of CERCLA.

Id. at *3-*4.

147. 685 F. Supp. 651 (N.D. Ill. 1988), *aff'd*, 861 F.2d 155 (7th Cir. 1988).

148. *Edward Hines Lumber Co.*, 861 F.2d at 158.

149. *Id.* at 157 ("The prospect of liability under CERCLA would induce a firm in [the defendant's] position to take greater care in design, construction and training, all of which would be beneficial . . .").

150. *Id.* ("The statute does not fix liability on slipshod architects, clumsy engineers, poor construction contractors or negligent suppliers of on-the-job training — and the fact that [the defendant] may have been all four rolled into one does not change matters.").

151. See, e.g., *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3rd Cir. 1988).

law doctrine into its analysis.¹⁵²

In *3550 Stevens Creek Associates v. Barclays Bank of California*,¹⁵³ the Ninth Circuit cited a building materials exemption in CERCLA¹⁵⁴ to hold a former owner not subject to arranger liability based on the sale of a commercial building.¹⁵⁵ The plaintiff claimed a right to contribution for asbestos abatement costs incurred subsequent to the sale.¹⁵⁶ The court held the statutory limitation indicated Congress did not intend to create such a cost recovery right.¹⁵⁷ The Ninth Circuit upheld the *3550*

152. *Edward Hines Lumber Co.*, 861 F.2d at 157.

It is not our function to design rules of liability from the ground up . . . We are enforcing a statute rather than modifying rules of common law . . . To the point that courts could achieve "more" of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits. Born of compromise, laws such as CERCLA and SARA do not pursue their ends to their logical limits. A court's job is to find and enforce stopping points no less than to implement other legislative choices.

Id.

153. 915 F.2d 1355 (9th Cir. 1990) (Pregerson, J., dissenting), *cert. denied*, 111 S. Ct. 2014 (1991).

154. Section 104((a)(3)(B)); 42 U.S.C. § 9604(a)(3)(B) (West 1989).

(3) LIMITATIONS ON RESPONSE

The President shall not provide for a removal or remedial action under this section in response to a release or threat of release —

(B) from products which are part of the structure or, and result in exposure within, residential buildings or business or community structures;

Id.

155. *3550 Stevens Creek Assoc.*, 915 F.2d at 1365.

156. *Id.* at 1366.

157. *Id.* at 1365. The court went on to say, "To recognize a private cause of action under Section 107(a)(2) for the voluntary removal of asbestos from a commercial building would have substantial and far-reaching legal, financial, and practical consequences." *Id.* The court bolstered its decision by quoting an opinion of the Fourth Circuit, *First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862 (4th Cir. 1989):

To extend CERCLA's strict liability scheme to all past and present owners of buildings containing asbestos as well as to all persons who manufactured, transported, and installed asbestos products into buildings, would be to shift literally billions of dollars of removal cost liability based on nothing more than an improvident interpretation of a statute that Congress never intended to apply in this context

Id. at 869. The court also made reference to the legislative history of the provision, quoting a senate report, *3550 Stevens Creek Assoc.*, 915 F.2d at 1364,

[The Bill] makes clear the exclusion from remedial or removal

Stevens Creek Associates rationale in *State v. Blech*.¹⁵⁸ In *Blech*, the plaintiff lessee brought an action against the property owner to recover the costs of abating asbestos fibers released into the building due to a fire.¹⁵⁹ The Ninth Circuit upheld the district court's dismissal of the action citing *3550 Stevens Creek Associates* and the fact that all of the released hazardous substance was contained within the building.¹⁶⁰

G. THE EFFECT OF INDEMNITY AGREEMENTS AMONG CERCLA-LIABLE PARTIES

Section 107(e) of the Act addresses the issue of indemnification or hold harmless agreements between parties:

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed

action of a release or a threat of a release . . . from products which are part of the structure of, and result in exposure within a facility . . . The Environmental Protection Agency has received requests to take removal or remedial action in situations where the contamination was from building materials used in the structure and was creating an indoor hazard. This section would clarify that such situations are not subject to remedial or removal action.

S.R. No. 11, 99th Cong., 1st Sess. 16-17 (1985), *referenced in* 4 U.S. CODE CONG. & ADMIN. NEWS 2835 (1986).

158. 976 F.2d 525 (9th Cir. 1992).

159. *Id.* at 526.

160. *Id.* at 527. In a footnote, the court cautioned that this holding should not be interpreted as suggesting a general exemption from CERCLA liability when the released hazardous substance is contained within the facility. *Id.* at 527 n.2. The Ninth Circuit drove home this cautionary note in *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338 (9th Cir. 1992), where CERCLA liability attached to a contractor who had moved contaminated soil from one part of a facility to another, uncontaminated portion of the same facility. The court stated:

Whether a transporter moves hazardous material from one parcel of land to another, or whether he simply takes the material from a contaminated area on one parcel and disposes of it on an uncontaminated area of the same parcel, he has spread contamination. There is no logical basis for a defendant's liability as a "transporter" under [42 U.S.C.] section 9607(a) to hinge solely on whether he moves hazardous substances across a recognized property boundary.

Kaiser Aluminum & Chem., 976 F.2d at 1343.

under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.¹⁶¹

This “inartfully drafted”¹⁶² and “internally inconsistent”¹⁶³ provision has caused courts considerable trouble. The ubiquitous presence of indemnity agreements in real estate transactions,¹⁶⁴ coupled with the accelerated prominence of claims for contribution resulting from CERCLA’s broad strict liability net,¹⁶⁵ ensures that courts will continue to wrestle with this provision.

As seems appropriate for so vaguely phrased a statute, courts vary in their interpretations. Though recognizing the validity of indemnity agreements, courts have differed on whether protection for CERCLA-like environmental liabilities must be expressed explicitly in the agreement.¹⁶⁶

161. Section 107(e); 42 U.S.C. § 9607(e) (West 1989).

162. *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1025 (N.D. Cal. 1990), *aff’d in part, rev’d in part sub nom.*, *Jones-Hamilton v. Beazer Materials & Serv. Inc.*, 959 F.2d 126 (9th Cir. 1992), *reh’g denied*, 973 F.2d 688 (9th Cir. 1992).

163. *AM Int’l v. International Forging Equip.*, 743 F. Supp. 525, 528 (N.D. Ohio 1990).

164. *DiRenzo Pigott & Bereket-Ab*, *supra* note 7, at 1351.

165. *RODGERS*, *supra* note 67, § 8.13(B).

166. *See generally Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1309, 1318 (D. N.J. 1992) (requiring that any such agreement must at least make mention that one party is assuming environmental-type liabilities to be effective against environmental based claims); *accord Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345 (D. N.J. 1991). *Hatco* recognizes that one party can specifically assume the CERCLA liability arising from the indemnitee’s actions, but requires “an unmistakable intent to do so must be expressed in unambiguous terms or be clearly implied.” *Hatco*, 801 F. Supp. at 1318. *Cf. Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022 (N.D. Cal. 1990) (accepting a general reference to all federal, state and local laws); *Weigmann & Rose Int’l Corp. v. NL Indus.*, 375 F. Supp. 957 (N.D. Cal. 1990) (holding “as is” to constitute an inadequate transfer of liability in a real estate transaction); *Chemical Waste Mgmt. v. Armstrong World Indus.*, 669 F. Supp. 1285 (E.D. Pa. 1987) (requiring a clear and unequivocal reference to CERCLA liability); *but see Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448 (N.D. Ind. 1990) (finding a contractual provision stating that one of the parties, “shall be released from all claims and obligations of any character or nature

In *Mardan Corp. v. C.G.C. Music Ltd.*,¹⁶⁷ an interpretation of Section 107(e) emerged that is followed by the majority of federal courts.¹⁶⁸ The *Mardan* plaintiff purchased a musical instrument manufacturing facility from which the seller had allowed hazardous electroplating wastes to drain into a settling pond for ten years prior to the transaction. Following the sale, the waste disposal practices continued under the new owner's direction. As part of the transaction, the parties executed an "Agreement of General Settlement and Release" (the Release) for which the seller paid \$995,000. Approximately 22 percent of the sum paid was described as addressing outstanding issues between the parties. The remainder related to "other claims based upon, arising out of or in any way relating to the Purchase Agreement." After satisfying an EPA abatement order, the purchaser brought a claim for contribution against the seller.¹⁶⁹

The Ninth Circuit held that the parties looked to state law for guidance in the formation of their agreement and the court's application of state law to the Release did not frustrate the Congressional purpose underlying CERCLA.¹⁷⁰ Applying New York law, the court found the scope of the Release extended to environmental liabilities.¹⁷¹ The Ninth Circuit interpreted Section 107(e) as negating any right to indemnification in an action brought by a governmental agency, but allowed parties to bargain freely to allocate CERCLA liability among themselves. The court held such an allocation "tangential" to the enforcement of CERCLA because the government was not in any way restricted by it.¹⁷² The court emphasized that such agreements are, for the most part, formed between sophisticated commercial entities of equal bargaining power and that to disregard state indemnity rules would introduce confusion and uncertainty into commer-

whatsoever arising out of or in connection with said agreements" adequate to effect a release from CERCLA contribution claims).

167. 804 F.2d 1454 (9th Cir. 1986).

168. DiRenzo Pigott & Bereket-Ab, *supra* note 7, at 1352.

169. *Mardan*, 804 F.2d at 1456.

170. *Id.* at 1459.

171. *Id.* at 1457. The Ninth Circuit pointed out that New York law did not recognize mutual mistake as to the extent of injuries, known or unknown, as a basis for invalidating commercial contracts in which "general peace" was a consideration of the parties. The Ninth Circuit did not address the district court's assertion that the doctrine of "unclean hands" provided additional support to the defendant's motion for dismissal.

172. *Id.* at 1459.

cial transactions.¹⁷³

A contrasting interpretation of Section 107(e) is presented by *AM International v. International Forging Equipment (AMI)*.¹⁷⁴ The court held a general release agreement between buyer and seller¹⁷⁵ void and counter to the policies underlying CERCLA.¹⁷⁶ Basing its interpretation on an exchange between two senators,¹⁷⁷ the court held that all contractual allocating of CERCLA liability between responsible parties is precluded by sentence (1) of the Section.¹⁷⁸ The *AMI* court found the reference to indemnification made in sentence (2) referred only to agreements extending liability to parties who would otherwise not satisfy Section 107(a)'s statutory definition of "covered persons."¹⁷⁹ The district court assessing J-H's claim against Beazer

173. *Id.* at 1460.

174. 743 F. Supp. 525 (N.D. Ohio 1990).

175. *Id.* at 528. AMI agreed to release "any and all [claims] of every kind and description, known or unknown, in law or in equity, which AMI now has or may hereafter have against [the defendants]."

176. *Id.* at 529.

While the statute's primary policy is the encouragement of clean-up initiative on the part of responsible parties, a secondary policy is the equitable apportionment of costs in the aftermath. A secondary policy that permitted defenses to contribution of this kind would undercut the primary policy of encouraging clean-up initiative. Parties would be less likely to take the initiative if a mutual release were in effect among them, since the release would confine the costs to any party which acted.

Id.

177. *AMI*, 743 F. Supp. at 529 (quoting 126 CONG. REC. 30, 984 (1980)).

Mr. CANNON. Section 107(e)(1) prohibits transfer of liability from the owner or operator of a facility to other persons through indemnification, hold harmless, or similar agreements or conveyances. Language is also included indicating that this prohibition on the transfer of liability does not act as a bar to such agreements, in particular to insurance agreements.

The net effect is to make the parties to such an agreement, which would not have been liable under this section, also liable to the degree specified in the agreement. It is my understanding that this section is designed to eliminate situations where the owner or operator of a facility uses its economic power to force the transfer of its liability to other persons, as a cost of doing business, thus escaping its liability under the act all together.

Mr. RANDOLPH. That is correct.

Id.

178. *AMI*, 743 F. Supp. at 529.

179. *Id.*

described the *AMI* court's use of the legislative record to interpret Section 107(e) as having "persuasive appeal," but felt compelled to follow *Mardan*.¹⁸⁰ Only one other federal court has applied the *AMI* interpretation.¹⁸¹ The *AMI* court's "drastic departure" from previous decisions has been described by one commentator as "transforming CERCLA's remedial purpose into a punitive statutory scheme."¹⁸²

The senatorial exchange relied upon in *AMI* was reappraised in *Niecko v. Emro Marketing Co.*¹⁸³ The *Niecko* court criticized *AMI*'s interpretation for failing to distinguish the difference between a "transfer" versus a "release" of liability.¹⁸⁴ By the *Niecko* court's interpretation, what Congress intended to prohibit was a transfer of liability, whereby the innocent buyer assumes all of the seller's pending liability to the government. A release of liability, on the other hand, where one liable party agrees to assume the liability of another for some bargained for consideration, comported with Congressional intent.¹⁸⁵

*Hatco Corp. v. W.R. Grace & Co.*¹⁸⁶ recognizes that an indemnitor can agree to assume the CERCLA liabilities of an indemnitee. The court emphasized that public policy concerns necessitate a strict construction be applied to such an agreement, as to any indemnity clause where one party assumes liability for the other's acts. But the court found such an arrangement was not precluded by CERCLA.¹⁸⁷

180. *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022, 1026 (N.D. Cal. 1990), *aff'd in part, rev'd in part sub nom.*, *Jones-Hamilton Co. v. Beazer Materials & Serv. Inc.*, 959 F.2d 126 (9th Cir. 1992), *reh'g denied*, 973 F.2d 688 (9th Cir. 1992).

181. *CPC Int'l v. Aerojet-Gen. Corp.*, 759 F. Supp. 1269, 1282 (W.D. Mich. 1991).

182. *DiRenzo Pigott & Bereket-Ab*, *supra* note 7, at 1355.

183. 769 F. Supp. 973 (E.D. Mich. 1991).

184. *Id.* at 990.

185. *Id.* at 991.

186. 801 F. Supp. 1309 (D. N.J. 1992).

187. *Id.* at 1317. The court stated:

[T]o create a contractual duty of one party to indemnify or hold the other harmless from CERCLA-type liability arising from that other's acts, an unmistakable intent to do so must be expressed in unambiguous terms or be clearly implied. Consequently, extrinsic evidence is for the most part irrelevant to the issue of the parties' intent. . . . An agreement will either unambiguously express or clearly imply that one party will indemnify the other against its own acts giving rise to liability under CERCLA, or it will not.

H. INDEMNITY AGREEMENTS UNDER CALIFORNIA LAW

California law recognizes that indemnity agreements may be expressly stated, implied within a written contract, or arise from equities of the particular circumstances.¹⁸⁸ Where an indemnification duty is expressly contracted for, the scope of obligation imposed is determined from the contract without regard to the independent doctrine of equitable indemnity.¹⁸⁹ Courts construe indemnity agreements strictly to assess the parties' intention, as reflected in the written document and the circumstances surrounding its execution.¹⁹⁰

Whether the negligent acts of an indemnitee fall within the protection of a hold harmless clause has spawned two schools of thought in California. The traditional view distinguished between "active" and "passive" negligence when confronted with a "general" indemnity clause, namely, one that did not specifically address the effect of an indemnitee's negligence.¹⁹¹ Only an indemnitee's passive negligence fell within the protection of the agreement.¹⁹² Active negligence on the indemnitee's part voided any protection.¹⁹³

Determining whether an indemnitee's conduct constituted passive or active negligence was not always obvious. For assessing this question of fact, courts often relied on the indemnitee's control and use of the subject property relative to that of the indemnitor.¹⁹⁴

The California Supreme Court provided guidance on distin-

Id. at 1318.

188. *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 532 P.2d 97, 100 (Cal. 1975).

189. *Id.*; *Markley v. Beagle*, 429 P.2d 129 (Cal. 1967).

190. *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 532 P.2d 97 (Cal. 1975); *Indenco, Inc. v. Evans*, 20 Cal. Rptr. 90 (Cal. App. 1962).

191. *Rossmoor*, 532 P.2d at 100.

192. *Id.* at 101.

193. *Id.*

194. *See, e.g., Harvey Mach. Co. v. Hatzel & Buchler, Inc.*, 353 P.2d 924 (Cal. 1960) (holding the owner of a building under renovation to be protected from liability for an injury suffered by a contractor's employee when the contractor maintained full control of the building); *but see Vinnell Co. v. Pacific Elec. R.R. Co.*, 340 P.2d 604 (Cal. 1959) (negating the protection of an indemnity agreement to a railroad where the indemnitee maintained full use of the rail yard and injury resulted from the negligent switching of rail cars into the yard area under repair).

guishing passive from active negligence in *Rossmoor Sanitation, Inc. v. Pylon, Inc.*¹⁹⁵ Active negligence could consist of acquiescing in the existence of a dangerous condition created by another.¹⁹⁶ Acts constituting passive negligence included failure to exercise a right to inspect a contractor's work and failure to exercise a supervisory right to order the removal of defective material.¹⁹⁷ The ambiguity presented by such a standard is reflected in *Doyle v. Pacific Telephone & Telegraph*,¹⁹⁸ where a Pacific Telephone employee's acquiescence in the unsafe road condition created by a contractor installing underground conduits and manholes was determined to be passive¹⁹⁹ despite the nondelegable nature of the duty imposed by local ordinance.²⁰⁰ A strict application of the standards articulated in *Rossmoor* would hold an acquiescence of this nature to be active negligence, thereby negating the indemnity protection provided by the agreement.²⁰¹

To minimize the ambiguity inherent in the active-passive negligence dichotomy, courts developed a second school of interpretation emphasizing the intent of the parties. Intent is reflected in the written agreement and the circumstances surrounding its formation.²⁰² Within this line of reasoning, an act of blatant negligence on an indemnitee's part may fall within an agreement's protection if the court construes the parties' intention to so provide.²⁰³

A clear application of this doctrine is found in *Schackman v. Universal Pictures Company*.²⁰⁴ Schackman leased his arcade to Universal for filming a scene in a shooting gallery and assured Universal that all of the weapons were unloaded. In a suit brought by a Universal employee injured when a gun discharged,

195. 532 P.2d 97 (Cal. 1975).

196. *Id.*

197. *Id.*

198. 21 Cal. Rptr. 326 (Cal. App. 1962).

199. *Id.* at 331.

200. *Id.* at 327.

201. *Rossmoor*, 532 P.2d at 101 ("Active negligence . . . is found when an indemnitee has personally participated in an affirmative act of negligence, [or] was connected with negligent acts or omissions [of another] by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform.").

202. *Id.* at 103; *Schackman v. Universal Pictures Co. Inc.*, 63 Cal. Rptr. 607 (Cal. App. 1967).

203. *Schackman*, 63 Cal. Rptr. at 609.

204. 63 Cal. Rptr. 607 (Cal. App. 1967).

Schackman cross-complained against Universal for protection under a general indemnity agreement. Rather than rely on an active-passive negligence standard, the court applied what it termed a "realistic" approach to interpret the indemnity agreement.²⁰⁵ The analysis applied in *Schackman* extended beyond the construction of the document to encompass the risks involved in the arrangement and the likely intention of the parties relative to such risks.²⁰⁶ The court cited the obvious nature of the risk as a basis for inferring that the parties intended that it be included within the agreement's scope.²⁰⁷ The court emphasized the modest consideration received by Schackman and the fact that Universal drafted the agreement as factors bolstering its determination.²⁰⁸ The validity of the *Schackman* approach was upheld by the Supreme Court in *Rossmoor*,²⁰⁹ where the court declared that the active-passive dichotomy was not wholly dispositive²¹⁰ and that the pragmatic approach of assessing the parties' intention, as expressed in the agreement, should control.²¹¹

California courts commonly include attorneys' fees within the costs recoupable under an indemnity agreement.²¹² The California Civil Code²¹³ is cited as authority for this policy.²¹⁴ Courts

205. *Id.* at 610.

206. *Id.*

207. *Schackman*, 63 Cal. Rptr. at 611.

208. *Id.*

209. *Rossmoor*, 532 P.2d at 103.

210. *Id.*

211. *Id.* at 104.

While adhering to the underlying distinction between active and passive negligence . . . the question whether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. When the parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts.

Id.

212. See, e.g., *DeWitt v. Western Pac. R.R. Co.*, 719 F.2d 1448, 1452 (9th Cir. 1983); see also *County of San Joaquin v. Stockton Swim Club*, 117 Cal. Rptr. 300, 303 (Cal. App. 1974) (finding the subject lawsuit fell within the scope of a general indemnity clause and that the defendant was liable for codefendant's legal expenses).

213. CAL. CIVIL CODE § 2778 (Deering 1986) states in pertinent part:

(3) An indemnity against claims, or demands, or liability, expressly or in other equivalent terms, embraces the costs of de-

have differed, however, in awarding attorneys' fees for appellate costs incurred enforcing indemnity rights.

One line of authority holds that the sole purpose of an indemnity clause is to protect the indemnitee against claims brought by third parties.²¹⁵ These courts award attorneys' fees for appellate procedures only if a right to such is explicitly provided for in the agreement.²¹⁶ Courts holding this perspective view the awarding of attorneys' fees for appellate costs to be a proper subject for negotiation between the parties and are unwilling to impose such an obligation.²¹⁷

A second view emphasizes that awarding reasonable attorneys' fees for appellate costs is within the court's discretion.²¹⁸ Courts adhering to this viewpoint expend little analysis on the matter,²¹⁹ which has been a focus of criticism from courts applying the express provision requirement.²²⁰

The Ninth Circuit first took notice of this split in California

fense against such claims, demands or liability incurred in good faith, and in the exercise of a reasonable discretion.

Id.

214. *Hillman v. Leland E. Burns, Inc.*, 257 Cal. Rptr. 535, 540 (Cal. App. 1989); *see also DeWitt v. Western Pac. R.R. Co.*, 719 F.2d 1448, 1453 (9th Cir. 1983) ("Thus costs, expenses and attorney's fees paid in defense of the claim are included within the amount that must be indemnified.").

215. *Hillman*, 257 Cal. Rptr. at 541.

216. *See County of San Joaquin v. Stockton Swim Club*, 117 Cal. Rptr. 300, 304 (Cal. App. 1974) ("We prefer to follow the general rule that the defendant in a contract suit is not liable for his opponent's attorney fees unless the contract expressly provides for it."); *see also Doyle v. Pacific Telephone & Telegraph Co.*, 21 Cal. Rptr. 326 (Cal. App. 1962).

Pacific requests . . . that the court order additional attorney fees for services on this appeal. However, the indemnity clause only requires Underground to pay the expense of defending actions brought by third persons against Pacific, it does not provide for any attorneys' fees to be awarded in any action between the parties based upon the indemnity agreement.

Id. at 332.

217. *Hillman v. Leland E. Burns, Inc.*, 257 Cal. Rptr. 535, 541 (Cal. App. 1989).

218. *Richard v. Degen & Brody, Inc.*, 5 Cal. Rptr. 263, 270 (Cal. App. 1960).

219. *See, e.g., Nicholson-Brown, Inc. v. City of San Jose*, 133 Cal. Rptr. 159, 166 (Cal. App. 1976) ("The city requests that . . . the trial court be directed to determine the amount of attorney's fees to be allowed for this appeal. In cases involving indemnification provisions, this has been determined to be the proper procedure.").

220. *See, e.g., County of San Joaquin v. Stockton Swim Club*, 117 Cal. Rptr. 300, 304 (Cal. App. 1974) ("The allowance was made in the *Schackman* case without any discussion.").

authority in *DeWitt v. Western Pacific Railroad Co.*²²¹ The plaintiff in *DeWitt* was a Western Pacific employee injured by an unsafe condition created by the indemnitor, the Flintkote Company. The Ninth Circuit criticized the express provision doctrine applied in *Stockton Swim Club* as unclear and declared its preference for the *Schackman* approach, awarding the indemnitee attorneys' fees for appellate costs.²²² In *J-H*, the court felt compelled to follow *Dewitt*.²²³ The Ninth Circuit made no reference in either case to the discretionary nature of the court's authority to make such an award.²²⁴

IV. THE COURT'S ANALYSIS

The Ninth Circuit upheld the decision in *Mardan* that enforcement of an indemnification agreement would not violate public policy under CERCLA.²²⁵ As per *Mardan*, both parties remain fully liable to the government but retain the right to enter private contractual arrangements allocating CERCLA liability between themselves.²²⁶ The Ninth Circuit upheld the district court's application of California law to the indemnity agreement,²²⁷ but held the district court erred in granting Beazer's summary judgment motion.²²⁸

In assessing the indemnity agreement in *J-H*, the Ninth Circuit applied a strict construction.²²⁹ Neither party's asserted intention was accepted. *J-H*'s argument that the legal protection incorporated in the agreement only applied to worker safety laws was rejected as an unreasonable interpretation,²³⁰ as was Beazer's claim of blanket protection.²³¹ The Ninth Circuit held

221. 719 F.2d 1448 (9th Cir. 1983).

222. *Id.* at 1453.

223. *Jones-Hamilton Co. v. Beazer Materials & Serv. Inc.*, 959 F.2d 126, 132 n.3 (9th Cir. 1992), *reh'g denied*, 973 F.2d 688 (9th Cir. 1992).

224. *See Richard v. Degen & Brody, Inc.*, 5 Cal. Rptr. 263, 270 (Cal App. 1960) ("The trial court, if it be so inclined, may allow a *reasonable* fee for services on appeal.") (emphasis original).

225. *Jones-Hamilton Co. v. Beazer Materials & Serv. Inc.*, 959 F.2d 126, 129 (9th Cir. 1992), *reh'g denied*, 973 F.2d 688 (9th Cir. 1992).

226. *Id.*

227. *Id.* at 130.

228. *Id.*

229. *J-H*, 959 F.2d at 129.

230. *Id.*

231. *Id.* at 130.

that the agreement applied to all laws, including those relevant to environmental quality,²³² but extended only to J-H's violations of these laws, not Beazer's.²³³

The level of Beazer's participation in waste disposal remained to be decided and the court held that J-H had offered sufficient evidence on this point to preclude a grant of Beazer's summary judgment motion.²³⁴ The district court's error arose from ignoring the limitation of the indemnity agreement's scope and disregarding material issues of fact presented by J-H's claim.²³⁵

The Ninth Circuit held J-H was entitled to a partial summary judgment against Beazer for having arranged for the disposal of hazardous substances as per CERCLA Section 107(a)(3).²³⁶ Citing *Aceto*²³⁷ as authority, the Ninth Circuit agreed that CERCLA liability based on an arrangement for the disposal of hazardous substances does not require that a chemical supplier intend such a disposal.²³⁸ The court felt that to construe the legislation so narrowly would frustrate the Act's goals of making companies responsible for the production of hazardous waste pay for the cleanup of environmental contamination that is likely to result.²³⁹ The Ninth Circuit embraced *Aceto's* pronouncement that courts will look beyond the defendant's characterizations to determine whether a transaction involves an arrangement for the disposal of a hazardous substance.²⁴⁰

In further concurrence with *Aceto*, the Ninth Circuit emphasized that the defendant's ownership of the toxic substances

232. *Id.* at 129.

233. *Id.* at 130.

234. *Id.* The agreement provided for a two percent monthly loss of product volume through spillage. Such loss would presumably include the hazardous substances for which CERCLA liability applied. In addition, J-H employees testified that they relied on Beazer's instructions for the handling of Beazer's chemicals and that Beazer's agent had been actively involved in the production process. This agent was alleged to have been fully aware of and supervised the rinsing of tote bins returned by customers, a process by which hazardous substances entered the waste water containment ponds.

235. *Id.*

236. *Id.* at 131.

237. *United States v Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989).

238. *J-H*, 959 F.2d at 131.

239. *Id.*

240. *Id.*

at issue negated, to some extent, the asserted lack of authority to control the formulator's operation.²⁴¹ The Ninth Circuit held that the agreement's two percent allowance for spillage constituted an arrangement for disposal as construed by CERCLA Section 107(a)(3),²⁴² and that J-H warranted a summary judgment on this claim.²⁴³

The district court's awarding of attorneys' fees to Beazer was partially vacated by the Ninth Circuit. Though approving of the district court's application of the *Dewitt* analysis to the issue, the Ninth Circuit held the awarding of attorneys' fees in total was error because the court had not distinguished the CERCLA liability Beazer had incurred separately. On remand, the district court was ordered to award Beazer attorneys' fees for all actions, including the appeal, but only to the extent Beazer's potential liability fell within the protection of the indemnity agreement with J-H.²⁴⁴

V. CRITIQUE

In attaching liability to Beazer, the Ninth Circuit successfully integrated what appear to be diametrically opposed viewpoints on the interpretation of a federal law criticized for its lack of clarity. *J-H* reiterates the right first articulated in *Mardan*,²⁴⁵ allowing CERCLA-liable parties to contractually assign liability among themselves, yet incorporates the expanded scope of "arranger" liability imposed by the Eighth Circuit in *Aceto*.²⁴⁶ The Ninth Circuit's holding in *J-H* is a logical progression in judicial reasoning and is consistent with the results-oriented trend reflected in recent decisions of other courts interpreting CERCLA,²⁴⁷ but comports with the logic of *Edward Hines Lumber Co. v. Vulcan Materials Co.*,²⁴⁸ a Seventh Circuit decision based on factual circumstances similar to those of *J-H*, reaching an opposite conclusion.

241. *Id.*; see also *Aceto*, 872 F.2d at 1380.

242. *J-H*, 959 F.2d at 131.

243. *Id.*

244. *Id.* at 132.

245. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986).

246. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989).

247. See, e.g., *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3rd Cir. 1992); *Nurad, Inc. v. William E. Hooper & Sons, Co.*, 966 F.2d 837 (4th Cir. 1992).

248. 685 F. Supp. 651 (N.D. Ill. 1988), *aff'd*, 861 F.2d 155 (7th Cir. 1988).

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Courts have long recognized the appropriateness of applying common law doctrine to flesh out the ambiguities in CERCLA.²⁴⁹ Under common law doctrine, parties engaged in an inherently dangerous activity are subject to liability.²⁵⁰ The liability imposed is strict and attaches without regard to a given defendant's active control of the enterprise.²⁵¹ Legal commentators discussing the evolutionary development of common law anticipate the scope of this enterprise liability doctrine will expand beyond that traditionally recognized.²⁵² Such an expansion is reflected in recent court decisions recognizing that a business enterprise involving the use of hazardous substances may constitute an abnormally dangerous activity.²⁵³

249. See generally *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3rd Cir. 1988); *United States v. Aceto Agric. Chem. Corp.*, 699 F. Supp. 1384 (S.D. Ohio 1988).

250. W. PAGE KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS, § 71 (5th ed. 1984). See also RESTATEMENT (SECOND) OF TORTS § 520 (1977). Section 520 defines "abnormally dangerous activities" by balancing six factors:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id.

251. RESTATEMENT (SECOND) OF TORTS § 427A (1984), comment b:

The principle . . . is that one who employs an independent contractor to do work which the employer knows or has reason to know to involve an abnormally dangerous activity cannot be permitted to escape the responsibility for the abnormal danger created by the activity which he has set in motion, and so cannot delegate the responsibility for harm resulting to others to the contractor.

Id.

252. W. KEETON ET AL., *supra* note 250, § 71.

253. See, e.g., *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1545 (10th Cir. 1992) (recognizing that the management of hazardous wastes and environmental cleanup actions can constitute abnormally dangerous activities subject to strict liability under common law doctrine); see also Lisa A. Jensen, *The Risk in Defining Risk: Potential Liability of Environmental Consultants and Engineers*, 23 ENV'T REP. (BNA) 1954, (1992) (advancing the argument that an environmental professional conducting a property assessment may be subject to strict liability based on common law doctrine).

[I]t could be argued that soil boring or other subsurface test-

Though a purposeful discharge of hazardous substances into the environment is a more reprehensible act, contamination arising from unintentional, accidental spillage is equally detrimental to environmental quality. In recognition of this fact, courts have consistently interpreted CERCLA as a strict liability regime.²⁵⁴ By not requiring proof of intent to pollute, courts achieve CERCLA's primary goals of a timely cleanup of contaminated sites with cleanup costs being borne by those responsible for creating the problem.

In *Aceto* the Eighth Circuit upheld an explicit reliance on Section 427A of the Restatement (Second) of Torts by a district court assigning CERCLA liability to pesticide manufacturers for the environmental contamination of a facility used to formulate market-grade products.²⁵⁵ Based on the manufacturers' ownership of the raw materials in addition to the final products, the district court had found the formulator was an independent contractor of the manufacturers.²⁵⁶ In conformity with Section 427A of the Second Restatement, the district court held the manufacturers liable for the environmental torts of their independent contractor.²⁵⁷ In addition to these findings, the Eighth Circuit concurred with the district court's recognition that environmental contamination was an inherent risk of the formulation process.²⁵⁸ *Aceto* holds a party's acquiescence to such a risk consti-

ing that results in the release of hazardous substance is an abnormally dangerous activity in situations where the environmental professional knew or reasonably should have known that the property was contaminated. For example, where there is reason to believe that underground tanks or buried drums exist on the property, subsurface testing could be viewed as an abnormally dangerous activity under the Restatement of Torts analysis.

Id. at 1955. *But see* Michael B. Hingerty, *Property Owner Liability for Environmental Contamination in California*, 22 U.S.F. L. REV. 31, 41 (1987) (arguing that the diverse range of potential risks posed by hazardous substances precludes a general rule that their use can be considered an abnormally dangerous activity per se).

254. *See, e.g.*, *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531 (N.D. N.Y. 1991), *aff'd*, 964 F.2d 252 (3rd Cir. 1992); *AM Int'l v. International Forging Equip.*, 743 F. Supp. 525 (N.D. Ohio 1990).

255. *Aceto*, 872 F.2d at 1382.

256. *Aceto*, 699 F. Supp. at 1387. The court stated, "The formulator is more of an independent contractor than a purchaser because the manufacturer maintains ownership of the technical grade pesticide, the work in progress, and the commercial grade pesticide, even after possession passes to the formulator." *Id.*

257. *Id.* at 1389-90.

258. *Aceto*, 872 F.2d at 1381 (agreeing with the district court, "The generation of

tutes an arrangement for the resulting environmental contamination, which, in turn, is an arrangement for the disposal of the hazardous substance contaminants as per CERCLA Section 107(a)(3).²⁵⁹

In its opinion, the Eighth Circuit emphasized that the authority to control the pollution-causing process is not the sole critical factor in imposing CERCLA liability for resulting environmental harm. Rather, the Act specifies ownership of the released substances as a distinct basis for assigning such liability.²⁶⁰

The Eighth Circuit distinguished its holding in *Aceto* from that of the Eleventh Circuit in *Florida Power & Light Co. v. Allis Chalmers Corp.*,²⁶¹ where CERCLA liability did not attach. Unlike *Aceto*, *Florida Power & Light* concerned the disposal of hazardous substances at the end of their commercially useful lifetime, years after their sale by the manufacturer. In the Eleventh Circuit case, the manufacturers neither possessed authority over the management of the materials nor owned the substances ultimately disposed of. Conversely, in *Aceto*, the disposal acts were an inseparable consequence of the transaction, contemporaneous with all other aspects of the arrangement.²⁶²

The rationale of *Aceto* does recognize a distinct and reasonable limit to the liability CERCLA imposes. The decision does not rely on one's having manufactured or introduced a hazardous substance into the stream of commerce as the sole basis for imposing CERCLA liability. *Aceto* therefore meshes readily with the decisions of other courts refusing to find an arrangement for disposal in commercial transactions involving hazardous substances.²⁶³

wastes containing a pesticide through spills, cleaning of equipment, mixing and grading operations, production of batches that do not meet specifications and other means, is inherent in the formulation process.”).

259. *Aceto*, 872 F.2d at 1382.

260. *Id.*

261. 893 F.2d 1313 (11th Cir. 1990).

262. *Aceto*, 872 F.2d at 1381.

263. See generally *General Elec. Co. v. Aamco Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990); *Jordan v. Southern Wood Piedmont Co.*, Nos. CV191-108, CV191-063, 1992 WL 232362 (S.D. Ga. July 14, 1992); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651 (N.D. Ill. 1988); *United States v. Westinghouse Elect. Corp.*, 22 ENVTL. REP.

The factual parallels between *J-H* and *Aceto* are conspicuous and the Ninth Circuit was correct in citing the Eighth Circuit case as authority for finding a disposal arrangement in the transaction between J-H and Beazer. Beazer retained ownership of all the hazardous substances supplied to J-H as well as the final formulated products,²⁶⁴ as had the pesticide manufacturers in *Aceto*, rendering J-H an independent contractor of Beazer. Presumably, the generation of waste was an inherent component of J-H's formulation process and, as these materials were hazardous substances, a degradation of environmental quality was thereby likely to result if these wastes were not managed properly.

The *Aceto* court's rationale would justify finding an arrangement for disposal on these facts alone, regardless of the degree of control exercised by Beazer's agent during the formulation process. But the Ninth Circuit was presented with an even stronger basis for finding an arrangement for disposal in *J-H*, the contractual allowance for a two percent loss of material for shrinkage and spillage.²⁶⁵ Were the Ninth Circuit not to impose CERCLA liability for such an arrangement, it would necessitate a rejection of not only *Aceto*, but the decisions of other courts looking beyond a party's characterization of a transaction to find an arrangement for disposal.²⁶⁶ The Ninth Circuit should receive no criticism for refusing to create so unsound a split in the circuits.

The Ninth Circuit's holding also readily resonates with the logic applied by the Seventh Circuit in *Edward Hines Lumber Co. v. Vulcan Materials Co.*,²⁶⁷ the decision seemingly most in conflict with the arranger liability imposed by *J-H* and *Aceto*. Although eschewing the application of common law doctrine to

CASES (BNA) 1230 (S.D. Ind. 1983).

264. *Jones-Hamilton Co. v. Beazer Materials & Serv., Inc.*, 959 F.2d 126 (9th Cir. 1992), *reh'g denied*, 973 F.2d 688 (9th Cir. 1992).

265. *Id.*

266. *See generally* *Nurad, Inc. v. William E. Hopper & Sons, Co.*, 966 F.2d 837 (4th Cir. 1992); *United States v. Northeastern Pharmaceutical & Chem. Co. Inc.*, 810 F.2d 726 (8th Cir. 1986); *Sanford Street Local Dev. Corp. v. Textron, Inc.*, 768 F. Supp. 1218 (W.D. Mich. 1991); *States v. BFG Electroplating & Mfg. Co.*, 31 ENVTL. REP. CASES (BNA) 1174 (W.D. Pa. 1989); *United States v. Ward*, 618 F. Supp. 884 (E.D. N.C. 1985); *United States v. A&F Materials Co.*, 582 F. Supp. 842 (S.D. Ill. 1984).

267. 861 F.2d 155 (7th Cir. 1988).

the interpretation of CERCLA, the Seventh Circuit did recognize the appropriateness of imposing liability on the supplier of a useful chemical product²⁶⁸ if an arrangement for disposal or treatment underlies the transaction.²⁶⁹ The rationale of the Seventh Circuit establishes that a defendant's summary judgment motion should be denied if the plaintiff offers any evidence that the disposal of a hazardous substance was a motivation behind the transaction.²⁷⁰ *Edward Hines Lumber* does not require such a disposal arrangement be the sole motivation underlying the transaction for liability to attach.

The Seventh Circuit's rationale provides strong support for the Ninth Circuit's holding, particularly in view of a recent decision of the Third Circuit. In *United States v. Alcan Aluminum Corp.*,²⁷¹ the Third Circuit established that there is no *de minimis* level of contamination that must be measured before CERCLA liability can be imposed.²⁷² An integration of the logic applied by the Third and Seventh Circuits leads to the conclusion that an express provision allowing for a two percent loss of material for spillage, as found in the agreement between the parties in *J-H*, constitutes an arrangement for the disposal of hazardous substances sufficient to warrant, if not the imposition of

268. *Edward Hines Lumber Co.*, 685 F. Supp. 651 (N.D. Ill. 1988), *aff'd*, 861 F.2d 155 (7th Cir. 1988). The court stated:

We reject the defendant's contention that a chemical sold for use in a manufacturing process cannot be considered a hazardous substance for purposes of establishing § 9607 liability. The statutory definition of hazardous substance is not so limited, 42 U.S.C. § 9601(14), and the courts have recognized that primary products may be hazardous substances.

Id. at 656 n.4.

269. *Id.* at 654.

270. *Id.* at 656 ("[S]ummary judgment for a defendant on CERCLA liability is inappropriate when there is some evidence that the motivation behind a transaction was to dispose of a waste or by-product.").

271. 755 F. Supp. 531 (N.D. N.Y. 1991), *aff'd*, 964 F.2d 252 (3rd Cir. 1992).

272. *Alcan*, 755 F. Supp. at 537. The district court stated:

[T]he plain statutory language fails to impose any quantitative requirement on the term hazardous substance. . . [T]he corporate generator, a non-natural person, has added to what nature has already seen fit to provide for the continued existence of various life forms on this planet; that Congress has enacted laws to limit, and perhaps limit quite severely, additions to nature for the sake of the environment and of life on this planet seems eminently reasonable.

Id.

CERCLA liability, at least the denial of a defendant's summary judgment motion.

Like *Mardan*, *J-H* upholds the right of parties to freely allocate environmental risks among themselves within the framework of their contractual arrangements. Though expressing deference to the logic of *AMI*, the district court assessing *J-H*'s claim applied the *Mardan* analysis to find indemnity agreements between responsible parties did not frustrate CERCLA's purpose.²⁷³ Though never mentioning *Niecko*,²⁷⁴ the Ninth Circuit's upholding of the district court on this issue comports with *Niecko*'s alternative interpretation of the legislative history cited in *AMI*.²⁷⁵ Consequently, the indemnity agreement whereby *J-H* agreed to protect Beazer from liability arising from *J-H*'s violation of applicable law was upheld on a sound basis. Extending the scope of this obligation to include environmental laws not in existence at the time of the contract's formation comported with general rules of contract interpretation and was consistent with the holding of other courts evaluating comparable agreements.²⁷⁶ Therefore, the Ninth Circuit was correct in upholding the district court's rejection of *J-H*'s eleventh-hour attempts to impose outlandish limitations on the clear wording of the contract.

The strict construction applied to the agreement by the Ninth Circuit is consistent with the treatment state courts have traditionally applied to indemnity clauses. In interpreting such agreements, California courts look beyond an instrument's wording to discern the parties' intention as reflected in the document and the circumstances surrounding its formation.²⁷⁷ The logic of the Ninth Circuit is sound in finding the indemnity provision is not reasonably susceptible to the interpretation that *J-H* intended to assume liability for Beazer's illegal acts. Whether such an arrangement, if intended, would survive a challenge based on public policy grounds was not addressed in this decision. The *J-H* holding does not preclude one party assuming liability for the illegal acts of another. The Ninth Circuit simply imposes the

273. *Kop-Coat*, 750 F. Supp. at 1026.

274. *Niecko v. Emro Marketing Co.*, 769 F. Supp. 973 (E.D. Mich. 1991).

275. *Id.* at 991.

276. *See, e.g., Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1309 (D. N.J. 1992); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345 (D. N.J. 1991).

277. *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 532 P.2d 97 (Cal. 1975).

reasonable and sensible mandate that any such obligation be expressed explicitly in the agreement.²⁷⁸

The weakest aspect of the Ninth Circuit's judgment concerned the awarding of attorneys' fees for costs incurred enforcing indemnity rights. The Ninth Circuit first took note of split of California authority on the issue in *Dewitt v. Western Pacific Railroad Co.*²⁷⁹ and therein chose to follow the line of reasoning it found most attractive.²⁸⁰ Though federal courts will view intermediate court opinions as indicia of the leanings of the state's highest court,²⁸¹ the Ninth Circuit was correct in asserting that where a clear split in state authority is manifest, J-H's citing of a single intermediate court opinion was inadequate to demonstrate that *Dewitt* was an improper application of state law.²⁸² Yet, the court was incorrect in stating it was compelled to follow *Dewitt* and award attorneys' fees.

What the Ninth Circuit failed to consider in either *J-H* or *Dewitt* was the discretionary nature of such an award.²⁸³ The split in authority noted in *Dewitt* likely reflects a fundamental difference in the discretionary standards California courts apply to the issue rather than a true difference in doctrine. As such, the Ninth Circuit could have awarded such fees in *Dewitt* while withholding them in *J-H* and comported with California law in either case.

In *Dewitt*, the Ninth Circuit expressed its preference for the approach followed in *Schackman v. Universal Pictures Co.*²⁸⁴ and awarded the indemnitee appellate attorneys' fees.²⁸⁵ One can only speculate whether the Ninth Circuit's judgment on this matter was colored by its having sanctioned Flintkote Company for bringing what it considered to be a "frivolous" appeal.²⁸⁶ The

278. See *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1309 (D. N.J. 1992) (emphasizing the same point with particular reference to CERCLA).

279. 719 F.2d 1448 (9th Cir. 1983).

280. *Id.* at 1453.

281. *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1543 (10th Cir. 1992).

282. *J-H*, 959 F.2d at 132 n.3.

283. *Richard v. Degen & Brody, Inc.*, 5 Cal. Rptr. 263, 270 (Cal. App. 1960) ("The trial court, if it be so inclined, may allow a reasonable fee for services on appeal.")

284. 63 Cal. Rptr. 607 (Cal. App. 1967).

285. *Dewitt*, 719 F.2d at 1453.

286. *Id.* at 1451 ("An appeal is frivolous if the result is obvious, or the arguments of error are wholly without merit . . . The only result of the appeal against DeWitt is to

Ninth Circuit's compulsion to follow *Dewitt* on this matter without regard to the discretionary nature of the court's authority to award such fees is the only blemish to an otherwise flawless judicial opinion.

VI. CONCLUSION

The holding in *J-H* is consistent with recent decisions of other circuits in expanding the environmental liability faced by industrial and commercial enterprises. CERCLA, tempered by evolving common law doctrine, is the mechanism driving this expansion. The trend reflected in recent case law may lead to uncertainty within the industrial community.²⁸⁷ But the prospect of such liability will serve to inject environmental considerations into many aspects of commercial and industrial transactions where, to date, these concerns have been woefully absent. Some may criticize this trend as needlessly retarding commercial development, but none can argue that it runs counter to the Congressional purpose reflected in CERCLA and the state environmental sister statutes the Act has spawned.

CERCLA's use of imprecise language to regulate transactions of so complex and technical a nature has made the Act difficult for courts to interpret. If the current trend of expanding the scope of liability imposed by the Act does not reflect a true Congressional objective, the legislative body can readily remedy the situation by either amending the law to more accurately reflect its intended design or by withholding future reauthorization of CERCLA. Courts, in conjunction with regulated entities and their legal counsel, will welcome any clarification of the Congressional purpose CERCLA embodies.

*Dennis J. Byrne**

delay payment of his judgment.").

287. See Robert C. Goodman, *Liability Backs Up The Waste Stream*, THE RECORDER, April 6, 1992, at 10.

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