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NOTES

"ARRANGER LIABILITY" UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA): JUDICIAL RETREAT FROM LEGISLATIVE INTENT

Although it is easy to sympathize with the courts' intuitive desire to hold liable parties whose egregious and tortious actions have posed environmental hazards for the rest of society, we must also recognize the constraints of the statute that Congress has enacted. CERCLA imposes strict liability; considerations of fault or blameworthiness are, by definition, irrelevant under its terms.¹

In enacting the Comprehensive Environmental Response, Compensation, and Liability Act of 1980² (CERCLA), Congress intended to hold liable, among others, responsible parties that "arranged for" the disposal of hazardous materials. The statute's failure to explicitly define "arranged for," combined with its scant legislative history, has led to multiple interpretations of CERCLA arranger liability by the federal courts of appeals, ranging from a standard of strict liability to a standard requiring specific intent. The lack of a unified judicial approach places individuals and corporations affected by the statute in the precarious position of being uncertain of their potential liability as "arrangers" under CERCLA. The confusion is unnecessary, however, because the existing statutory language and the available legislative history are sufficient to discern the meaning of "arranged for" intended by Congress and required of the courts when interpreting CERCLA.

1. Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 635 (1993).

2. 42 U.S.C. §§ 9601-75 (1994).

During the first decade following CERCLA's enactment, courts consistently applied a strict liability standard to those who "arranged for" the disposal or treatment of hazardous substances, relying primarily on the statutory wording of CERCLA and its available legislative history. In 1993, however, when writing for the United States Court of Appeals for the Seventh Circuit, Judge Richard Posner opted instead to adopt an approach requiring specific intent,³ ignoring over a decade of existing CERCLA case law. Unfortunately, the effect of Judge Posner's decision extended well beyond the facts of that individual case; in essence, the opinion served as an indication to other courts that CERCLA arranger liability was subject to varying interpretations, setting the stage for judicial activism.

Following Posner's decision, federal courts located in jurisdictions that previously had not ruled on the issue of CERCLA arranger liability discovered two disparate approaches when consulting appellate case law. This eventually led to the genesis of a third, middle-ground approach involving a "totality of the circumstances" assessment of each individual case. The strict liability scheme intended by Congress has been virtually abandoned by the modern judiciary, replaced with a trend toward a case-by-case analysis that specifically considers the intent, knowledge, and ownership interests of the parties.

This Note traces the evolution of CERCLA's liability scheme since the statute's inception. It begins with a brief history of CERCLA and a short description of the traditional framework for statutory interpretation. The Note then describes the various approaches the courts have adopted in holding CERCLA "arrangers" liable: strict liability; specific intent; and a "totality of the circumstances," or case-by-case analysis.

This Note argues that sufficient evidence exists, both in the statute and in the legislative history, to show that Congress intended to hold CERCLA "arrangers" strictly liable. This Note also postulates that Judge Posner's decision was an unjustified

3. See *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993). Posner's opinion in this case subsequently became the precedent for a narrow interpretation of CERCLA arranger liability. See *infra* notes 82-100 and accompanying text.

judicial deviation from the virtually universal approach of strict liability previously applied by the courts. Finally, this Note recommends that the United States Supreme Court resolve the different approaches the federal appellate courts have adopted in interpreting CERCLA arranger liability by applying the strict liability scheme referenced in the statutory wording and intended by the federal legislature.

HISTORY OF CERCLA

At the time of CERCLA's enactment in 1980, the Environmental Protection Agency (EPA) estimated that the United States produced fifty-seven million metric tons of hazardous waste per year, or about six hundred pounds per citizen.⁴ The EPA also calculated that ninety percent of this waste was being disposed of by U.S. farmers, manufacturers, and producers in environmentally unsound ways.⁵ Improper disposal methods and abandoned waste disposal sites resulted in pollution of surface water and groundwater, causing "contamination of drinking water supplies, destruction of fish, wildlife and vegetation, and threats to public safety due to health hazards and threats of fires and explosions."⁶

CERCLA was passed in the wake of several nationally publicized "environmental disasters,"⁷ including the infamous Love

4. See SENATE COMM. ON ENVIRONMENT & PUBLIC WORKS, ENVIRONMENTAL EMERGENCY RESPONSE ACT, S. REP. NO. 96-848, at 3 (1980) [hereinafter S. REP. NO. 96-848], reprinted in SENATE COMM. ON ENVIRONMENT & PUBLIC WORKS, 97TH CONG., 1 LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), at 305, 310 (1983) [hereinafter CERCLA LEGISLATIVE HISTORY].

5. See S. REP. NO. 96-848, *supra* note 4, at 3-4, reprinted in 1 CERCLA LEGISLATIVE HISTORY, *supra* note 4, at 310-11 (identifying unsound disposal methods as "haphazard land disposal, improper storage of dangerous substances and illicit dumping").

6. S. REP. NO. 96-848, *supra* note 4, at 4, reprinted in 1 CERCLA LEGISLATIVE HISTORY, *supra* note 4, at 311.

7. Lance A. Lawson, Note, *Direct Liability as an Arranger Under CERCLA § 107(a)(3): The Efficacy of Adhering to the Tenets of Traditional Corporate Law*, 71 NOTRE DAME L. REV. 731, 734 (1996). High profile incidents cited by Congress in proposals for hazardous waste legislation included: the disposal of 17,000 drums of hazardous waste in the "Valley of the Drums" outside Louisville, Kentucky; the discharge of kepone, a hazardous insecticide, into the James River in Virginia; the

Canal tragedy in New York.⁸ Additionally, the possibility of new federal legislation governing the release of hazardous substances gained acceptance in Congress after a series of major maritime oil spills resulted in the passage of federal bills governing oil spills and chemical wastes.⁹

The legislature's purpose in creating CERCLA was two-fold:

First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.¹⁰

polychlorinated biphenyl (PCB) contamination of the Hudson River in New York through the discharge of electric insulating fluid by General Electric; and the contamination of Michigan livestock through ingestion of cattle feed contaminated with polybrominated biphenyl (PBB), a fire retardant. See S. REP. NO. 96-848, *supra* note 4, at 4, 7-8, *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 4, at 311, 314-15.

8. See S. REP. NO. 96-848, *supra* note 4, at 7, *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 4, at 314 (claiming that "Love Canal . . . propelled the problems of inadequate hazardous chemical waste disposal into the national spotlight").

The Love Canal incident involved an abandoned canal near Niagara Falls that later was used as a hazardous waste site. In 1953, the canal was filled in and sold to the city for one dollar; the city then erected a school and playground on the site. By the spring of 1978, many area homes were deteriorating rapidly. An investigation found that houses located on the Love Canal site were infiltrated by highly toxic chemicals that had percolated into their basements. The investigation also revealed startling health problems, including birth defects, miscarriages, epilepsy, liver abnormalities, sores, rectal bleeding, and headaches. The federal government declared a state of emergency and evacuated area residents. Ultimately, 200 homes were abandoned and the school was closed permanently. See S. REP. NO. 96-848, *supra* note 4, at 8-9, *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 4, at 315-16.

9. See Jeffrey H. Howard & Linda E. Benfeild, *CERCLA Liability for Hazardous Waste "Generators": How Far Does Liability Extend?*, 9 TEMP. ENVTL. L. & TECH. J. 33, 38 & n.37 (1990) (referring to the huge oil spill accidents involving the Torrey Canyon in 1967, the Argo Merchant in 1976, and the Amoco Cadiz in 1978); see also S. REP. NO. 96-848, *supra* note 4, at 7, *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 4, at 314 (discussing a 1978 Senate proposal to expand the Clean Water Act).

10. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982), *quoted in* *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). Many courts have cited this passage when defining the two main policy objectives of CERCLA. See 1 ALLAN J. TOPOL & REBECCA SNOW,

Few could disapprove of such laudatory goals, developed to counter a burgeoning environmental problem that squarely confronted the nation.¹¹ After all, "[l]egislative and judicial pronouncements that 'the polluter should pay' resonate with deep chords of fairness and justice."¹²

CERCLA authorized the EPA to clean up hazardous waste sites¹³ and created a "Superfund" with which to fund its activities.¹⁴ The financing for Superfund came from a combination of appropriations, industry taxes, and judgments received through legal actions to recover response costs from those responsible for the creation of the hazardous waste sites.¹⁵

Many courts have criticized the congressional drafting of CERCLA.¹⁶ The language of the statute, believed inartful by some critics,¹⁷ was the product of a lame-duck Congress¹⁸ and

SUPERFUND LAW AND PROCEDURE § 1.1, at 6 n.16 (1992). Congress stated similar goals when considering amendments to the statute in 1985. See HOUSE COMM. ON THE JUDICIARY, SUPERFUND AMENDMENTS OF 1985, H.R. REP. NO. 99-253, pt. 3, at 15 (1985) [hereinafter H.R. REP. NO. 99-253(III)], reprinted in 1986 U.S.C.A.N. 3038, 3038, and in SENATE COMM. ON ENVIRONMENT & PUBLIC WORKS, 101ST CONG., 3 A LEGISLATIVE HISTORY OF THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986 (PUBLIC LAW 99-499), at 2213, 2227 (1990) [hereinafter SARA LEGISLATIVE HISTORY] (noting that Congress's goals in enacting CERCLA were: "(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups").

11. See Oswald, *supra* note 1, at 635.

12. *Id.*

13. See 42 U.S.C. §§ 9604-05 (1994).

14. See 26 U.S.C. § 9507 (1994). The creation of this "Superfund" led many to refer to "CERCLA" as "Superfund." See 1 TOPOL & SNOW, *supra* note 10, § 1.1, at 2 & n.2.

15. See 26 U.S.C. § 9507(b).

16. See John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1405 & n.3 (1997) (citing multiple cases); cf. Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 636 (1987) ("To get two separate majorities to agree separately on a single set of words to convey a clear and complete idea—and then to get the President to sign such a miracle—is not easy."). Mikva went on to state:

We certainly should not be critical of ambiguity of [statutory] language. Sometimes that is the only way a bill can pass—by sloughing over the hard parts and dulling the bright lines we would like to see. It is then for us, the judges, to try to find out what holes must be left to future policy-making and what gaps require immediate filling.

Id. at 637.

17. See Nagle, *supra* note 16, at 1405-06.

a lame-duck President¹⁹ intent on passing comprehensive environmental legislation before the end of the Ninety-sixth Congress.²⁰ Based on the remedial nature of the statute, courts have interpreted CERCLA to provide broad coverage.²¹ As a consequence of the unusually rapid passage of the legislation, however, little legislative history exists to guide the courts in interpreting the statute.²² "The controversial nature of the various CERCLA bills and the political complexities caused by the

18. See Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 19 (1982) ("[T]he actions of the Senate in November and December of 1980 were distinctly the transactions of a lame duck legislature.").

19. See 1 TOPOL & SNOW, *supra* note 10, § 1.1, at 2 (stating that the legislation was signed by President Carter on December 11, 1980 as one of his final acts in office).

20. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080 (1st Cir. 1986) ("CERCLA was . . . enacted as a 'last-minute compromise' between three competing bills . . ." (quoting *United States v. Mottolo*, 605 F. Supp. 898, 905 (D.N.H. 1985))); Nagle, *supra* note 16, at 1405-06 ("The usual explanation for CERCLA's poor drafting blames the hurry with which the lame-duck Ninety-sixth Congress passed the hazardous waste law in December 1980 before President-elect Reagan and a Republican Senate majority assumed office.").

21. See, e.g., *Dedham*, 805 F.2d at 1081 ("CERCLA is essentially 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."). This interpretation of remedial statutes conforms with traditional statutory construction tenets. See, e.g., 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §§ 45.02, 45.05 (5th ed. 1992) (explaining that when statutory language is ambiguous, courts look to legislative intent and, in doing so, look to Congress's intended objective). In the CERCLA context, federal appellate courts consistently have supported this approach. See Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 262 (1996).

The environmental statute . . . that most frequently triggers the employment of the remedial purpose canon by federal district and appellate courts is CERCLA. Although the courts only began construing CERCLA in the early 1980s, every circuit that has considered the Act has produced decisions in which the canon has played an interpretive role.

Id. (footnote omitted). CERCLA represents the "best-case scenario" for the employment of the remedial purpose canon. See generally *id.* at 271-97 (discussing "judicial application of the remedial purpose canon in CERCLA cases").

22. No committee or conference reports exist that address the version of the legislation that ultimately became law. See 1 TOPOL & SNOW, *supra* note 10, § 1.1, at 5. Additionally, some believe that the available reports concerning prior versions of the statute are of little value in interpreting CERCLA because the previous proposals "differed significantly" from the final legislation. See *id.* § 1.1, at 4-5.

change in control of the Senate following the November, 1980 election[] are largely responsible for its enigmatic legislative history."²³

The sponsors of CERCLA crafted the statute's liability scheme with an anticipation that the common law would provide guidance in interpreting the legislation.²⁴ As the courts have opined their disparate interpretations of CERCLA, Congress has considered making drastic changes to CERCLA's liability scheme.²⁵ Some have viewed Congress's failure to alter the original statute's liability standard appreciably as an indication that it is satisfied with CERCLA's language and with the interpretations of the statute's language by the courts.²⁶

Unfortunately, judicial opinions under CERCLA have been far from uniform.²⁷ "Lacking direction from the traditional tools of statutory construction, and unable to wait for Congress to correct the errors, the courts interpreting CERCLA muddle along."²⁸ Not surprisingly, there has been considerable litigation concerning the interpretation of this sweeping legislation,²⁹ resulting in inconsistent decisions and significant jurisdictional differences. Such interpretive incongruities are blatantly evident in CERCLA arranger liability case law.³⁰

23. Howard & Benfeld, *supra* note 9, at 38.

24. *See, e.g.,* Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988) (stating that sponsors of the statute expected courts to turn to common law analogies) (citing *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1488-89 (D. Colo. 1985) (quoting statements given on the floor of the House of Representatives and the Senate)); *see also infra* note 187 and accompanying text (discussing the courts' role in developing CERCLA through case law).

25. *See* Nagle, *supra* note 16, at 1423 & n.83 (noting that "Congress has reviewed numerous proposals to completely overhaul CERCLA's liability scheme").

26. *See id.* at 1423. The original statute was amended in 1986; these amendments did not, however, affect the liability scheme of the original statute. *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-75 (1994)).

27. *See* Nagle, *supra* note 16, at 1410.

28. *Id.*

29. *See* 1 TOPOL & SNOW, *supra* note 10, at vi (stating that in its first 10 years, CERCLA generated over one thousand reported decisions and, as of 1992, that number increased by almost one every court work day).

30. *See infra* notes 59-144 and accompanying text.

FRAMEWORK FOR STATUTORY INTERPRETATION

The Statute

CERCLA is a complex and technical statute³¹ that imposes liability on four classes of potentially responsible parties: (1) current owners and operators of hazardous waste producers; (2) former owners or operators of hazardous waste producers; (3) "arrangers" of hazardous substance disposal or treatment; and (4) transporters of hazardous waste.³² An "arranger" is defined in the statute as

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.³³

Although the act broadly defines "person" to include individuals as well as corporations and other business entities,³⁴ it unfortunately offers no definition of "arranged for." This shortcoming has led some to conclude that defining "arranged for" is "problematic," and has subjected CERCLA arranger liability to substantial judicial interpretation.³⁵ In addition, there is dis-

31. See 1 RICHARD H. MAYS, CERCLA LITIGATION, ENFORCEMENT, AND COMPLIANCE § 1.01, at 1-1 (1995).

32. See 42 U.S.C. § 9607(a) (1994).

33. *Id.* § 9607(a)(3) (emphasis added). The statutory language does not require the "arranger" to have "produced" the hazardous materials; thus, liability extends to operators of storage facilities and to property owners who inherit wastes from previous occupants. See *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1516 (1986). The most common example of an "arranger" is a "generator" of hazardous substances, such as a manufacturing facility that ships its hazardous wastes to off-site facilities for treatment or disposal. See 1 MAYS, *supra* note 31, § 7.05, at 7-7.

34. See 42 U.S.C. § 9601(21) (1994).

35. See Anna Marple Buboise, Comment, *Expanding the Scope of Arranger Liability Under CERCLA*, 43 U. KAN. L. REV. 469, 473 (1995) ("The most problematic component of section 9607(a)(3), and that which is most subject to judicial interpretation, is the phrase 'or otherwise arranged for disposal.'" (citing Jeffrey M. Gaba, *Interpreting Section 107(A)(3) of CERCLA: When Has a Person "Arranged for Disposal?"*, 44 SW. L.J. 1313, 1314 (1991))). More "arrangers" have been held liable under CERCLA

agreement over the statute's application in the traditional corporate environment of limited liability, resulting in disagreement among the courts as to whether liability can extend to corporate officers, directors, and shareholders.³⁶ Finally, CERCLA specifies only four narrow defenses against liability.³⁷

Plain and Ordinary Meaning

There is a "strong presumption that Congress expresses its intent through the language it chooses."³⁸ Further, when a statute is clear and unambiguous on its face, a court need not, and indeed cannot, interpret its language.³⁹ When a statute re-

than parties in any of the other three classes subject to CERCLA's prohibitions. See 1 MAYS, *supra* note 31, § 7.05, at 7-7.

36. See generally Lawson, *supra* note 7 (recommending an approach with respect to corporate liability).

37. See 42 U.S.C. § 9607(b) (listing as defenses: (1) an act of God; (2) an act of war; (3) an act or omission of a third party; and (4) any combination of the preceding three defenses). See generally Brian J. Pinkowski, *Simplifying CERCLA Defenses to Liability*, 28 URB. LAW. 197 (1996) (describing the defenses in detail). Some consider an "innocent purchaser" to be a fifth defense. See, e.g., Lawson, *supra* note 7, at 737 & n.33 (citing 42 U.S.C. § 9601(35)(b)); cf. 1 MAYS, *supra* note 31, § 7.12, at 7-21 (claiming that the "innocent purchaser" defense is a variation of the "third party" defense); 1 TOPOL & SNOW, *supra* note 10, § 5.6, at 433 (explaining that "innocent purchasers" are not bound by CERCLA based on the statute's definition of "contractual relationship," which was added in 1986). The legislative history of The Superfund Amendments and Reauthorization Act of 1986 supports Topol and Snow's interpretation. See H.R. CONF. REP. NO. 99-962, SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, at 186-88 (1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3279-81, and in 6 SARA LEGISLATIVE HISTORY, *supra* note 10, at 4818, 5002-04.

38. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); see also *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984) ("Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, . . . '[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.'" (quoting *North Dakota v. United States*, 460 U.S. 300, 312 (1983))).

39. See 2A SINGER, *supra* note 21, § 45.02, at 5. The Supreme Court has endorsed the use of this canon of statutory construction.

[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted)

quires interpretation due to its ambiguity, however, it is undeniably the duty of the judiciary to interpret it.⁴⁰

"When a word is not defined by statute, [courts] normally construe it in accord with its ordinary or natural meaning."⁴¹ Statutes sometimes use words in nonstandard senses, however, and do so without the benefit of a definitional section; this is true in CERCLA, which does not specifically define "arranged for."⁴² Additionally, courts may be unable to discern a universal interpretation of the statutory language, potentially producing conflicting guidance for those ultimately bound by the legislation.⁴³

Legislative Intent

Although judges typically prefer the legal certainty that comes with the stable body of rules accompanying the administration of common law, jurisprudence regarding statutes often precludes such certainty.⁴⁴ It therefore is necessary, when "interpreting statutes, [that] judges achieve the democratic ideal through a search for and understanding of legislative intent and goals."⁴⁵

(quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

40. See 2A SINGER, *supra* note 21, § 45.03, at 17-19.

41. *Smith v. United States*, 508 U.S. 223, 228 (1993). This canon of interpretation has come to be known as "the plain meaning rule." See 2A SINGER, *supra* note 21, § 46.01, at 81.

42. See *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (attempting to define "arranged for" in the context of CERCLA liability).

43. As stated by Justice Holmes: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

44. See Mikva, *supra* note 16, at 627; see also J. FRANK, *COURTS ON TRIAL* 292 (1950) ("[T]he legislature makes new rules, frequently without adequate consideration, which upset legal certainty. The legislatures do their work capriciously, superficially, on the basis of the limited subjective impressions of a few members of a legislative committee. Why should we [as judges] greatly respect such shoddy products?"), quoted in Mikva, *supra* note 16, at 627.

45. *Id.* at 628. Having served five terms in the United States Congress, five terms in the Illinois legislature, as a judge on the United States Court of Appeals for the District of Columbia Circuit, and as head counsel to President Clinton, Abner Mikva possesses a unique perspective regarding the role of legislative intent in judicial proceedings. See *id.* at 627 n.*; see also 2A SINGER, *supra* note 21, § 45.05, at 22 ("When a question arises concerning applicability of a statute a decision can be reached only by applying some kind of a criterion. For the interpretation of statutes, 'intent of the legislature' is the criterion that is most often recited.").

The legislative history of a statute is always important in determining the legislative intent behind its implementation.⁴⁶

In the case of CERCLA, "a hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law."⁴⁷ Many have concluded, therefore, that CERCLA's legislative history offers little guidance in ascertaining the meaning of "arranged for."⁴⁸ Moreover, the perception that CERCLA's legislative history is contradictory further eviscerates its usefulness in interpreting the statute.⁴⁹

There are, however, those in the judiciary who believe that "the constitutionally mandated role of the Court is only to interpret laws—the actual statutory language—rather than to reconstruct legislators' intentions." WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 226 (1994) (explaining Justice Scalia's viewpoint). Scalia himself notes that courts do not really look for subjective legislative intent, but rather look for an "objectified" intent. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (1997). Justice Scalia has stated:

[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. . . . Men [and women] may intend what they will; but it is only the laws that they enact which bind us.

Id. Proponents of "new textualism" argue that legislative history, unlike statutory language, has not been subject to bicameralism and presentment requirements. See ESKRIDGE, *supra*, at 226 (analogizing this argument to the Supreme Court's invalidation of legislative vetoes in *INS v. Chadha*, 462 U.S. 919 (1983)). Although the Supreme Court has been more reluctant to consult legislative history since Justice Scalia joined the Court, it still does so in a significant number of cases. See *id.* at 227 fig. 7.2 (illustrating that the Court consulted legislative history in over 15% of its statutory cases in 1991, the most recent year for which data was available). Eskridge also provides credible criticisms for Justice Scalia's constitutional justifications for the new textualism. See *id.* at 230-38. Further,

even [Justice Scalia] probably would agree that a dictionary definition will not always answer the difficult interpretive questions, and would admit that context is necessary. Like the defenders of legislative history, therefore, Scalia admits "coherence" arguments, that is, arguments that an ambiguous term is rendered clear if one possible definition is more coherent with the surrounding legal terrain than other possible definitions.

Id. at 226.

46. See Grad, *supra* note 18, at 2.

47. *Id.* Because there was too little time remaining in the congressional session for a conference, the final statute lacked the standard committee and conference reports addressing the legislation. See 1 TOPOL & SNOW, *supra* note 10, § 1.1, at 5.

48. See *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 n.8 (8th Cir. 1989); accord *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039-42 (2d Cir. 1985).

49. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080

Judicial Interpretation

Discerning the meaning and intent of statutes necessarily involves matters of judgment on which informed opinions may honestly disagree; hence, judicial interpretations of statutes will not always be concordant.⁵⁰ A court must find and enforce stopping points regarding liability to the same extent that it must implement other legislative choices.⁵¹ Interpretation of CERCLA's statutory language concerning liability has proved particularly challenging, however, because "the lower federal courts cannot turn to past Supreme Court cases or to existing administrative interpretations for guidance."⁵²

With arguably ambiguous statutory language and inadequate legislative guidance, the courts have resorted to their own perceptions and interpretations regarding CERCLA. As a result, copious case law exists concerning owner,⁵³ successor,⁵⁴ governmental,⁵⁵ and arranger⁵⁶ liability under

(1st Cir. 1986) ("We recognize that 'CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history.'" (quoting *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985))).

50. See 2A SINGER, *supra* note 21, § 45.03, at 17, 19.

51. See *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988).

52. Nagle, *supra* note 16, at 1410.

53. See generally William B. Johnson, Annotation, *What Constitutes "Disposal" for Purposes of Owner or Operator Liability Under § 107(a)(2) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (42 U.S.C.S. § 9607(a)(2)), 136 A.L.R. FED. 117 (1997) (explaining owner and operator liability under CERCLA).

54. See generally William B. Johnson, Annotation, *Liability of Parent or Successor Corporation, or Corporate Shareholders, in Action Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (42 U.S.C.S. §§ 9601-9675), 121 A.L.R. FED. 173 (1994) (explaining parent or successor liability under CERCLA).

55. See generally William B. Johnson, Annotation, *Liability of Local Government Under § 107(a) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (42 U.S.C.S. § 9607(a)), 133 A.L.R. FED. 293 (1996) (explaining governmental liability under CERCLA).

56. See generally William B. Johnson, Annotation, *Arranger Liability of Nongenerators Pursuant to § 107(a)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (42 U.S.C.S. § 9607(a)(3)), 132 A.L.R. FED. 77 (1996) (explaining the potential liability of entities that did not generate hazardous waste under CERCLA); William B. Johnson, Annotation, *Arranger Liability of State Government Under § 107(a) of Comprehensive Environmental Response,*

CERCLA.⁵⁷ It therefore should come as no surprise that judicial approaches to arranger liability have not been consistent. Modern courts have adopted three fundamentally dissimilar approaches: (1) a strict liability approach; (2) a specific intent approach; and (3) a "totality of the circumstances," case-by-case approach.⁵⁸

JUDICIAL INTERPRETATION OF "ARRANGED FOR"

The Broad Interpretation

Courts often cite *United States v. Aceto Agricultural Chemicals Corp.*⁵⁹ for the proposition that arrangers are subject to strict liability under CERCLA.⁶⁰ In *Aceto*, the EPA and the

Compensation, and Liability Act (CERCLA) (42 U.S.C.S. § 9607(a)), 130 A.L.R. FED. 431 (1996) (explaining governmental arranger liability under CERCLA); William B. Johnson, Annotation, *Liability of Generators Pursuant to § 107(a)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (42 U.S.C.S. § 9607(a)(3)), 126 A.L.R. FED. 265 (1995) (explaining generator liability under CERCLA).

57. See Lawrence S. Coven, Comment, *Liability Under CERCLA: After a Decade of Delegation, the Time is Ripe for Legislative Reform*, 17 OHIO N.U. L. REV. 165, 166 (1990) ("Liability under environmental law is constantly being litigated and places itself in the forefront of contemporary legal issues.").

58. See *United States v. Gordon Stafford, Inc.*, 952 F. Supp. 337, 339-40 (N.D. W. Va. 1997); accord *Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1523-25 (D. Colo. 1996).

59. 872 F.2d 1373 (8th Cir. 1989).

60. See, e.g., *Gordon Stafford*, 952 F. Supp. at 340 ("In finding the pesticide manufacturers had 'arranged for' the disposal of wastes, the Eighth Circuit did not require the United States to show that the pesticide manufacturers intended for the wastes to be disposed."). Although the *Aceto* court was not the first to apply strict arranger liability under CERCLA, it was the first federal appellate court to do so expressly. See generally Anita Letter, Comment, *Reasonable Inference of Authority to Control Hazardous Waste Disposal Results in Potential Liability: United States v. Aceto Agricultural Chemicals Corporation*, 31 NAT. RESOURCES J. 673 (1991) (documenting the judicial trend of expanding CERCLA arranger liability); Kim Ruckdaschel-Haley, Note, *"Arranging for Disposal of Hazardous Substances": Expansive CERCLA Liability for Pesticide Manufacturers After U.S. v. Aceto Agricultural Chemicals Corp.*, 35 S.D. L. REV. 251 (1990) (pointing out that *Aceto's* expansive view was consistent with prior case law and provided a logical extension to the growing scope of CERCLA arranger liability).

Strict liability, or "liability without fault," has been defined as "liability that is imposed on an actor *apart from* either (1) an intent to interfere with a legally protected interest without a legal justification to do so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence." W. PAGE KEETON ET AL.,

State of Iowa attempted to recover over ten million dollars in response costs incurred in the clean up of Aidex Corporation's (Aidex) contaminated pesticide formulation facility in Mills County, Iowa.⁶¹ Aidex operated the site from 1974 until it went bankrupt in 1981.⁶² EPA investigations in the early 1980s revealed that the site was highly contaminated:⁶³ "[H]azardous substances were found in deteriorating containers, in the surface soil, in fauna samples, and in the shallow zone of the groundwater, threatening the source of irrigation and drinking water for area residents."⁶⁴ According to the EPA and the State of Iowa, six pesticide manufacturers that contracted with Aidex to formulate their technical grade pesticides into commercial grade pesticides "arranged for" hazardous waste disposal.⁶⁵ The manufacturers retained ownership of the pesticides throughout the treatment process and supplied the specifications for the commercial grade products.⁶⁶ Additionally, the manufacturing formulation process inherently generated hazardous wastes.⁶⁷

The Eighth Circuit Court of Appeals began its analysis by stating that "[m]ost courts have held [that] CERCLA imposes strict liability."⁶⁸ It found that the broad language used in the

PROSSER AND KEETON ON THE LAW OF TORTS § 75, at 534 (5th ed. 1984) (emphasis added).

61. See *Aceto*, 872 F.2d at 1375. As stated in *Aceto*:

[I]t is a common practice in the pesticide industry for manufacturers of active pesticide ingredients to contract with formulators such as Aidex to produce a commercial grade product which may then be sold to farmers and other consumers. Formulators mix the manufacturer's active ingredients with inert materials using the specifications provided by the manufacturer. The resulting commercial grade product is then packaged by the formulator and either shipped back to the manufacturer or shipped directly to customers of the manufacturer.

Id. (citations omitted).

62. See *id.*

63. See *id.*

64. *Id.*

65. See *id.* at 1376.

66. See *id.* at 1383.

67. See *id.*

68. *Id.* at 1377 (citing *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1982); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-10 (S.D. Ohio 1983)).

statute to describe arranger liability indicated that "a liberal judicial interpretation [was] consistent with CERCLA's 'overwhelmingly remedial' statutory scheme."⁶⁹ Further, the court stated that "[other] courts have not hesitated to look beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance."⁷⁰

The Eighth Circuit noted that other courts have held defendants liable as arrangers under CERCLA even when they attempted to define their relationship with the party that disposed of their hazardous substances as a buy-sell relationship instead of one of disposal.⁷¹ It also pointed out that defendants can be held liable for "arranging for" waste disposal even if they had no actual knowledge that the substances would be deposited illegally.⁷² The court in *Aceto* noted, however, that other courts have

69. *Id.* at 1380 (quoting *Northeastern Pharm. & Chem. Co.*, 810 F.2d at 733).

70. *Id.* at 1381 (citing *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 237-41 (W.D. Mo. 1985)). In *Conservation Chemical*, the sale of lime slurry and fly ash by-products to treat other hazardous substances at a hazardous waste site constituted "arranging for disposal" of hazardous materials. See *Conservation Chemical*, 619 F. Supp. at 241. The court based liability on the fact that the sellers of the lime slurry and fly ash contracted "for deposit or placement" of their hazardous substances on the site. *Id.*

71. See *Aceto*, 872 F.2d at 1381 (citing *New York v. General Elec. Co.*, 592 F. Supp. 291, 297 (N.D.N.Y. 1984); *United States v. A & F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984)). In *General Electric*, the district court determined that when General Electric sold used transformer oil containing PCBs and other hazardous substances to a dragstrip to be used for dust control, the company may have "arranged for" the dragstrip to take away its used transformer oil with "knowledge or imputed knowledge" that the oil would be deposited on the land surrounding the dragstrip. *General Electric*, 592 F. Supp. at 297. In *A & F Materials Co.*, the district court held McDonnell Douglas liable as an arranger when it sold spent aluminum etch caustic solution to A & F for oil reclamation use. See *A & F Materials Co.*, 582 F. Supp. at 845.

The Eighth Circuit noted the *General Electric* court's reference to CERCLA's legislative history: "[P]ersons cannot escape liability by 'contracting away' their responsibility or alleging that the incident was caused by the act or omission of a third party." *Aceto*, 872 F.2d at 1381 (quoting S. REP. NO. 96-848, *supra* note 4, at 31, reprinted in 1 CERCLA LEGISLATIVE HISTORY, *supra* note 4, at 338, quoted in *General Electric*, 592 F. Supp. at 297).

72. See *Aceto*, 872 F.2d at 1381 (citing *United States v. Ward*, 618 F. Supp. 884, 895 (E.D.N.C. 1985); *Missouri v. Independent Petrochemical Corp.*, 610 F. Supp. 4, 5 (E.D. Mo. 1985); *United States v. Wade*, 577 F. Supp. 1326, 1333 n.3 (E.D. Pa. 1983)).

not imposed liability when a "useful" substance was sold to a third party, which then incorporated the material into a product that was disposed of at a later date.⁷³ The Eighth Circuit apparently considered "useful" sales of hazardous materials to be the limit for imposing CERCLA arranger liability.

The court also was careful to distinguish *Aceto* from its earlier decision in *United States v. Northeastern Pharmaceutical & Chemical Co.*⁷⁴ (*NEPACCO*), in which it stated that "[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme."⁷⁵ The Eighth Circuit noted that in *NEPACCO*, it imposed liability on, *in addition to owners*, individuals who had "the authority to control the disposal, even without ownership or possession."⁷⁶

In short, the Eighth Circuit held that, under CERCLA, "arranged for" does not require an intent to dispose of hazardous

73. See *id.* (citing *Florida Power & Light Co. v. Allis-Chalmers Corp.*, [1988] 27 Env't Rep. Cas. (BNA) 1558 (S.D. Fla. 1988), *aff'd*, 893 F.2d 1313 (11th Cir. 1990); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 654-57 (N.D. Ill.), *aff'd on other grounds*, 861 F.2d 155 (7th Cir. 1988); *United States v. Westinghouse Elec. Corp.*, [1983] 22 Env't Rep. Cas. (BNA) 1230 (S.D. Ind. 1983)). In *Florida Power*, the court held that Allis-Chalmers' sale of "new" electrical transformers, containing PCB-contaminated mineral oil, to Florida Power did not expose Allis-Chalmers to arranger liability when Florida Power disposed of the transformers up to 40 years later. See *Florida Power*, [1988] 27 Env't Rep. Cas. (BNA) at 1560 ("[Previous] cases have consistently held that intent to dispose, and foreseeability of the eventual need to dispose are irrelevant under CERCLA. They have held that sale of a useful product containing a contaminant does not subject the seller to CERCLA liability."). In *Edward Hines*, the court held that the plaintiff, a wood supply company, could not collect from its wood preservative chemical supplier because the supplier did not "arrange for" disposal or treatment of hazardous substances under CERCLA. See *Edward Hines*, 861 F.2d at 157. The court did not impose liability despite the fact that the supplier designed and built the preservation plant, furnished the toxic chemical, trained Edward Hines's employees, and reserved a right to inspect ongoing operations. See *id.* Similarly, the *Westinghouse* court concluded that Monsanto was not liable for providing PCB-contaminated dielectric fluid to Westinghouse by stating that "[t]he claims of the United States are not based on its control of the manufactured product of Monsanto as sold to Westinghouse but are based on Westinghouse's waste product disposition in issue." *Westinghouse*, [1983] 22 Env't Rep. Cas. (BNA) at 1233.

74. 810 F.2d 726 (8th Cir. 1986).

75. *Id.* at 743, *quoted in Aceto*, 872 F.2d at 1381-82.

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

waste.⁷⁷ It emphasized that requiring an *intent* to arrange for disposal would frustrate CERCLA's goal of requiring responsible parties to pay for hazardous substance cleanup.⁷⁸ Following the Eighth Circuit's decision, both the Ninth⁷⁹ and Eleventh⁸⁰ Circuit Courts of Appeals cited *Aceto's* broad interpretation of CERCLA arranger liability with approval, imposing strict liability under the statute. A number of other courts also have followed this strict liability approach.⁸¹

77. *See id.* at 1380.

78. *See id.*

79. *See Jones-Hamilton Co. v. Beazer Materials & Serv. Inc.*, 973 F.2d 688, 695 (9th Cir. 1992). In this case, Jones-Hamilton, a contract chemical formulator, entered into a formulation agreement with Wood Treating Chemicals Co., a predecessor to Beazer, to formulate raw materials, which Beazer had provided, into wood preservation compounds. *See id.* at 691. The contract permitted a tolerance of up to 2% by volume for spillage or shrinkage during any calendar month, and Beazer retained ownership of all materials it supplied to Jones-Hamilton. *See id.* Beazer later discharged hazardous substances into waste water containment ponds, requiring over two million dollars in cleanup costs. *See id.*

The court found the issues very similar to *Aceto* and agreed with the Eighth Circuit that requiring "intent" would frustrate CERCLA's goal of making the companies that were responsible for producing hazardous waste pay for cleanup. *See id.* at 695 (citing *Aceto*, 872 F.2d at 1380). Relying on *Aceto* and the wording of the statute, the court found that "it is clear that under the agreement Beazer 'arranged for disposal' of toxic substances within the meaning of section 9607." *Id.*

80. *See Florida Power & Light Co. v. Allis-Chalmers Corp.*, 893 F.2d 1313, 1318 (11th Cir. 1990) ("In light of the broad remedial nature of CERCLA, we conclude, as other courts have, that even though a manufacturer does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed, the manufacturer may be liable.").

81. *See, e.g., United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993). In *Alcan*, the Second Circuit held that to impose strict liability under CERCLA,

the government need only prove: (1) there was a release or threatened release, which (2) caused incurrence of response costs, and (3) that the defendant generated hazardous waste at the clean-up site. . . . Hence, it seems plain that in addition to imposing a strict liability scheme, CERCLA does away with a causation requirement.

Id. at 721; *see also United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 264 (3d Cir. 1992) (finding that the statute "imposes no such causation requirement, but rather requires that the plaintiff in a CERCLA proceeding establish that the *release or threatened release* caused the incurrence of response costs").

Additionally, some feel that *Aceto* and its progeny represented a judicial expansion of CERCLA liability. *See Buboise, supra* note 35, at 477 ("The *Aceto* line of cases confirms courts' willingness to extend CERCLA liability to parties engaging in

The Narrow Interpretation

On the opposite end of the causation spectrum, Judge Richard Posner, writing for the Seventh Circuit Court of Appeals in 1993, contravened existing precedent by adopting a specific intent approach regarding CERCLA arranger liability in *Amcast Industrial Corp. v. Detrex Corp.*⁸² In *Amcast*, Elkhart Products Corporation (Elkhart), a subsidiary of Amcast Industrial Corporation (Amcast), manufactured copper fittings at a plant in Indiana using the solvent trichloroethylene (TCE), a hazardous substance.⁸³ One of the chemical manufacturers from which Elkhart had purchased liquid TCE was Detrex Corporation (Detrex); Detrex either delivered the TCE in its own tanker trucks or hired a common carrier to deliver the solvent.⁸⁴ In 1984, almost eight hundred gallons of TCE were discovered in the groundwater beneath a pharmaceutical plant adjacent to Elkhart's plant.⁸⁵ Evidence suggested that drivers from both Detrex and the common carrier accidentally spilled TCE on Elkhart's premises while filling Elkhart's storage tanks, resulting in severe environmental contamination.⁸⁶

The Seventh Circuit determined that Detrex was not liable because it did not hire the transporter for the purpose of spilling TCE on Elkhart's premises.⁸⁷ The court stated that although

transactions intended primarily to produce useful materials that also result in waste disposal.").

82. 2 F.3d 746 (7th Cir. 1993). Shortly after the *Amcast* decision, legal scholars recognized Posner's opinion as a deviation from over a decade of previous case law upholding strict CERCLA arranger liability. See generally Beth A. Caretti, Note, *Amcast Industrial Corp. v. Detrex Corp.: The Shippers Exception to CERCLA and How it Compares in "Arranging For" Environmental Liability*, 41 WAYNE L. REV. 227 (1994) (pointing out that *Amcast's* approach to arranger liability deviated from other circuits and was contrary to the statute's wording and legislative history). Cf. T. Christopher Daniel, Comment, *Posner Reigns in CERCLA: Amcast Industrial Corp. & Elkhart Products Corp. v. Detrex Corp.*, 9 J. NAT. RESOURCES & ENVTL. L. 531, 550 (1993-94) (positing that Posner's narrow interpretation was a well-reasoned approach to ambiguous legislation). Posner's rejection of the strict liability approach of *Aceto* and its progeny arguably was without justification. See *infra* notes 194-221 and accompanying text.

83. See *Amcast*, 2 F.3d at 747.

84. See *id.* at 747-48.

85. See *id.* at 748.

86. See *id.*

87. See *id.* at 751.

the statute defines disposal to include spilling, the critical words in the liability section are "arranged for."⁸⁸ The court found those words to "*imply intentional action*,"⁸⁹ a suggestion that other courts overwhelmingly had rejected. According to Posner, the sole thing Detrex "arranged for" was the common carrier's delivery of TCE.⁹⁰ The court found that Detrex did not "arrange for" any spilling on Elkhart's premises, and that "disposal" excludes accidental spillage because no one "arranges for" such occurrences.⁹¹ The court found that the words "arranged with a transporter for transport for disposal or treatment"⁹² appeared to contemplate a case in which an entity that desired to rid itself of its hazardous wastes hired a transporter to deliver the wastes to a disposal site, not a case in which the entity provided for delivery of a *useful* product as Detrex did in *Amcast*.⁹³

Judge Posner, writing for the court, held that "[i]t would be an extraordinary thing to make shippers strictly liable under the Superfund statute for the consequences of accidents to common carriers or other reputable transportation companies that the shippers had hired in good faith to ship their products."⁹⁴ The court further stated that there were multiple "direct regulatory controls" governing the transportation of hazardous substances,

88. *See id.*

89. *Id.* (emphasis added). The court went on to state that "[n]o one arranges for an accident, except in the sinister sense, not involved here, of 'staging' an accident—that is, causing deliberate harm but making it seem accidental." *Id.*

90. *See id.*

91. *See id.* ("[I]n the context of the shipper who is arranging for the transportation of a product, 'disposal' excludes accidental spillage because you do not arrange for an accident except in the *Æsopian* sense illustrated by the staged accident.").

92. 42 U.S.C. § 9607(a)(3) (1994).

93. *See Amcast*, 2 F.3d at 751.

94. *Id.* (citing *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174, 1180-81 (7th Cir. 1990) (finding that negligence, and not strict liability, was the proper common law liability standard based on the hazard posed by the material carried by the shipper)). *Indiana Harbor* was a non-CERCLA case applying common law liability. *See infra* notes 202-04 and accompanying text. It was the only case the *Amcast* court cited to support the imposition of a negligence liability scheme. *See Amcast*, 2 F.3d at 751. The court simultaneously conceded that the wording of CERCLA allowed, but did not compel, holding shippers to a strict liability standard. *See id.* ("The language of the statute permits but does not compel [strict liability], and we can find no evidence that it was intended.").

outlined in the Hazardous Materials Transportation Act,⁹⁵ and that based on this fact, the imposition of a specific intent requirement "[did] not create a regulatory void."⁹⁶

The court ultimately found that Detrex was liable as a "responsible person" for the spillage from its own trucks but not for the spillage from the hired common carrier's trucks.⁹⁷ Elkhart, on the other hand, would have to pay for cleanup of any contamination that was caused by the spillage from the common carrier's trucks unless it could find another responsible person to whom it could shift that cost.⁹⁸ The Seventh Circuit concluded, therefore, that a party did not "arrange for" disposal of a hazardous substance when it did not *intentionally arrange for* the hazardous substance being delivered to be spilled on its premises.⁹⁹ Subsequent to the Seventh Circuit's opinion, other courts relied on *Amcast's* holding, and Posner's narrow approach to CERCLA arranger liability, as talismanic precedent.¹⁰⁰

95. 49 U.S.C. §§ 5101-27 (1994).

96. See *Amcast*, 2 F.3d at 751.

97. See *id.*

98. See *id.*

99. See *id.*

100. See, e.g., *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1336 (D. Utah 1996) (finding a specific-intent requirement for arranger liability to be compatible with CERCLA's strict liability scheme because strict liability is not imposed until one is determined to be a responsible party, and finding a requirement of intentional action consistent with the plain language of the statute); *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 559 (S.D. Ill. 1994) (determining that "the phrase 'arranged for' implies intentional action"), *aff'd*, 54 F.3d 379 (7th Cir. 1995); *United States v. Cello-Foil Prods., Inc.*, 848 F. Supp. 1352, 1357 (W.D. Mich. 1994) (holding that purchasers of drum-delivered solvents were not subjected to arranger liability when (1) they returned the drums with solvent residue to the producer in exchange for a deposit, and (2) solvents were released into the environment when the drums were rinsed by the producer, absent a showing that the purchasers *intended* to dispose of the residual solvent), *rev'd and remanded*, 100 F.3d 1227 (6th Cir. 1996).

A specific-intent rationale also has been used to justify a "useful product" exception to arranger liability. See *Florida Power & Light Co. v. Allis-Chalmers Corp.*, 893 F.2d 1313, 1319 (11th Cir. 1990); *accord* *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 654 (N.D. Ill.), *aff'd* 861 F.2d 155 (7th Cir. 1988).

The *Cello-Foil* district court aptly summed up the specific-intent approach to CERCLA arranger liability: "Whatever else 'otherwise arranged for disposal' means . . . it does not apply to situations where there was no intent to dispose of a hazardous substance." *Cello-Foil*, 848 F. Supp. at 1357. The Sixth Circuit Court of Appeals retreated, however, from the district court's hard line stance. See *Cello-Foil*, 100 F.3d at 1233 ("The district court employed an overly restrictive view on what is

The Middle Ground Interpretation

The Eleventh Circuit Court of Appeals found a middle ground between the strict liability and specific intent approaches to CERCLA arranger liability when it decided *South Florida Water Management District v. Montalvo*.¹⁰¹ In *Montalvo*, Chemspray, owned by Montalvo, formulated pesticides from chemicals.¹⁰² Chemairspray, an aerial spraying service also allegedly controlled by Montalvo, then contracted with area farmers and ranchers to conduct aerial spraying of their properties.¹⁰³ A district court found Montalvo, Chemspray, Chemairspray, and Chemspray's corporate successor, Glades Formulating Corporation (collectively known as the "Sprayers"), jointly and severally liable for the hazardous waste cleanup of an airstrip and adjacent pesticide storage site.¹⁰⁴ The Sprayers thereafter sought contribution for incurred response costs from landowners who had contracted with them for aerial spraying services.¹⁰⁵ The airstrip and storage site had become contaminated with pesticide and herbicide wastes due to spillage during Chemairspray's

necessary to prove intent, state of mind, or purpose, by assuming that intent could not be inferred from the indirect action of the parties.").

101. 84 F.3d 402 (11th Cir. 1996). Although *Montalvo* is often cited as the seminal decision adopting a "totality of the circumstances," case-by-case approach to CERCLA arranger liability, other federal appellate courts previously had adopted various "middle-ground" interpretations. See, e.g., *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1088-90 (8th Cir. 1995) (holding that a finding of arranger liability requires *some level of actual participation* in, or exercise of control over, activities that are causally connected to, or have some nexus with, the arrangement for disposal of hazardous substances or the off-site disposal itself (citing *United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995); *United States v. Gurley*, 43 F.3d 1188 (8th Cir. 1994))). Of note, *TIC*, *Vertac*, and *Gurley* represent a retreat from the Eighth Circuit's strict liability approach in *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989).

Nevertheless, *Montalvo* signaled a departure from prior precedent regarding CERCLA arranger liability. See generally Vincent S. Capone, Note, *A Preemptive Limitation of CERCLA Arranger Liability—South Florida Water Management District v. Montalvo*, 16 TEMP. ENVTL. L. & TECH. J. 139 (1997) (pointing out that *Montalvo* offended the intent of CERCLA as a remedial statute).

102. See *Montalvo*, 84 F.3d at 404.

103. See *id.*

104. See *id.* at 405.

105. See *id.*

mixing and loading operations, and rinsing of its planes' applicating tanks.¹⁰⁶

The court in *Montalvo* began its analysis by recognizing the various approaches courts had utilized in interpreting the phrase "arranged for" under CERCLA, including consideration of the sale of a useful product,¹⁰⁷ an intent to dispose,¹⁰⁸ and whether the defendant made the "crucial decision" to place hazardous substances in the possession and control of a specific facility.¹⁰⁹ The Eleventh Circuit also pointed out that it had previously rejected all attempts to substitute a per se rule for arranger liability under CERCLA, holding instead that courts must consider all of the facts when deciding each case.¹¹⁰ The court found that "[f]or the Landowners to have 'arranged for' the disposal of the pesticide wastes, they must have done more than simply contract[] for aerial spraying services. The Sprayers must demonstrate the landowners took some affirmative act to dispose of the wastes."¹¹¹ In the instant case, the court found no allegations or evidence from which it could infer that the landowners had an implicit agreement to dispose of hazardous wastes.¹¹²

The Eleventh Circuit distinguished *Montalvo* from the Eighth Circuit's approach in *Aceto*.¹¹³ The court stated that because the manufacturers in *Aceto* supplied chemicals to the formulator, provided mixing instructions, and retained ownership of the hazardous substances throughout the formulating process, a court could infer that the manufacturers exercised some control over the formulator's mixing process.¹¹⁴

106. See *id.*

107. See *id.* at 406 (citing *AM Int'l, Inc. v. International Forging Equip. Corp.*, 982 F.2d 989, 999 (6th Cir. 1993); *Prudential Ins. Co. of America v. United States Gypsum*, 711 F. Supp. 1244, 1254 (D.N.J. 1989)).

108. See *id.* at 406-07 (citing *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993); *United States v. Cello-Foil Prods., Inc.*, 848 F. Supp. 1352, 1357 (W.D. Mich. 1994); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 654-56 (N.D. Ill.), *aff'd* 861 F.2d 155 (7th Cir. 1988)).

109. See *id.* at 407 (citing *United States v. A & F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984)).

110. See *id.* (citing *Florida Power & Light Co. v. Allis-Chalmers Corp.*, 893 F.2d 1313, 1317-18 (11th Cir. 1990)).

111. *Id.* (citing *AM Int'l*, 982 F.2d at 999).

112. See *id.* at 408.

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

114. See *Montalvo*, 84 F.3d at 408 (citing *Aceto*, 872 F.2d at 1381-82).

The fact that the landowners in *Montalvo* owned the pesticides during the application process did not alone suggest the type of control over the Sprayers' application procedures that the chemical manufacturers in *Aceto* had retained.¹¹⁵ The court reasoned that, unlike the Eighth Circuit in *Aceto*, it could not infer that the landowners in *Montalvo* knew that spraying pesticides entailed spilling hazardous substances and draining contaminated rinse water.¹¹⁶ The Eleventh Circuit therefore did not find the landowners liable as arrangers.¹¹⁷

In short, the court held that "[w]hen determining whether a party has 'arranged for' the disposal of a hazardous substance, courts must focus on all of the facts in a particular case."¹¹⁸ The court recognized that factors such as knowledge of the disposal, ownership of the hazardous substances, and intent are germane to the determination of whether the hazardous substance disposal had been "arranged for";¹¹⁹ however, it stated that those factors do not necessarily determine liability in each case.¹²⁰

The Modern Trend (A Case-By-Case Analysis)

The Eleventh Circuit's reasoning in *South Florida Water Management District v. Montalvo*¹²¹ provided courts a third available approach with which to analyze CERCLA arranger liability.¹²² With its inherent judicial flexibility, other courts quickly adopted this case-by-case approach.¹²³

115. *See id.*

116. *See id.* at 409.

117. *See id.*

118. *Id.* at 407 (emphasis added). Later decisions have referred to the Eleventh Circuit's approach to CERCLA arranger liability in *Montalvo* as the "totality of the circumstances" or "case-by-case" approach. *See, e.g.,* United States v. Gordon Stafford, Inc., 952 F. Supp. 337, 340 (N.D. W. Va. 1997).

119. *See Montalvo*, 84 F.3d at 407.

120. *See id.*

121. 84 F.3d 402 (11th Cir. 1996).

122. *See Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1523 (D. Colo. 1996) (referring to *Montalvo*, *Aceto*, and *Amcast* as "three leading cases . . . that have each taken different approaches in interpreting 'arranged for'").

123. *See, e.g.,* Briggs & Stratton Corp. v. Concrete Sales & Servs., Inc., 990 F. Supp. 1473, 1479 (M.D. Ga. 1998) ("Whether arranger status is found must depend upon the particular facts of each case, using the guidelines of the relevant caselaw along with other pertinent factors in each individual instance." (citing *Montalvo*, 84

In *United States v. Gordon Stafford, Inc.*, a case of first impression for the Fourth Circuit Court of Appeals, the United States District Court for the Northern District of West Virginia adopted the Eleventh Circuit's approach.¹²⁴ Defendant Gordon Stafford purchased eleven electrical transformers at a public surplus auction and resold them to co-defendant Gary Powell.¹²⁵ Powell subsequently had tests performed on the transformers and discovered that PCBs had contaminated seven of the eleven units.¹²⁶ Stafford and Powell discussed the situation and thereafter instructed a third party to remove the transformers, along with two fifty-five gallon drums of hazardous materials, from Powell's facility and dispose of the items at a site in Harrison County, West Virginia.¹²⁷

The district court reviewed the various approaches to CERCLA arranger liability previously used by other courts: the Eighth Circuit's strict liability approach in *Aceto*,¹²⁸ the Seventh Circuit's specific intent approach in *Amcast*,¹²⁹ and the Eleventh Circuit's "totality of the circumstances," case-by-case approach in *Montalvo*.¹³⁰ The district court then adopted the Eleventh Circuit's approach, stating that based on the facts of

F.3d at 407)); *Gordon Stafford*, 952 F. Supp. at 339-40; *Mathews*, 947 F. Supp. at 1523-25. In *United States v. North Landing Line Construction Co.*, 3 F. Supp. 2d 694 (E.D. Va. 1998), the United States District Court for the Eastern District of Virginia decided not to apply the *Montalvo* "totality of the circumstances" test, finding that the defendant was not liable as an arranger under CERCLA. *See id.* at 702. The court sought to show that the outcome of the case would be the same regardless of which test it employed. *See id.* The *North Landing* court ultimately chose to adopt the "crucial decision" test, stating that "[i]n the absence of Fourth Circuit precedent, the [c]ourt will follow precedent from its own district." *Id.* at 701 (referring to *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1293 (E.D. Va. 1993)); *see also* text accompanying note 109 (describing the "crucial decision" test).

124. *See Gordon Stafford*, 952 F. Supp. at 340.

125. *See id.* at 338.

126. *See id.*

127. *See id.*

128. *See id.* at 340 ("[T]he Eighth Circuit did not require the United States to show that the pesticide manufacturers intended for the wastes to be disposed.").

129. *See id.* ("The Seventh Circuit focused exclusively on the intent of the parties, concluding that the phrase 'arranged for' implies intentional action.").

130. *See id.* ("The Eleventh Circuit concluded that it must focus on all of the facts in a particular case.").

the case, Powell's actions surrounding the disposal indicated that he "assisted in activities to conceal the ultimate disposal of hazardous waste."¹³¹

The United States District Court of Colorado later followed the rationale of the *Gordon Stafford* court when deciding *Mathews v. Dow Chemical Co.*¹³² In *Mathews*, the plaintiff landowner sought to recover damages for groundwater contamination from neighboring property that previously had been used to package and store paint thinner and other hazardous substances.¹³³ The groundwater contamination allegedly resulted from spillage of hazardous substances associated with the paint thinner operation.¹³⁴

The district court outlined the "[t]hree leading cases" that "have each taken different approaches in interpreting 'arranged for.'"¹³⁵ It went on to hold that the Eleventh Circuit's case-by-case approach, which considered all relevant factors—including intent, ownership, and knowledge—was "most faithful to the statutory language and purposes of CERCLA."¹³⁶ The court in *Mathews* felt that the Eighth Circuit's strict liability approach "stretch[ed] the meaning of 'arranged for' too far"¹³⁷ and that the Seventh Circuit's specific intent approach was "too limited and [did] not adequately consider the remedial nature of CERCLA."¹³⁸ The district court premised its analysis on the belief that "no court within the Tenth Circuit" had interpreted "arranged for" under CERCLA.¹³⁹ The *Mathews* court inexplicably failed to recognize the "specific intent" interpretation previously adopted within the circuit by the United States District Court of Utah.¹⁴⁰

131. *Id.* at 341.

132. 947 F. Supp. 1517 (D. Colo. 1996).

133. *See id.* at 1519.

134. *See id.*

135. *Id.* at 1523 (citing *South Fla. Water Management Dist. v. Montalvo*, 84 F.3d 402 (11th Cir. 1996); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989)).

136. *Id.* at 1525.

137. *Id.*

138. *Id.*

139. *Id.* at 1523.

140. *See* *Ekotek Site PRP Comm. v. Self*, 932 F. Supp. 1328, 1334 (D. Utah 1996).

The Eleventh Circuit's case-by-case approach to CERCLA arranger liability presents a unique challenge to those who are potentially liable as arrangers under CERCLA.¹⁴¹ The case-by-case approach requires consideration of factors such as intent, ownership of the hazardous substances, and knowledge of the disposal when determining arranger liability.¹⁴² These factors are not dispositive, however, and depending on the formula that a court relies on to evaluate them, disparate outcomes may emerge from identical facts.¹⁴³ "Although some lines of demarcation can be identified, questions remain concerning the minimum connections that a person must have with a transaction that ultimately results in disposal of hazardous substances before that person is liable as an arranger."¹⁴⁴

IN SEARCH OF A UNIFIED APPROACH TO ARRANGER LIABILITY

A unified approach to arranger liability is necessary for several reasons. For potentially responsible parties to adequately protect themselves, they need to understand their possible liability under CERCLA fully.¹⁴⁵ Additionally, if parties know in ad-

For a discussion of *Ekotek*, see *supra* note 100.

141. See *Buboise*, *supra* note 35, at 474 (noting that because the case-by-case approach has yielded few guidelines, it is unclear how closely connected an individual must be to a transaction for liability to attach).

142. See *South Fla. Water Management Dist. v. Montalvo*, 84 F.3d 402, 406-07 (11th Cir. 1996).

143. See *id.* at 407 ("While factors such as a party's knowledge (or lack thereof) of the disposal, ownership of the hazardous substances, and intent are relevant to determining whether there has been an 'arrangement' for disposal, they are not necessarily determinative of liability in every case.").

144. *Buboise*, *supra* note 35, at 474. *Buboise* went on to state:

[C]ourts seem content to examine each case on its facts, leaving parties who may have transactions that involve hazardous substances with very little guidance.

....

... [T]he lack of uniformity in the courts' analysis makes it difficult for parties to have any reasonable assurances that their transactions involving hazardous substances will not subject them to potential arranger liability

Id. at 486-87.

145. Many have argued that a *uniform* scheme of liability always was intended by Congress. See *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993) (pointing out "the federal interest in uniformity in the applica-

vance that they will be strictly liable for any release of hazardous substances, they are more likely to seek newer and safer methods of hazardous waste disposal.¹⁴⁶

The presence of multiple judicial interpretations of a federal statute creates additional concerns. The lack of a uniform CERCLA arranger liability scheme presents the same increased costs that arise when a given law varies from state to state: inconsistency costs; information costs; litigation costs; instability costs; costs associated with externalities; and drafting costs.¹⁴⁷ Further, multiple interpretations introduce great uncertainty in

tion of CERCLA"); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1464 (9th Cir. 1986) (Reinhardt, J., dissenting) ("[B]oth the policy and legislative history of CERCLA necessitate the formulation of uniform federal rules of liability under section 107." (citing *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27 (E.D. Mo. 1985); *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985); *United States v. A & F Materials Co.*, 578 F. Supp. 1249 (S.D. Ill. 1984); *United States v. Ward*, [1984] 22 Env't Rep. Cas. (BNA) 1235 (E.D.N.C. 1984); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983))). Although CERCLA greatly limits available indemnification provisions, it nonetheless allows the allocation of responsibility for remediation of contamination between contracting parties through indemnity or "hold harmless" agreements. See 42 U.S.C. § 9607(a) (1994); 1 MAYS, *supra* note 31, § 7.15, at 7-30.

146. See *Developments in the Law—Toxic Waste Litigation*, *supra* note 33, at 1520 (advocating that a strict liability scheme is the most efficient means of encouraging the development of safer waste disposal techniques).

147. See Allan W. Vestal, "Assume a Rather Large Boat . . .": *The Mess We Have Made of Partnership Law*, 54 WASH. & LEE L. REV. 487, 524 n.185 (1997) (describing the six "benefits or cost-reducing attributes of uniform laws" identified by Professors Ribstein and Kobayashi). These cost-reducing attributes are:

- (1) a reduction in "inconsistency costs" by exposing parties involved in multiple jurisdictions to fewer sets of governance rules; (2) a reduction in "information costs" by making it easier for parties involved in multiple jurisdictions to determine what statute applies and to predict judicial interpretations of applicable statutes; (3) a reduction in "litigation costs" "by trivializing otherwise difficult choice-of-law issues and eliminating deadweight litigation costs involved in forum shopping"; (4) a reduction in "instability costs" as the uniform regime establishes a momentum to resist statutory changes that would differentially affect the parties to existing contracts; (5) a reduction in "externalities" when state legislators pass legislation to aid constituents at the expense of nonconstituents, by giving legislators a common solution to facilitate reciprocal fairness; and (6) a reduction in "drafting costs" by allowing drafting agencies to hire experts and otherwise dedicating resources to improve the quality of the legislative product.

Id. (citing Bruce H. Kobayashi & Larry E. Ribstein, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 137-40 (1996)).

litigation, create questions of legal complexity, promote forum shopping, and "produce a wholly unjustifiable lack of uniformity in the practical impact of a major federal statute on both plaintiffs and defendants."¹⁴⁸ It therefore is imperative that Congress or the courts promulgate a uniform interpretation of CERCLA arranger liability.

The Statutory Language

The judiciary undeniably has a responsibility to adhere to CERCLA's statutory language.¹⁴⁹ The legislative proposals that led to the enactment of the final statute¹⁵⁰ contemplated two different liability schemes.¹⁵¹ One of the bills considered by the House of Representatives, which Congress eventually rejected, imposed liability on those who "caused or contributed" to hazardous problems.¹⁵² The Senate proposal, which ultimately was

148. G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 341 (1982) (arguing for a universal interpretation of the Racketeer Influenced and Corrupt Organizations (RICO) provisions of the Organized Crime Control Act of 1970); see also *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (1988) ("In resolving the successor liability issues here, the district court must consider national uniformity; otherwise, CERCLA aims may be evaded easily by a responsible party's choice to arrange a merger or consolidation under the laws of particular states which unduly restrict successor liability."); *Mardan*, 804 F.2d at 1464 (Reinhardt, J., dissenting) ("To insure the development of a uniform rule of law, and to discourage business[es] dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law in [the CERCLA liability] area of law." (quoting 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio))).

149. See, e.g., *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, [the Court's] task is to interpret the words of [the statute] in light of the purposes Congress sought to serve."); *Abbott v. Bragdon*, 107 F.3d 934, 938 (1st Cir. 1997) (holding that in all cases of statutory construction, a court begins with the words of the statute and approaches them with the understanding that its "role is not to set public policy, but, rather, to discern the legislature's will"), *vacated*, 118 S. Ct. 2196 (1998).

150. See *Grad*, *supra* note 18, at 2 (identifying the three bills that contributed to the final legislation—H.R. 7020, 96th Cong. (1980); H.R. 85, 96th Cong. (1980); and S. 1480, 96th Cong. (1980)).

151. See John Copeland Nagle, *CERCLA, Causation, and Responsibility*, 78 MINN. L. REV. 1493, 1493 (1994).

152. See *id.* at 1493-94 (referring to H.R. 7020, 96th Cong. § 3071(a)(1)(D) (1980)). Based on the wording in the bill, the exact liability standard is unclear; the bill states that "any person who caused or contributed to the release or threatened re-

adopted in the final version of CERCLA, imposed liability on all "responsible parties."¹⁵³ The choice of responsible parties, and not causation, indicates that Congress intended a strict liability scheme based on the difficulty in applying traditional tort causation doctrines to hazardous waste cases.¹⁵⁴

CERCLA explicitly provides that the standard of liability should be construed in accordance with that established under section 311 of the Clean Water Act,¹⁵⁵ which the courts already had interpreted as a strict liability standard.¹⁵⁶ As in the Clean Water Act, the narrowly written, enumerated defenses outlined in CERCLA¹⁵⁷ imply strict liability. Courts have concluded that if the statute were to impose a negligence standard, the enumerated "defense of due care with respect to possible intervention by

lease [of hazardous substances] shall be strictly liable for such [cleanup] costs." H.R. 7020, 96th Cong. § 3071(a)(1)(D) (1980), *reprinted in* 2 CERCLA LEGISLATIVE HISTORY, *supra* note 4, at 391, 438. This liability scheme has been described by scholars both as a causation standard, *see* Nagle, *supra* note 151, at 1493-94, and as a strict liability standard, *see* Grad, *supra* note 18, at 5.

153. *See* Nagle, *supra* note 151, at 1494 (referring to S. 1480, 96th Cong. § 4(a) (1980)). "[T]hose actually 'responsible for any damage, environmental harm, or injury from chemical poisons [may be tagged with] the cost of their actions . . .'" United States v. Bestfoods, 118 S. Ct. 1876, 1882 (1998) (quoting S. REP. NO. 96-848, *supra* note 4, at 13, *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 4, at 320).

154. *See* Nagle, *supra* note 151, at 1503 ("The Senate bill specified in the statute itself the precise elements of liability instead of simply relying on the common law understanding of those who 'caused or contributed' to hazardous waste contamination.").

155. 33 U.S.C. § 1321 (1994). The CERCLA provision states: "[L]iability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of title 33." 42 U.S.C. § 9601(32) (1994).

156. *See* Pinkowski, *supra* note 37, at 202 n.24 (citing multiple cases supporting strict liability under the Clean Water Act). According to Pinkowski:

CERCLA § 107(a), 42 U.S.C.A. § 9607(a), is fairly clear about the nature of CERCLA liability. Although the statute does not specify that liability under section 107(a) is strict, it does describe who is liable and clearly states that liability may be defeated only by the defenses in 107(b). Further, CERCLA § 101(32) provides that liability shall be construed to be the standard of liability under section 311 of the Clean Water Act. Federal common law has held section 311 to impose strict liability.

Id. at 201-02 (footnotes omitted). Topol and Snow made a similar claim. *See* 1 TOPOL & SNOW, *supra* note 10, § 4.2, at 336 ("At the time that Congress [enacted CERCLA], Section 311 of the Clean Water Act had been construed by the courts as imposing strict liability upon certain designated parties, subject only to the defenses specifically enumerated in that statute.").

157. *See supra* note 37 and accompanying text.

third parties would be redundant, because due care is always a defense to negligence."¹⁵⁸

Strict liability also serves as the most efficient means of encouraging development of safer methods of hazardous waste disposal.¹⁵⁹ In fact, many scholars feel that CERCLA is clear in its imposition of strict liability.¹⁶⁰ As Professor Nagle concluded, the language of CERCLA "does not require proof that a defendant's actions caused the contamination."¹⁶¹ The statute may appear "harsh"¹⁶² or may lead to the "unfair imposition of liability,"¹⁶³ but the courts must take the statute as written.¹⁶⁴

158. *Developments in the Law—Toxic Waste Litigation*, *supra* note 33, at 1518; cf. 2A SINGER, *supra* note 21, § 45.12, at 61 ("[U]nreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result. It is a 'well established principle of statutory interpretation that the law favors rational and sensible construction.'" (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982))).

159. *See Developments in the Law—Toxic Waste Litigation*, *supra* note 33, at 1519-20 ("By forcing corporations involved in toxic waste disposal to internalize cleanup costs, strict liability serves as the most efficient means of encouraging the development of safer waste disposal techniques."); *see also* B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996) (stating that strict liability is intended to insure that those who benefit commercially "internalize the environmental costs of the activity as a cost of doing business"), *cert. denied*, 118 S. Ct. 2318 (1998).

160. *See, e.g.*, 1 TOPOL & SNOW, *supra* note 10, § 1.2, at 10. According to Topol & Snow:

Section 107(a) of the statute imposes strict liability upon [potentially responsible parties (PRPs)]. A plaintiff need not prove that a PRP negligently caused an adverse condition at a hazardous waste site. Instead, liability for governmental cleanup costs may be imposed on a PRP if the following conditions are satisfied: (1) the site where cleanup occurred was a "facility" as defined by CERCLA; (2) a "release" or "a threatened release" of a "hazardous substance" occurred at the site; and (3) the release or threatened release caused the plaintiff to incur response costs.

Id.; *see also* Nagle, *supra* note 151, at 1507 ("[T]he statute itself specifies who is liable, and the statutory language says nothing about showing cause in fact."); *supra* note 156 and accompanying text (discussing the imposition of strict liability under the statute through CERCLA's reference to the Clean Water Act).

161. Nagle, *supra* note 151, at 1524 (agreeing that CERCLA should be interpreted to impose strict arranger liability, as held in *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993), and *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992).

162. *Alcan*, 990 F.2d at 721.

163. *Alcan*, 964 F.2d at 267.

164. *See Alcan*, 990 F.2d at 717; cf. Nagle, *supra* note 151, at 1524-43 (recommend-

Recognizing Legislative Intent

CERCLA's legislative history lacks the committee and conference reports that traditionally accompany statutes.¹⁶⁵ Sufficient materials are available, however, to discern Congress's intent in enacting CERCLA.¹⁶⁶ Courts frequently have looked to the existing legislative history to interpret provisions of CERCLA.¹⁶⁷ The available legislative history supports the conclusion that responsibility, and not causation, was the legitimate intent of Congress.¹⁶⁸ As one scholar noted, "CERCLA's liability provision, which seeks to establish the responsibility of persons to pay the cost to remedy the harmful effects of their inadequate disposal activities, was critical to Congress'[s] choice to implement the new, strict standard of care."¹⁶⁹

ing a "no causation, no responsibility" liability scheme premised on the notion that "[i]f a party can prove that it did not pollute a site, it should not have to pay").

165. See *supra* note 22; see also Nagle, *supra* note 16, at 1406 (commenting on the dearth of useful legislative history regarding CERCLA).

166. Mikva points out that the tools necessary to ascertain legislative intent go beyond committee and conference reports:

Even the nuts and bolts of the legislative process can be valuable in divining the intent of Congress. The use of committee reports and floor debate (and the lack of it), the difference between floor amendments and committee amendments, the trade-offs between statutory language and committee report language, the impact of conference committee changes in a bill, the effect of conflicting interpretations given by members during floor debate—all of these elements are weighed differently by judges who have been exposed to the tortuous way in which a bill becomes law.

Mikva, *supra* note 16, at 634; see also 2A SINGER, *supra* note 21, § 45.06, at 30 ("[T]he sources of legislative intent are the language of a statute, the policy behind the statute and concepts of reasonableness and legislative history.").

167. See, e.g., *United States v. Bestfoods*, 118 S. Ct. 1876, 1883 (1998) (analyzing corporate liability); *Exxon Corp. v. Hunt*, 475 U.S. 355, 365-69, 373-74 (1986) (analyzing compensable damages); *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1581-82 (5th Cir. 1997) (analyzing contribution); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997) (analyzing contribution), *cert. denied*, 118 S. Ct. 2340 (1998); *United States v. Olin Corp.*, 107 F.3d 1506, 1513-14 (11th Cir. 1997) (analyzing retroactive liability); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996) (analyzing the purpose and liability scheme of the statute), *cert. denied*, 118 S. Ct. 2318 (1998); *Alcan*, 964 F.2d at 264-65 (analyzing causation).

168. See Grad, *supra* note 18, at 21.

169. Michael P. Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 CASE W. RES. L. REV. 65, 78 (1992).

Both the House and the Senate considered bills imposing strict liability when devising hazardous waste legislation.¹⁷⁰ Although the final bill deleted the term "strict liability," opting instead to refer to the liability scheme in the Clean Water Act, the statute nonetheless implicitly maintained a strict liability standard.¹⁷¹

Senator Randolph, Chairman of the Committee on Environment and Public Works and manager of the compromise bill that ultimately became CERCLA, specifically pointed out that the statute still imposed strict liability despite the change in statutory wording.¹⁷² In presenting the final bill to the Senate, Sen-

170. See Grad, *supra* note 18, at 9 (discussing strict liability as laid forth in S. 1480, 96th Cong. (1980)); *id.* at 3 (discussing strict liability as envisioned in H.R. 85, 96th Cong. (1980)); *id.* at 14-15 (discussing the concern in the House of Representatives regarding the scope of CERCLA liability in H.R. 7020, 96th Cong. (1980)); *id.* at 16-17 (discussing the concern over the third party defense to strict liability in "the Gore amendments").

Senate Report 96-848 summed up the rationale for CERCLA strict liability in describing the imposition of such a liability scheme in Senate Bill 1480:

The goal of assuring that those who caused chemical harm bear the costs of that harm is addressed in the reported legislation by the imposition of liability. Strict liability, the foundation of S. 1480, assures that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business. Strict liability is an important instrument in allocating the risks imposed upon society by the manufacture, transport, use, and disposal of inherently hazardous substances.

To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in hazardous substances which cause such damage benefit with relative impunity.

S. REP. NO. 96-848, *supra* note 4, at 13, reprinted in 1 CERCLA LEGISLATIVE HISTORY, *supra* note 4, at 320.

171. See Grad, *supra* note 18, at 21-22 (describing Senator Randolph's comments that the CERCLA compromise bill contained a strict liability scheme (citing 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph))).

172. See *id.* at 21 ("[Senator Randolph] noted that strict liability was kept in the compromise by specifying the standard of liability under section 311 of the [Clean Water Act]" (citing 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph))).

Although statements of individual legislators often are accorded little weight by courts, see 2A SINGER, *supra* note 21, § 48.13, at 353, a court will consider statements by the committee person in charge of a bill in construing provisions of the bill subsequently enacted into law, see *id.* § 48.14, at 361 ("These statements are

ator Stafford, a sponsor of the compromise bill, clarified the inclusion of strict liability in the final version of the act.¹⁷³ Congressman Florio similarly articulated Congress's intent to impose strict liability when the final bill was presented to the House of Representatives.¹⁷⁴ Moreover, those outside of Congress were aware that CERCLA included a strict liability scheme. For instance, in a letter to Congressman Florio commenting on CERCLA's liability provisions, the Department of Justice clearly acknowledged that CERCLA's liability scheme was strict.¹⁷⁵

Congress reiterated its intent regarding CERCLA liability in a more straightforward manner when considering amendments to the statute in 1985.¹⁷⁶ As stated by the House Committee on

regarded as being like supplemental committee reports and are accorded the same weight as formal committee reports.").

173. See Grad, *supra* note 18, at 28 ("Senator Stafford, in response to questions from Senator Simpson, reasserted that the liability standard under the Randolph-Stafford compromise was still strict liability by reference to section 311 of the [Clean Water Act]." (citing 126 CONG. REC. 30,986 (1980) (statement of Sen. Stafford))).

Like the committee person in charge of a particular bill, the bill's sponsor is particularly well informed regarding the bill's purpose, meaning, and intended effect. See 2A SINGER, *supra* note 21, § 48.15, at 364 ("[C]ourts give consideration to statements made by a bill's sponsor on the same grounds supporting the use of statements by the committeeman in charge of the bill." (footnote omitted)).

174. See Grad, *supra* note 18, at 30 ("While strict liability was not mentioned, Congressman Florio assured the members [of the House] that it was indeed continued by way of reference to section 311 of the [Clean Water Act]." (citing 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio))).

175. The letter stated, in pertinent part:

Senator Randolph is correct in stating that the liability standard under section 311 [of the Clean Water Act] is one of strict liability. Both the Senate passed "Superfund" legislation and section 311 provide for liability subject to certain specifically enumerated defenses. Neither provision allows for a defense based on the defendant's non-negligent conduct or exercise of due care. Caselaw construing section 311 clearly indicates that not only are the defenses to be narrowly construed but the plain meaning of the liability regime establishes a strict liability standard.

Letter from Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs, to James J. Florio, Chairman, Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce (Dec. 1, 1980), *reprinted in* 126 CONG. REC. 31,966 (1980).

176. See HOUSE COMM. ON ENERGY AND COMMERCE, SUPERFUND AMENDMENTS OF 1986, H.R. REP. NO. 99-253, pt. 1, at 74 (1985) [hereinafter H.R. REP. NO. 99-253(I)], *reprinted in* 1986 U.S.C.A.N. 2835, 2856, and in 3 SARA LEGISLATIVE HISTORY, *supra* note 10, at 1764, 1837.

Energy and Commerce, "[n]o change has been made in the standard of liability that applies under CERCLA. As under section 311 of the Federal Water Pollution Control Act, 33 U.S.C. [§] 1321, liability under CERCLA is strict, that is, without regard to fault or willfulness."¹⁷⁷ The report of the House Committee on the Judiciary and the Senate debates that followed the presentation of the conference report similarly reinforced a strict liability scheme under CERCLA.¹⁷⁸

The available legislative history regarding CERCLA demonstrates that Congress envisioned a strict liability standard, and there is nothing in the wording of the statute that is contrary to this vision.¹⁷⁹ Under CERCLA's strict liability scheme, parties are accountable for waste disposal practices regardless of intent, negligence, or causal connection.¹⁸⁰ Further, strict liability makes sense in the context of hazardous operations¹⁸¹ and, more specifically, in the context of hazardous waste disposal, based on the inherent danger involved in those activities.¹⁸² Simply put, "[t]he text, structure, and history of the statute

177. *Id.*

178. See H.R. REP. NO. 99-253(III), *supra* note 10, at 15, reprinted in 1986 U.S.C.A.N. at 3038, and in 3 SARA LEGISLATIVE HISTORY, *supra* note 10, at 2227 ("Liability for the cost of clean-ups under CERCLA . . . may be imposed without fault . . ."); 132 CONG. REC. 28,447 (1986), reprinted in 6 SARA LEGISLATIVE HISTORY, *supra* note 10, at 5236. Senator Durenberger, during Senate debate following presentation of the House Conference Report on SARA, stated: "But on the question of liability we have held firm. The rule is still strict, joint, and several liability. . . . Senator Stafford's steadfast adherence to this principle has been the one thing that everyone could count on from the very day this reauthorization process was begun." *Id.*

179. See 1 MAYS, *supra* note 31, § 7.01, at 7-3 (pointing out that although CERCLA's standard of liability is not specifically mentioned in the statute, CERCLA's legislative history makes it clear that the standard is one of strict liability); Oswald, *supra* note 1, at 590 ("The legislative history does indicate, however, that Congress intended that the general standard of liability under CERCLA be strict liability.").

180. Factors such as intent, negligence, and causation simply are irrelevant under a strict liability standard. See KEETON ET AL., *supra* note 60, § 75, at 537 ("The defendant is held liable merely because, as a matter of social adjustment, the conclusion is that the responsibility should be so placed.").

181. See Oswald, *supra* note 1, at 590-98 (describing the policy rationales underlying the imposition of strict liability to hazardous operations).

182. See *id.* at 598-603 (describing why strict liability is appropriate under CERCLA).

indicate that CERCLA does not require proof of causation. Most importantly, the statute itself specifies who is liable, and the statutory language says nothing about showing cause in fact.¹⁸³

The Evolution of Arranger Liability

For at least a decade after the statute was enacted, courts accepted a strict liability scheme under CERCLA without controversy.¹⁸⁴ As of 1992, scholars examining existing case law stated that "[i]t is now well settled that responsible parties are strictly liable under CERCLA"¹⁸⁵ and that courts "have *unanimously concluded* that the appropriate standard under CERCLA is strict liability."¹⁸⁶

Congress did anticipate, however, the adoption of federal common law to supplement the statute.¹⁸⁷

In sum, Congress intended that courts would play a substantial role in clarifying and supplementing the rules of liability stated in the Act. Congress expected that courts would focus on the purposes of the statute, i.e., prompt cleanups, *a strict standard of care for disposal activities*, narrowly limited

183. Nagle, *supra* note 151, at 1507.

184. See 1 TOPOL & SNOW, *supra* note 10, § 4.2, at 337-42; see also Oswald, *supra* note 1, at 598 (stating that "courts uniformly agree that strict liability applies to CERCLA violations"); *Developments in the Law—Toxic Waste Litigation*, *supra* note 33, at 1518 (noting that "[c]ourts addressing the issue have concluded, however, that CERCLA does impose strict liability"); cf. General Electric Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 286 (2d Cir. 1992) ("Almost all of the courts that have held defendants liable as arrangers have found that the defendant had *some actual involvement* in the decision to dispose of waste." (emphasis added)). See generally Healy, *supra* note 169, at 104-27 (examining the application of CERCLA strict liability in various contexts).

185. Healy, *supra* note 169, at 72.

186. 1 TOPOL & SNOW, *supra* note 10, § 4.2, at 337 (emphasis added).

187. See Healy, *supra* note 169, at 102 ("Congress also anticipated that the courts would play a critical role in implementing this new standard of liability."). The courts fulfilled this role by subsequently clarifying CERCLA's liability scheme. See, e.g., Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90-92 (3d Cir. 1988) (adopting successor liability); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809-10 (S.D. Ohio 1983) (adopting joint and several liability). Congress thereafter commented favorably on such judicial actions. See H.R. REP. NO. 99-253(I), *supra* note 176, at 74, reprinted in 1986 U.S.C.C.A.N. at 2856, and in 3 SARA LEGISLATIVE HISTORY, *supra* note 10, at 1837.

defenses, and an equitable cleanup cost allocation, to guide their construction of interstitial rules.¹⁸⁸

The evolution of federal common law therefore was never meant to supplant Congress's intended strict liability scheme.¹⁸⁹ Courts have reasoned that a strict liability standard is the best way to meet the congressional goals of "rapid cleanup, cost-shifting to responsible parties, and cost-spreading throughout the industry and the population of consumers."¹⁹⁰ Although strict liability is admittedly harsh,¹⁹¹ if parties know they are legally responsible, they should be able to protect themselves accordingly.¹⁹²

Since 1992, however, courts have strayed, without apparent justification, from the original legislative intent of strict liability.¹⁹³ This deviation from the CERCLA liability scheme that had been judicially accepted at the federal appellate level for over a decade can be classified only as judicial activism.¹⁹⁴

188. Healy, *supra* note 169, at 104 (emphasis added).

189. See *supra* notes 168-79 and accompanying text.

190. *Developments in the Law—Toxic Waste Litigation*, *supra* note 33, at 1519 (citing *United States v. Conservation Chem. Co.*, [1984] 14 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,207, 20,208 (W.D. Mo. Feb. 3, 1984); *United States v. Price*, 577 F. Supp. 1103, 1104 (D.N.J. 1983)).

191. See *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993). Although this liability scheme is potentially harsh, it is justified for several reasons. First, it shifts cleanup costs from the victims of hazardous waste to the parties responsible for creating the hazard. Second, it creates incentives for safer handling and disposal of wastes by ensuring that cleanup costs are internalized by the waste-generating industry. Third, it relieves the strain on the government's limited budget by encouraging defendants to locate and implead other responsible parties with whom they may share the burden of cleanup.

Developments in the Law—Toxic Waste Litigation, *supra* note 33, at 1513. Additionally, this "harshness" may be attenuated in individual cases through indemnification or contribution proceedings. See JOEL S. MOSKOWITZ, *ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS: LAW AND PRACTICE* § 12.6, at 156-65 (2d ed. 1995); *supra* note 145.

192. This argument loses some strength in light of the retroactive enforcement provision of CERCLA. See *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 732-33 (8th Cir. 1986) ("Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect."); MOSKOWITZ, *supra* note 191, § 4.5, at 48-49 (explaining that courts have held "that retroactive application of CERCLA for acts committed before the enactment of CERCLA is intended by the statute and does not offend due process").

193. See 1 *TOPOL & SNOW*, *supra* note 10, at III (Supp. 1998).

194. See *id.* As Topol and Snow point out:

Judge Posner's 1993 decision in *Amcast*¹⁹⁵ represented the court's initial departure from the paradigmatic approach of strict CERCLA arranger liability, although previous court decisions may have set the stage for the retreat.¹⁹⁶ Posner's requirement of intentional action¹⁹⁷ seemingly ignored the numerous CERCLA strict liability decisions that the United States District Court for the Northern District of Indiana found persuasive;¹⁹⁸ in so doing, the Seventh Circuit reversed the district court's finding that the supplier of a hazardous substance arranged for its disposal.¹⁹⁹

Although ample CERCLA case law imposing strict arranger liability existed at the time *Amcast* was decided, Posner opted to rely instead on a single case for support of his analysis of arranger liability:²⁰⁰ *Indiana Harbor Belt Railroad v. American*

Although . . . Congress has managed to agree on changes to only one small aspect of the scheme (the reduced exposure to liability of lenders and fiduciaries), the federal courts have undertaken a Superfund reform of their own. While they have reached only a few truly radical decisions, the federal courts have frequently decided close cases in ways that constitute departures from past rulings. In addition, the federal courts have, in a number of significant instances, read the law somewhat more favorably for potentially responsible parties. We can only assume that some courts now recognize that the Superfund program has gone too far and that a fix is needed. Those courts seem ready and willing, within the limits of their judicial role, to correct the problems.

Id.

195. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993).

196. See, e.g., *Florida Power & Light Co. v. Allis-Chalmers Corp.*, [1988] 27 Env't Rep. Cas. (BNA) 1558 (S.D. Fla. 1988), *aff'd*, 893 F.2d 1313 (11th Cir. 1990); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 654-57 (N.D. Ill.), *aff'd on other grounds*, 861 F.2d 155 (7th Cir. 1988); *United States v. Westinghouse Elec. Corp.*, [1983] 22 Env't Rep. Cas. (BNA) 1230 (S.D. Ind. 1983). These cases differ from *Amcast*, however, in that they deal with the "useful" substance exception to CERCLA liability. See *Florida Power*, [1988] 27 Env't Rep. Cas. (BNA) at 1560; *Edward Hines*, 685 F. Supp. at 656; *Westinghouse*, [1983] 22 Env't Rep. Cas. (BNA) at 1232. See also *supra* note 73 and accompanying text (discussing the "useful" substance exception).

197. See *Amcast*, 2 F.3d at 751.

198. See *Amcast Indus. Corp. v. Detrex Corp.*, 779 F. Supp. 1519, 1535 (N.D. Ind. 1991) (citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989)); *Rodenbeck v. Marathon Petroleum Co.*, 742 F. Supp. 1448, 1455-56 (N.D. Ind. 1990); *General Electric Co. v. Litton Bus. Sys. Inc.*, 715 F. Supp. 949, 959 (W.D. Mo. 1989), *aff'd*, 920 F.2d 1415 (8th Cir. 1990), *aff'd in part, rev'd in part*, 2 F.3d 746 (7th Cir. 1993).

199. See *Amcast*, 2 F.3d at 751.

200. See *id.* Posner also failed to explore the decision in *Edward Hines*, a previous

Cyanamid Co.,²⁰¹ an opinion he wrote three years earlier. *Indiana Harbor* was a non-CERCLA case involving a common law decision that explored whether to apply strict liability to a company that supplied acrylonitrile, a "hazardous" chemical, for rail transportation.²⁰² Crucial to the decision in *Indiana Harbor* seemed to be the extent of danger involved in the "hazardous" operation; Posner suggested that transportation of a more hazardous substance might warrant the imposition of strict liability.²⁰³ Therein lies the key distinction between *Indiana Harbor* and *Amcast*. In *Indiana Harbor*, the court found that it had to look to the common law to determine where the line should be drawn between negligence and strict liability.²⁰⁴ In *Amcast*, however, the court's task was to apply a statute that *required* the imposition of strict liability.²⁰⁵ Although Posner made the correct determination regarding the appropriate liability standard in *Indiana Harbor*, such a determination was inappropriate in *Amcast*. In *Amcast*, Posner had a duty to apply the legislatively mandated strict liability standard that Congress enacted when it created CERCLA.

There is little indication that Judge Posner viewed his role in *Amcast* as one involving statutory *interpretation*. It can be argued, however, that Posner felt that no interpretation was required; he may have believed that the plain and ordinary meaning of "arranged for" was apparent from the statutory language.

Seventh Circuit case that involved the "useful" substance exception to strict liability and that arguably could have supported his requirement of intent. *See Edward Hines*, 685 F. Supp. at 656. This is especially surprising in light of the fact that Posner sat on the panel that affirmed the case. *See Edward Hines*, 861 F.2d 155, 155 (7th Cir. 1988).

201. 916 F.2d 1174 (7th Cir. 1990).

202. *See id.* at 1175-76.

203. *See id.* at 1182 ("We need not speculate on the possibility of imposing strict liability on shippers of more hazardous materials, such as . . . bombs We noted earlier that acrylonitrile is far from being the most hazardous among materials shipped by rail in highest volume. Or among materials shipped, period.").

204. *See id.* at 1182-83 (pointing out that "the emphasis is on picking a liability regime (negligence or strict liability) that will control the particular class of accidents in question most effectively").

205. *See supra* notes 149-64 and accompanying text. It has been argued that "[b]y resorting to the common law, Judge Posner render[ed] CERCLA ineffective in achieving its goals of facilitating cleanup and providing incentives to [potentially responsible parties]." Caretti, *supra* note 82, at 244.

As Posner himself stated, "[a]lthough the statute defines disposal to include spilling, the critical words . . . are 'arranged for.' *The words imply intentional action.*"²⁰⁶ Perhaps Posner found the plain meaning that somehow had eluded other courts during the first twelve years of CERCLA's existence.²⁰⁷

In announcing his "definition" of "arranged for," however, Posner cited no source, and apparently ignored other courts' previous interpretations of the phrase.²⁰⁸ Additionally, in relying only on the language of the statute, Posner contradicted his own view of the "plain meaning" rule of statutory interpretation. Posner believes that in interpreting statutes, judges

start with the case law and may never return to the statutory language Even in dealing with statutes that have not generated a huge body of case law, a judge usually begins not with the language of the statute but with some conception of its subject matter and the likely purpose²⁰⁹

Judge Posner's failure to mention CERCLA's legislative history, even though it was pointed out in *Amcast's* lower court opinion,²¹⁰ is particularly surprising in light of his well-documented views regarding the importance of understanding the legislative process and discerning legislative intent when interpreting stat-

206. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (emphasis added).

207. See *supra* notes 184-86 and accompanying text.

208. See *Amcast*, 2 F.3d at 751; see also *supra* note 200 (discussing a previous district court decision within the Seventh Circuit that had interpreted CERCLA arranger liability).

209. Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808 (1983). Posner went on to say:

Of course the words of a statute are always relevant, often decisive, and usually the most important evidence of what the statute was meant to accomplish. I merely object to the proposition that one must always begin with the words, and I am reasonably confident that more often than not the judge—the good judge as well as the bad judge—in fact begins somewhere else.

Id.

210. See *Amcast Indus. Corp. v. Detrex Corp.*, 779 F. Supp. 1519, 1535 (N.D. Ind. 1991) (summarizing the plaintiff's argument that anything other than strict liability would make the third party defense of section 9607(b)(3) of CERCLA "superfluous" (citing 126 CONG. REC. 24,151 (1980); S. REP. NO. 96-848, *supra* note 4, at 13, reprinted in 1 CERCLA LEGISLATIVE HISTORY, *supra* note 4, at 320)), *aff'd in part, rev'd in part*, 2 F.3d 746 (7th Cir. 1993).

utes.²¹¹ As a starting point, Posner believes that judges cannot decide statutory construction cases adequately without understanding the legislative process.²¹² To this end, Posner favors the establishment of law school courses focusing on the academic study of legislation,²¹³ with instruction in researching legislative history as one of its main objectives.²¹⁴ Further, Posner has stated that when reviewing statutes, "[c]ourts [should] look to the language of the statute, to the legislative history, and to other evidence of legislative intent."²¹⁵ In his view, "[a] court should adhere to the enacting legislature's purposes (so far as those purposes can be discerned) even if it is certain that the

211. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 267-70 (1985) [hereinafter POSNER, *FEDERAL COURTS*]; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 269-78 (1990) [hereinafter POSNER, *JURISPRUDENCE*]; Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 272, 274-75 (1982) [hereinafter Posner, *Reading of Statutes*]; Posner, *supra* note 209, at 804-05, 810, 818.

212. See Mikva, *supra* note 16, at 632 (discussing Posner's view).

213. See Posner, *supra* note 209, at 800-05. Posner pointed out that "[w]hile many academic lawyers are experts on particular statutes—which largely means experts on what courts have said about the particular statutes they teach—few are experts on legislation. Few study legislation as an object of systematic inquiry comparable to the common law" *Id.* at 801.

214. See *id.* at 803-05 (stating that such a course should include topics dealing with the process of legislation, the empirical study of legislation, techniques for judicial interpretation of statutes, and researching legislative history). Regarding researching legislative history, Posner indicated that "[a] year and a half of reading briefs in cases that often involve statutory interpretation has convinced me that many lawyers do not research legislative history as carefully as they research case law." *Id.* at 804.

215. Posner, *Reading of Statutes*, *supra* note 211, at 272 (footnote omitted); see also RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 317 (1996) ("[I]t would be questionable if judges decided to stop consulting legislative history so that they could decide issues of statutory interpretation in less time."). Additionally, other Seventh Circuit opinions written by Posner near the time at which *Amcast* was decided expressed his reliance on legislative history and legislative intent when interpreting statutes. See, e.g., *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181 (7th Cir. 1993) (relying on legislative history in holding that supplemental jurisdiction could be exercised over a privacy claim that arose under the Labor Management Relations Act); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493-94 (7th Cir. 1993) (attempting to determine the legislative intent of a provision of the Fair Labor Standards Act, and pointing out that in a previous Supreme Court case requiring interpretation of the Act, "the Court did not stop with the 'plain language' of the Act, but went on to examine the legislative intent" (citing *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987))).

current legislature has different purposes and will respond by amending the relevant legislation to reverse the court's interpretation.²¹⁶

Posner has recognized, however, the long-standing debate concerning whether it is ever proper, based on the potential bias of legislators, for judges to use legislative history in interpreting statutes.²¹⁷ His solution to this dilemma is an alternative approach to statutory interpretation: the method of "imaginative reconstruction."²¹⁸ Under this approach, the goal of the judge is "to put himself [or herself] in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him [or her]."²¹⁹ This necessarily dictates that the judge cannot study only the plain meaning of a statute; he or she also must attempt to discern the intent of the legislature.²²⁰

The judge who follows this approach will be looking at the usual things that the intelligent literature on statutory construction tells him to look at—such as the language and apparent purpose of the statute, its background and structure, *its legislative history* (especially the committee reports and the floor statements of the sponsors), and the bearing of related statutes. . . . It is not the judge's job to keep a statute up to date in the sense of making it reflect contemporary values; it is his [or her] job to imagine as best he [or she] can how the legislators who enacted the statute would have wanted it applied to situations that they did not foresee.²²¹

216. Posner, *supra* note 209, at 810.

217. See POSNER, *FEDERAL COURTS*, *supra* note 211, at 269.

218. See *id.* at 286-93; POSNER, *JURISPRUDENCE*, *supra* note 211, at 273-76; Posner, *supra* note 209, at 817-18.

219. POSNER, *FEDERAL COURTS*, *supra* note 211, at 286-87. Posner went on to point out that a "judge who follows the suggested approach will not only consider the language, structure, and *history of the statute*, but also study the values and attitudes, as far as they can be known today, of the period when the legislation was enacted." *Id.* at 287 (emphasis added).

220. See POSNER, *JURISPRUDENCE*, *supra* note 211, at 273 ("[Judges] cannot only study plain meanings; they must try to understand the problem that the legislators faced.").

221. Posner, *supra* note 209, at 818 (emphasis added); see also POSNER, *FEDERAL COURTS*, *supra* note 211, at 287 (making the same argument).

Judge Posner inexplicably declined to apply "imaginative reconstruction" when deciding *Amcast*.

As a consequence of Posner's decision in *Amcast*, judicial application of strict liability to "arrangers" in CERCLA cases ceased to be automatic.²²² The Eighth Circuit's opinion in *United States v. Aceto Agricultural Chemicals Corp.*,²²³ a decision that was consistent with the overwhelming majority of previous cases supporting strict CERCLA arranger liability, later was viewed by courts as an "alternative approach" to *Amcast*, exposing a fertile middle ground to the judiciary. This "compromise" interpretation was seized upon by, among others, the Eleventh Circuit in *South Florida Water Management District v. Montalvo*.²²⁴ Once other courts recognized the split among the federal circuits, a green light was given for judicial activism, resulting in an ignorance of the original legislative intent and a myriad of interpretations of CERCLA arranger liability.²²⁵

222. See *supra* notes 101-44 and accompanying text; see also Caretti, *supra* note 82, at 245 ("[T]he *Amcast* decision presents a potential for other courts to adopt its faulty reasoning and narrow the scope of CERCLA liability.").

223. 872 F.2d 1373 (8th Cir. 1989).

224. 84 F.3d 402, 409 (11th Cir. 1996). Several federal district courts subsequently adopted this approach. See, e.g., *Briggs & Stratton Corp. v. Concrete Sales & Servs., Inc.*, 990 F. Supp. 1473, 1479 (M.D. Ga. 1998); *United States v. Gordon Stafford, Inc.*, 952 F. Supp. 337, 339-40 (N.D. W. Va. 1997); *Mathews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1523-25 (D. Colo. 1996).

225. See *supra* notes 101-44 and accompanying text. Challenging logic, the Sixth Circuit Court of Appeals seemingly attempted to reconcile the three approaches to arranger liability when it decided *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227 (6th Cir. 1996). The court initially recognized CERCLA's strict liability standard. See *id.* at 1231 ("[I]f the tortured history of CERCLA has taught us one lesson, it is that CERCLA is a strict liability statute."). It then went on to state that "[n]otwithstanding the strict liability nature of CERCLA, it would be error for us not to recognize the indispensable role that state of mind must play in determining whether a party has 'otherwise arranged for disposal . . . of hazardous substances.'" *Id.* (quoting 42 U.S.C. § 9607(a) (1994)). According to the court, "in the absence of a contract or agreement, a court must look to the *totality of the circumstances*, including any 'affirmative acts to dispose,' to determine whether the Defendants *intended to enter into an arrangement for disposal*." *Id.* at 1232 (emphasis added). The court justified its holding by noting that "this principle is in line with the Seventh Circuit's 'intentional action' requirement for arranger liability announced in *Amcast*." *Id.* This line of reasoning arguably would be of little use to those facing potential liability as "arrangers" under CERCLA.

CONCLUSION

The statutory language and available legislative history indicate that Congress intended CERCLA to possess a concomitant strict liability standard. Courts applied such a standard consistently for over a decade in CERCLA arranger liability cases. Judge Posner's 1993 opinion in *Amcast* represented a sharp departure from previous CERCLA case law by inexplicably requiring intentional action for liability to attach. Despite the wealth of previous case law and the existing legislative history, Posner chose instead to adopt a "plain meaning" of "arranged for" that previous courts overwhelmingly had rejected. Other courts subsequently viewed Posner's opinion as an alternate interpretation to the strict liability approach adopted in the plethora of previous CERCLA arranger liability cases, paving the way for a third, middle-ground interpretation of "arranged for" that has left the interpretation of CERCLA "arranger liability" in an uncertain state.

The United States Supreme Court routinely decides issues on which federal appellate courts disagree. The existence of three separate interpretations of CERCLA arranger liability makes the issue ripe for the Supreme Court to determine "the law of the land."²²⁶ A unified judicial interpretation is necessary to assist those affected by CERCLA in taking prophylactic measures to ensure compliance with the statute. In light of the wording of the statute and the available legislative history, courts should interpret CERCLA as Congress intended, imposing *strict liability* on parties responsible for arranging the disposal of hazardous substances.

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226. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").