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Comment

*641 CERCLA VICARIOUS LIABILITY AFTER UNITED STATES v. ACETO AGRICULTURAL CHEMICAL CORPORATION: MORE THAN A COMMON-LAW DUTY?

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The problem of hazardous waste generated by American industry has increased at an alarming rate. [\[FN1\]](#) Unfortunately, prior to 1980 legal mechanisms failed to manage properly the disposal of these wastes. [\[FN2\]](#) Public outcry arising from images of improperly disposed chemicals oozing from the ground in places such as Love Canal [\[FN3\]](#) finally pushed Congress, in 1980, to enact what has been called the "most radical environmental statute in American history." [\[FN4\]](#) This statute, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), [\[FN5\]](#) implements long-range goals designed to clean the hazardous waste left by decades of industrial mismanagement. [\[FN6\]](#)

CERCLA responds to problems of actual or threatened releases [\[FN7\]](#) of *642 hazardous substances [\[FN8\]](#) into the environment. [\[FN9\]](#) CERCLA authorizes the Environmental Protection Agency (EPA), or a state acting under a cooperative agreement with the EPA, to undertake response activities [\[FN10\]](#) that mitigate the effects of a release of hazardous substances. [\[FN11\]](#) If the EPA or authorized state agency performs the cleanup, [\[FN12\]](#) the response costs may be recovered from potentially responsible parties (PRPs) [\[FN13\]](#) through CERCLA's liability, [\[FN14\]](#) enforcement, [\[FN15\]](#) and settlement provisions. [\[FN16\]](#) Alternatively, the *643 EPA may order PRPs to perform the cleanup themselves [\[FN17\]](#) at their own expense. [\[FN18\]](#)

Four classes of parties are potentially liable under CERCLA for the cost of response actions. [\[FN19\]](#) Of the four classes, one is especially ambiguous. CERCLA section 107(a)(3), which describes the ambiguous class, provides that "any person who . . . arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, *644 at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances." [\[FN20\]](#)

In *United States v. Aceto Agricultural Chemicals Corporation* [\[FN21\]](#) the Eighth Circuit Court of Appeals held that manufacturers could be held liable for releases caused by the operations of a third party--the manufacturer's independent contractor--on land owned by the third party under the ambiguous "arranged for" liability provision in section 107(a)(3) of CERCLA. [\[FN22\]](#) The *Aceto* decision is a new development in the interpretation of the "arranged for" liability provision [\[FN23\]](#) because it is the first time a court *645 has used common-law concepts of vicarious liability to aid in interpretation of that provision. [\[FN24\]](#) This Comment focuses on how use of common-law vicarious liability concepts has changed CERCLA liability under section 107(a)(3). [\[FN25\]](#)

This Comment analyzes *United States v. Aceto Agricultural Chemicals Corporation*, a case that introduced common-law vicarious liability to the evolving formulation of CERCLA liability. First, the Comment reviews the *Aceto* decision and the case law on which it is based. [\[FN26\]](#) The Comment then explains how the *Aceto* decision is consistent with the intent of Congress and evolving CERCLA case law because it used common-law principles of vicarious liability to aid in interpreting CERCLA liability. [\[FN27\]](#) The Comment next analyzes the potential impact

of using common-law concepts of vicarious liability to help solve the ambiguity of the term "arranged for" under section 107(a)(3) of **CERCLA**. [FN28] The Comment then argues that the appropriate scope and formulation of vicarious liability under **CERCLA** should be more stringent than that allowed under the common-law *646 approach to vicarious liability. [FN29] To meet the unique purposes behind **CERCLA**, generators must be held liable under section 107(a)(3) for any release of a hazardous substance by their independent contractors even if the generator's activity would have escaped liability under common law.

The EPA and the State of Iowa initiated the **Aceto** case in order to recover over ten million dollars in response costs they incurred in the cleanup of a pesticide formulation plant operated by Aidex Corporation in Mills County, Iowa. [FN30] During the time the Aidex plant was in operation, [FN31] the site contained four metal buildings, an eight-thousand-gallon underground storage tank, two waste burial trenches, a liquid formulation building, and hundreds of storage drums and tanks containing hazardous wastes and other hazardous substances. [FN32] In 1976 a fire destroyed the liquid formulation building, leaving only the foundation of the building on the site. [FN33] The force of the water used to fight the fire caused various chemicals to spill onto the ground, spread over the surface of the site, and contaminate the soil. [FN34] In addition, chemical wastes leaked from the deteriorating storage tanks. [FN35] As a result, hazardous substances were found in soil, groundwater, fauna samples, and deteriorating containers at the site. [FN36] The existence of hazardous substances in the groundwater threatened the source of irrigation and drinking water for area residents. [FN37]

These events attracted the attention of the Environmental Protection Agency. [FN38] The EPA and the State of Iowa proceeded to clean up the site. [FN39] They collected and transported solid and liquid chemical wastes and contaminated debris to EPA-approved sites for incineration or disposal. [FN40] They also removed contaminated surface soils and placed them in a storage area constructed on-site. [FN41] As of November 30, 1986, the EPA had spent \$10,013,700.00 on these response actions. [FN42] As of March 1, 1987, the State of Iowa had incurred expenses of \$95,451.00 and was committed to the EPA to pay an additional \$780,000.00. [FN43]

The EPA sought to recover its response costs from eight pesticide manufacturers who contracted with Aidex to formulate their technicalgrade *647 pesticides into commercial-grade pesticides. [FN44] It is a common industry practice for pesticide manufacturers to contract with a pesticide formulator, such as Aidex, to mix active pesticides with inert ingredients pursuant to specifications provided by the manufacturer. [FN45] After mixing, the formulator packages the commercial product and ships it back to the manufacturer or sells it directly to farmers. [FN46] The EPA and the State of Iowa alleged that the generation of pesticide-containing wastes was an "inherent" part of the formulation process because of inevitable spills, cleaning of equipment, mixing and grinding operations, and production of batches that do not meet specifications. [FN47] Thus, the government asserted that the manufacturers were liable under **CERCLA** "because the manufacturers arranged for Aidex to formulate and package their pesticides through processes that necessarily result in the generation of wastes." [FN48] Under **CERCLA** section 107(a)(3), [FN49] a PRP is liable for cleanup response costs if it is found that the PRP "arranged for" the disposal of hazardous wastes that subsequently were released into the environment. [FN50]

The defendants moved to dismiss the claim, [FN51] arguing that the contract was for the performance of services on a valuable product, and left the control and disposal of any resulting hazardous wastes with Aidex. [FN52] The district court reasoned that liability under **CERCLA** for a person who arranges the disposal of hazardous substances requires a showing of ownership of the hazardous material at least at the time of the arrangement. [FN53] The court implied that since the defendants still owned the hazardous substances, they had ultimate responsibility for their disposal and treatment. [FN54] Furthermore, the court held that the defendants could not *648 escape liability by claiming that they did not intend for any disposal activities to take place at the hands of the independent contractor. [FN55]

How the district court reached its conclusions, however, is even more significant than the outcome in the case. The court held that when the statutory language and legislative history of **CERCLA** are inconclusive and the legislative history shows that common law was intended to fill such gaps, the common law is a proper source of guid-

ance. [\[FN56\]](#) Although the district court cited to several sections of the Restatement (Second) of Torts, [\[FN57\]](#) it relied on section 427A to establish vicarious liability for one who employs an independent contractor to do work that involves an abnormally dangerous [\[FN58\]](#) activity. [\[FN59\]](#) Applying section 427A, the court held that liability could be imposed on the defendants for physical harm resulting from their independent contractor's work, even if that harm was not an intended result of the relationship. [\[FN60\]](#) The district court added a caveat to its holding, however, that "the Court does not hold that **CERCLA** and the common law are co-extensive." [\[FN61\]](#)

The district court explained that the common law was helpful in two respects. First, the common-law provisions of vicarious liability "support the contention that the [manufacturers] can be viewed as 'parties responsible for creating hazardous waste products,' so that the burden of ambiguity of the terms 'arranged for' shifts to the defendants, and the Court can demand that they find specific congressional intent to absolve them of liability." [\[FN62\]](#) Second, the district court said the common law is helpful because it provides meaningful guidelines for resolving liability questions instead of relying only on the ambiguous terms of section 107(a)(3) of **CERCLA**. [\[FN63\]](#)

The district court denied the defendant's motion to dismiss since it was possible that the plaintiffs could prove they were entitled to relief under *649 **CERCLA**. [\[FN64\]](#) On appeal, the Eighth Circuit affirmed the lower court's decision. [\[FN65\]](#) The Eighth Circuit Court of Appeals agreed that Congress had intended to impose liability under **CERCLA** on parties responsible for harmful conditions created by hazardous waste, and this responsibility could not be avoided by parties claiming they only had intended that the formulator produce useful products [\[FN66\]](#) and never intended disposal. [\[FN67\]](#) The **Aceto** court reasoned that the defendants had never transferred ownership [\[FN68\]](#) and the common law supported imposition of liability on them. [\[FN69\]](#) To reach its holding, the appellate court distinguished **Aceto** from cases that have held that liability cannot be imposed when a useful substance is sold to another party who incorporates it into a product and then disposes of it. [\[FN70\]](#)

An analysis of the cases relied on by the **Aceto** court seems at first to suggest that the intent of the parties conducting the transaction is dispositive as to the issue of liability. However, a closer analysis of these cases reveals that lack of an intent to dispose is not dispositive. [\[FN71\]](#) Coupled with the *650 outcome of **Aceto**, these cases clearly establish the principle that even if a hazardous substance is sold with the intention that it will be used as a useful product, this alone is not enough to relieve a PRP from liability. [\[FN72\]](#) In fact, the only cases in which the "sale" of a hazardous substance has relieved a PRP from liability are those in which a newly-manufactured primary product was sold to an entity that then incorporated it into its own product. [\[FN73\]](#) Unless this "bona fide" [\[FN74\]](#) transfer of ownership has occurred, the PRP remains liable for the response costs incurred as a result of any release of its hazardous substance from a facility. In determining whether the transfer of ownership amounts to a "bona fide" sale, courts look to whether the hazardous substance was incorporated into another product [\[FN75\]](#) and how long the hazardous substance was "used" after the transaction and before disposal. [\[FN76\]](#)

In **Aceto** and other cases interpreting section 107(a)(3) of **CERCLA**, the overriding concern is that unless a hazardous substance has been sold as a bona fide product, the PRP should remain liable for any release from a facility. Absent a bona fide sale, the responsibility of ensuring proper disposal is nondelegable. [\[FN77\]](#) This controversial interpretation results from *651 attempts by courts to give effect to the congressional intent behind the most radical environmental statute in United States history. [\[FN78\]](#)

CERCLA is a remedial statute, [\[FN79\]](#) designed by Congress to give government "the tools necessary for a prompt and effective response" [\[FN80\]](#) to remedy sites leaking hazardous waste and to make those responsible for the sites bear the costs. [\[FN81\]](#) The statute was hastily enacted as a compromise bill "in the closing days of a lame-duck" Congress. [\[FN82\]](#) As a result, **CERCLA** contains numerous ambiguities, poorly drafted provisions, [\[FN83\]](#) and "a fragmented legislative history." [\[FN84\]](#) The statute's assignment of liability is little more than a list of enumerated parties who are liable for incurred cleanup costs. [\[FN85\]](#) The standards for determining liability are not defined by the statute. The legislative history indicates simply that liability issues are intended to be resolved by the courts in accordance with evolving principles of tort common law [\[FN86\]](#) and cases decided under the Federal Water Pollution Control Act. [\[FN87\]](#) Courts that have been faced with deciding liability issues under **CERCLA** soon

realized that strict as well as joint and several liability were intended by the drafters of **CERCLA**. [FN88] The Eighth Circuit has followed this trend and has added yet another aspect to **CERCLA** liability. The Eighth Circuit in **Aceto** held that the common-law doctrines of vicarious liability [FN89]--in particular, section 427A of the Restatement (Second) of *652 Torts [FN90]--are a proper source of guidance when interpreting **CERCLA** liability. [FN91]

The **Aceto** court's invitation to use common-law principles of vicarious liability [FN92] to interpret section 107(a)(3) of **CERCLA** [FN93] may have great impact on the future of defining **CERCLA** liability. Since the appeal in **Aceto** was based on a motion to dismiss for failure to state a claim, [FN94] the court did not have to decide whether the plaintiffs would ultimately prevail, but only whether they had alleged a claim for which relief could be granted. [FN95] Thus, the Eighth Circuit never discussed the details of how common-law doctrines of vicarious liability would help define liability concepts under **CERCLA**. [FN96] It is unclear whether courts applying vicarious liability concepts in **CERCLA** cases after **Aceto** should adopt the Restatement formulation of vicarious liability [FN97] or whether vicarious liability under **CERCLA** should differ from the Restatement approach. [FN98] The Eighth Circuit simply concluded that "the common law supports the imposition of liability on the defendants." [FN99] A comparison of common-law vicarious liability with existing *653 concepts of liability under **CERCLA** reveals some similarities and some very important differences that may create difficult issues for courts faced with determining liability. Section 427A of the Restatement, [FN100] the section that arguably would fit most fact situations involving **CERCLA** claims, illustrates the implications of adopting a Restatement formulation of liability. [FN101] This Restatement section imposes strict liability on employers (or PRPs under **CERCLA**) for the activities of their independent contractors if the activities are "abnormally dangerous." [FN102] Comment a of section 427A directs the reader to apply Restatement section 520 to determine the liability of both the employer and the independent contractor. [FN103] Section 520 contains a list of factors to be used by courts in defining what activities amount to "abnormally dangerous activities." [FN104] These factors are:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes. [FN105]

Consequently, according to these Restatement factors, a defendant can escape liability if the defendant's activity serves the broad public interest. [FN106] For example, chemical industries can benefit communities in which they are located by furnishing essential goods to many industrial and agricultural activities, by providing jobs, and by contributing to the development of the local economy. As long as these industries remain appropriately located away from residential areas, [FN107] they will escape liability for damages resulting from their release of hazardous substances into the environment.

*654 The implication of adopting the Restatement formulation of liability is that it favors PRPs. Applying Restatement § 427A, PRPs find relief from liability when their operations serve a broader public interest than the danger the operations pose. This approach is justifiable because it protects populations from the possible hazards to human health that are caused by inappropriately located facilities releasing hazardous substances. Moreover, this method seems to meet most of the cost-shifting [FN108] and effective response goals of **CERCLA**. [FN109] Consequently, adoption of the Restatement appears consistent with **CERCLA** in this context.

Adoption of the Restatement formulation of factors for determining liability, however, may conflict with the existing approach to **CERCLA** in other factual contexts. The following hypothetical scenario illustrates this tension. Imagine that the EPA is alerted to a site heavily contaminated with a variety of hazardous substances. Although the contamination has migrated to the underlying aquifer, the site does not present any immediate harm to the public because it lies two miles from the nearest community. [FN110] Any court addressing such a standard would be precluded from resting its decision solely on the plain language of **CERCLA** because of the ambiguity [FN111] and unclear legislative history of section 107(a)(3) and because of the lack of guidance regarding the use of common-law

standards in defining that section. Consequently, the interpretation of section 107(a)(3) should be based on the best public policy. One public policy argument PRPs will raise is that the chosen rule should create a legal incentive for independent contractors to locate away from populated areas. PRPs will further argue that section 427A requires that the rule consider whether an activity is appropriate to its surroundings. The contrary public policy argument addresses the policies behind **CERCLA**. Allowing the defendants to escape liability under these factual circumstances could create a trend that is likely to frustrate the statutory goals of **CERCLA** [\[FN112\]](#) and the strict liability concepts established by **CERCLA** case law. [\[FN113\]](#) Since **CERCLA** was designed as a remedial statute rather than a statute creating causes of action for individual compensation, anything that frustrates the fundamental *655 purposes of the statute is against public policy. The latter argument necessarily rejects the complete adoption of the Restatement approach.

Courts applying vicarious liability concepts under **CERCLA** liability claims should conclude that in order to meet the unique purposes behind **CERCLA**, a stricter formulation for vicarious liability is needed than that found in the Restatement. Four reasons support formulation of a vicarious liability standard different from that found in section 427A of the Restatement (Second) of Torts. First, Congressional intent, as evidenced by **CERCLA**, precludes allowing the appropriateness of a facility handling hazardous substances relative to its surroundings to be considered when determining liability under **CERCLA**. [\[FN114\]](#) Second, a rule creating an incentive for locating industrial activities involving hazardous substances outside of residential areas, or for any other similar relaxation of the strict liability standards, would produce the same situation that federal hazardous waste laws were designed to eliminate. Third, administrative mechanisms already exist under **CERCLA** that sufficiently meet the public policy interest of protecting the public from harmful effects of inappropriately located facilities that handle hazardous substances. Finally, going back to the common law to limit liability would defeat the comprehensive liability mechanism provided by **CERCLA**.

The intent behind **CERCLA** provides the first reason why the Restatement formulation of vicarious liability should not be completely adopted. Under **CERCLA** liability, the appropriateness of a facility is irrelevant to a liability determination because Congress sought to protect the environment as well as human health. [\[FN115\]](#) Following the plain language of **CERCLA** and the developing case law, if the activity results in a "release to the environment" of a hazardous substance from a "facility," then the PRP is liable regardless of the location of the facility. [\[FN116\]](#) The design to minimize or mitigate damage to the public health or welfare or to the environment represents a common theme running throughout **CERCLA**. [\[FN117\]](#) The First and Second Circuits have ruled that courts should not "interpret § 107(a) of **CERCLA** in any way that frustrates the statute's goals, in the absence of *656 specific congressional intent otherwise." [\[FN118\]](#) "Environment" is defined under **CERCLA** as including any water, land, or ambient air within the United States. [\[FN119\]](#) Because a legislative history on the definition of "environment" is virtually non-existent, [\[FN120\]](#) one can only conclude that the definition is broad enough to include releases from facilities, even if those facilities do not currently threaten the health or welfare of a community. [\[FN121\]](#) Because the statute includes the "environment" in addition to "public health or welfare," the intent must extend **CERCLA** liability to situations including those that affect a population. Consequently, the language of **CERCLA** apparently places the burden of the ambiguity of the term "arranged for" on the defendants to find a specific congressional intent to absolve them of liability. [\[FN122\]](#)

Second, allowing complete adoption of the Restatement would increase the likelihood of situations that would directly frustrate the successful implementation of federal hazardous waste law. Such a result is not justifiable in light of the massive public interest at stake in cleaning up and preventing the formation of new mismanaged and abandoned hazardous waste dumps. Federal hazardous waste laws such as **CERCLA** were enacted in response to events in such places as Love Canal, New York [\[FN123\]](#) so as to provide a mechanism for the cleanup of old, hazardous waste sites and to prevent similar situations from occurring in the future. [\[FN124\]](#) The EPA has recognized that voluntary cleanups by PRPs are essential to the successful program for the cleanup of the nation's hazardous waste. [\[FN125\]](#) Voluntary cleanups through negotiations facilitate more expeditious cleanups and are favored over the protracted litigation resulting from mandated cleanups. [\[FN126\]](#) As time passes, contaminants migrate from the site and enter drinking water supplies, creating significantly greater risks to health and more expensive cleanups.

[\[FN127\]](#)

*657 Providing legal incentives for independent contractors who handle hazardous substances to locate in "appropriate surroundings" [\[FN128\]](#) would frustrate the EPA's efforts to achieve voluntary cleanup agreements that are needed to remedy effectively our enormous hazardous waste problem. [\[FN129\]](#) Complete adoption of the Restatement provisions would create an incentive for parties to litigate, rather than to negotiate for a voluntary cleanup. If cleanup efforts under **CERCLA** are not successful, there is a greater likelihood of the reoccurrence of events such as Love Canal in the future, even if sites are currently "appropriately located," [\[FN130\]](#) since what may be an "appropriately located" site today may be a heavily populated area tomorrow. Additionally, with the reduction in the threat of liability, profit-maximizing industries are likely to focus on the productive aspects of an operation rather than prevention of the release of hazardous substances, thus increasing the contamination of our environment and delay doing what is necessary to clean up the contamination. The ultimate result is that future generations would be left to deal with neglected sites at a time when they are exponentially more costly to clean up and already have created serious health problems. [\[FN131\]](#)

The third reason against adoption of the Restatement rule is that it fails to recognize existing administrative mechanisms under **CERCLA** that protect the public from health effects caused by releases from facilities located near or in communities. Following notification of a release, the EPA conducts a preliminary assessment of a facility to determine the need for response action. [\[FN132\]](#) The EPA initiates removal actions by weighing factors including the "actual or potential exposure to hazardous substances by nearby populations or animals" and the "actual or potential contamination of drinking water supplies." [\[FN133\]](#) "Environment" is not mentioned anywhere in these factors, but "nearby populations" is specifically mentioned. In addition, the term "drinking water supplies" is used instead of the more general term, "groundwater." The careful wording of these factors demonstrates that the paramount considerations in the determination of whether to initiate an immediate cleanup are the human health concerns and a facility's location in relation to population. Thus, the EPA's cleanup policies sufficiently protect the public from the health effects caused by releases of hazardous substances into the environment.

*658 Even if the EPA decides that removal actions are not required, but a remedial action is, the relative risk of sites to human health is a predominant concern. In deciding if and when a remedial action is needed, the EPA is required to initiate a procedure to evaluate and determine whether the site should be placed on the National Priorities List. [\[FN134\]](#) This determination is made by scoring factors that measure the probability and likelihood of harm to the human population or sensitive environment from exposure to hazardous substances. [\[FN135\]](#) Any site with a score over a certain amount is included on the list. [\[FN136\]](#) Thus, even if a site is not immediately determined to be ready for cleanup after application of the community health-risk standards quoted above in part, the relevant urgency of a potential problem as it relates to the location of the site is taken into account under the listing procedures.

Finally, **CERCLA** was created to meet the particular needs of the enormous environmental problem of improperly discarded hazardous waste. [\[FN137\]](#) Congress recognized that existing legal mechanisms were not sufficient to meet the public interest. [\[FN138\]](#) The common-law tort doctrine of vicarious liability was one of the pre-statutory legal mechanisms that failed to deter mismanagement of hazardous substances. While victims of injuries caused by hazardous substances had a common-law remedy for compensation, the common law failed to provide the inducements necessary to cure the cause of the problems. [\[FN139\]](#) That is why **CERCLA** was enacted. Vicarious liability under **CERCLA** must continue to provide government with a mechanism to force the cleanup of hazardous waste by the parties responsible for the mess. Generators of hazardous waste are arguably still rewarded for their efforts to appropriately locate their facilities under a Restatement section 427A defense to a personal injury claim. [\[FN140\]](#) Generators of hazardous wastes, however, must remain responsible under **CERCLA** for the cleanup of these substances no matter where the release occurs if they are still under their statutory duty to control the handling of the substances.

*659 As courts continue to give effect to **CERCLA**'s necessarily harsh liability provisions, generators of hazardous substances desperately search for ways to avoid their wrath. The **Aceto** court, while attempting to clarify

issues of liability under **CERCLA**, inadvertently provided an opportunity for generators to escape liability if they serve the public interest. [\[FN141\]](#) The purpose of this Comment is to set the record straight. A fair reading of **CERCLA**, its legislative history, and existing case law compels the conclusion that vicarious liability under **CERCLA** is necessarily distinguishable from the Restatement formulation of vicarious liability. The **Aceto** court simply intended to give effect to the statutory goals of **CERCLA** by alerting generators that they are directly responsible for any releases of hazardous substances that occur while in the hands of their independent contractors, regardless of where these independent contractors are located. **CERCLA**, like the common law, provides recovery for immediate harm that can occur from the release of hazardous substances. **CERCLA**, however, attempts to accomplish what the common law failed to do, by creating inducements that protect the public from the cause of such harm--the mismanagement of hazardous substances. To protect the public and future generations from further harm to their health and the environment, courts must continue to provide government with the tools necessary to remedy the national crisis caused by the mismanagement of hazardous substances. Courts must stand firm and interpret **CERCLA** in a way that will not allow generators of hazardous substances to "close their eyes" [\[FN142\]](#) to the practices of their independent contractors.

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[\[FN1\]](#). Developments in the Law--Toxic Waste Litigation, [99 Harv. L. Rev. 1458, 1462 \(1986\)](#).

[\[FN2\]](#). Developments in the Law--Toxic Waste Litigation, *supra* note 1, at 1471. The Resource Conservation and Recovery Act was enacted in 1976 to provide a "cradle-to-grave" system of managing hazardous wastes. However, the statute did not address problems caused by improper disposal prior to 1976. *Id.*

[\[FN3\]](#). In 1980, carcinogenic chemicals improperly disposed of decades earlier began to ooze out of the ground and into the homes of residents of Love Canal, New York. Hayes & Mackerron, Superfund II: A New Mandate, 17 *Env't Rep. Part II (BNA)* 42, at 4 (Feb. 13, 1987). This event, compounded with reports of a high incidence of adverse health effects ranging from headaches to birth defects in the area, led President Jimmy Carter to declare that Love Canal was in a state of emergency. Frank & Atkeson, Superfund: Litigation and Cleanup, 16 *Env't Rep. (BNA)* 9, at 1 (June 28, 1985). Subsequent local and national media response to the Love Canal situation triggered the discovery of thousands of other dumpsites around the country. *Id.* Congress responded to these alarming discoveries by enacting legislation designed to meet the public's demand for cleanup at such sites. *Id.* at 1-2.

[\[FN4\]](#). Developments in the Law--Toxic Waste Litigation, *supra* note 1, at 1465.

[\[FN5\]](#). [42 U.S.C. §§ 9601-65 \(1988\)](#).

[\[FN6\]](#). See Barr, [CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980](#), 45 *Bus. Law.* 923, 925 (1990).

[\[FN7\]](#). "The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" [42 U.S.C. § 9601\(22\) \(1988\)](#). "Release" is defined broadly under **CERCLA** so that the statute's remedial goals are not frustrated by situations that do not clearly fall under the definition. See [Amoco Oil Co. v. Borden, Inc.](#), 889 F.2d 664, 670 n.8 (5th Cir. 1990) ("release" is defined so broadly that in cases of multiple sources of contamination, plaintiff does not need to show that a source of a "release" caused the actual contamination); [Colorado v. Dep't of the Interior](#), 880 F.2d 481, 487 (D.C. Cir. 1989) (a broad definition of "release" was necessary to provide for diverse matters such as notification requirements . . . , remedial action and abatement authority"); *In re Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution*, 722 F. Supp 893, 896 n.6 (D. Mass. 1989) (inferring that Congress intended a broad scope of liability because definition of "release" includes less intuitive incidents of pollution such as abandonment of containers).

[FN8]. A "hazardous substance" is defined under § 101(4) of **CERCLA** by referring to sections of other federal environmental statutes that have designated certain substances as toxic or hazardous. [42 U.S.C. § 9601\(14\) \(1988\)](#). See, e.g., [15 U.S.C. § 2606 \(1988\)](#) (imminently hazardous chemical substance or mixture for which EPA has taken action under § 7 of the Toxic Substances Control Act); [33 U.S.C. § 1317\(a\) \(1988\)](#) (any toxic pollutant listed under § 307 of the Clean Water Act); [33 U.S.C. § 1321 \(1988\)](#) (substances listed under § 311 of the Clean Water Act); [42 U.S.C. § 6921 \(1988\)](#) (hazardous waste under § 3001 of the Solid Waste Disposal Act (RCRA)); [42 U.S.C. § 7412 \(1988\)](#) (hazardous air pollutants listed under § 112 of the Clean Air Act); [42 U.S.C. § 9601\(14\)\(B\) \(1988\)](#) ("any element, compound, mixture, solution, or substance designated" under § 102 of **CERCLA**).

CERCLA § 101(14) explicitly excludes to some extent petroleum and some forms of natural gas and synthetic gas usable for fuel. [42 U.S.C. § 9601\(14\)\(F\) \(1988\)](#).

[FN9]. **CERCLA** defines the term "environment" very broadly, including all navigable waters and "any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States." [42 U.S.C. § 9601\(8\) \(1988\)](#) (emphasis added).

[FN10]. [42 U.S.C. § 9604\(a\)\(1\) \(1988\)](#). "Response actions may include both 'removal' (i.e., cleanup of the spilled substance) and 'remedial action' (e.g., dredging, repair of leaking containers, collection of rainfall runoff, relocation of displaced residents)." [Ohio v. Dep't of Interior, 880 F.2d 432, 438-39 \(D.C. Cir. 1989\)](#).

[FN11]. [42 U.S.C. § 9604 \(1988\)](#).

[FN12]. In 1980 Congress created a \$1.6 billion Hazardous Substance Response Trust Fund, known as the "Superfund," which funds the EPA's response efforts under **CERCLA**. Frank & Atkeson, supra note 3, at 2. Six years later **CERCLA** was reauthorized by the Superfund Amendments and Reauthorization Act of 1986 (SARA). Hayes & Mackerron, supra note 3, at 1. SARA overhauled the 1980 **CERCLA**, in part, by replenishing the Superfund with \$8.5 billion. Environmental Law Institute, Superfund Deskbook 10 (1989). This sum is provided through a combination of taxes on imported petroleum, taxes on chemical feedstock and imported chemical derivatives, and a new "environmental tax" on corporations, with the balance derived from general revenues, recoveries from suits initiated by the Department of Justice against PRPs, and interest. Id. at 10-11.

[FN13]. "Potentially responsible parties" is a general category used to refer to persons covered under **CERCLA's** liability provision. See [42 U.S.C. § 9607 \(1988\)](#).

[FN14]. [42 U.S.C. § 9607 \(1988\)](#). **CERCLA** does not contain provisions specifying the standard of liability applicable to responsible parties. This was left to the courts to define. In interpreting **CERCLA's** ambiguous liability provisions, courts have established that liability under **CERCLA** entails both strict liability and joint and several liability. See, e.g., [United States v. Northeastern Pharmaceutical and Chem. Co., \(NEPACCO\), 579 F. Supp. 823, 844- 845 \(W.D. Mo. 1984\)](#); [United States v. A & F Materials Co., 578 F. Supp. 1249, 1252-57 \(S.D. Ill. 1984\)](#); [United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808-10 \(S.D. Ohio 1983\)](#); [United States v. Conservation Chem. Co., 589 F. Supp. 59, 61-63 \(W.D. Mo. 1984\)](#); [United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984, 991-92 \(D.S.C. 1984\)](#). Furthermore, courts have established that proof of causation is minimal. [New York v. Shore Realty Corp., 759 F.2d 1032, 1044 \(2d Cir. 1985\)](#) (showing of causation not required to establish liability of owner/operator under § 107(a)(1) of **CERCLA**). See generally Developments in the Law--Toxic Waste Litigation, supra note 1, at 1520 (a relaxed causation requirement is appropriate under **CERCLA**).

[FN15]. Generally, the enforcement provisions impose extensive fines for violations of **CERCLA** and punitive damages for noncompliance with cleanup orders. See [42 U.S.C. §§ 9604\(e\), 9606\(b\), 9607\(c\)\(3\) and 9609\(a\)-\(b\) \(1988\)](#). **CERCLA** also allows for citizen suits whenever a person or governmental authority is alleged "to be in violation of any standard, regulation, condition, requirement or order which has become effective pursuant to this Act"

or when a government authority has failed to undertake non-discretionary duties specified in the statute. [42 U.S.C. § 9659\(a\)\(1\)-\(2\) \(1988\)](#). The enforcement provisions of **CERCLA** also allow the federal government to place a federal lien on all real property and related rights subject to or affected by a removal or remedial action and to exercise the right of eminent domain to acquire land needed to conduct a remedial action. [42 U.S.C. § § 9604\(j\), 9607\(c\)\(3\) \(1988\)](#). See generally Hayes & Mackerron, *supra* note 3, at 63-64 (discussing two **CERCLA** enforcement mechanisms, the "Federal Lien" and the "Acquisition of Property").

[FN16]. To minimize litigation costs and to expedite effective remedial actions, the EPA encourages potentially responsible parties to enter into settlement agreements with the agency to obtain complete cleanup or to collect 100% of the remedial costs. Government Institutes, Inc., *Superfund Manual* 7-13 (2d ed. 1987).

[FN17]. [42 U.S.C. § 9604\(a\)\(1\) \(1988\)](#) ("... When the President determines that [removal or remedial actions] will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action . . ."). See generally Barr, *supra* note 6, at 926-32 (explaining government response actions under **CERCLA** § 9604 and government injunctive abatement proceedings and punitive remedies under **CERCLA** § 9606).

[FN18]. In either event, the burden of the costs is to rest on PRPs. In economic terms, the PRPs are forced to "internalize" the environmental costs from society to the parties who are actually responsible for the contamination. See S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980), reprinted in *II Superfund: A Legislative History*, 1980, at 483 (1982) (one of the basic elements of **CERCLA** is that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions). See also *Developments in the Law--Toxic Waste Litigation*, *supra* note 1, at 1477-80 (discussing concepts of fairness and efficiency under **CERCLA**). To shift effectively costs of the hazardous waste problem, **CERCLA** imposes personal liability to ensure that the federal government can reach a deep pocket to finance the cleanup costs. See Rich, *Personal Liability For Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 *B.C. Env'tl. Aff. L. Rev.* 643, 668 (1985-86); *Developments in the Law--Toxic Waste Litigation*, *supra* note 1, at 1513.

[FN19]. These four classes include:

- (1) The owner and operator of a vessel or a facility;
- (2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
- (3) Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and
- (4) Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

[42 U.S.C. § 9607\(a\) \(1988\)](#) (emphasis added).

[FN20]. [42 U.S.C. § 9607\(a\)\(3\) \(1988\)](#) (emphasis added).

[FN21]. [872 F.2d 1373 \(8th Cir. 1989\)](#).

[FN22]. *Id.* at 1384.

[FN23]. Courts consistently have interpreted § 107(a)(3) of **CERCLA** broadly. See, e.g., [United States v. Northeastern Pharmaceutical & Chem. Co., Inc.](#), 810 F.2d 726, 743 (8th Cir. 1986) ("requiring proof of personal ownership or actual physical possession of hazardous substances as a precondition for liability under **CERCLA** §

107(a)(3) . . . would be inconsistent with the broad remedial purposes of CERCLA"); [United States v. A & F Materials Co.](#), 578 F. Supp. 1249, 1257 (S.D. Ill. 1984) ("Congress desired to use quite broad terminology" in § 107 of CERCLA) (quoting [United States v. Price](#), No. 80-4104 (D. N.J. 1983)), *aff'd in part*, 872 F.2d 1373 (8th Cir. 1989); [United States v. Reilly Tar & Chem. Corp.](#), 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("[CERCLA] should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs . . .").

In an effort to prevent frustration of the statute's overriding "remedial" goals, courts have refused to interpret CERCLA narrowly. The Reilly Tar & Chem. court delineated these goals:

A review of [CERCLA and its legislative history] reveals at least two Congressional concerns that survived the final amendments to the Act. First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to 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. To give effect to these Congressional concerns, CERCLA should be given a broad and liberal construction.

[546 F.Supp. at 1112](#); See also [Northeastern Pharmaceutical](#), 810 F.2d at 733 (CERCLA "is overwhelmingly remedial"); [New York v. Shore Realty Corp.](#), 759 F.2d 1032, 1045 (2nd Cir. 1985) (court refused to interpret statute so as to frustrate the statute's remedial goals, absent specific congressional intent to the contrary). See generally H.R. Rep. No. 1016, 96th Cong., 2d Sess. 22, reprinted in 1980 U.S. Code Cong. & Admin. News 6119, 6125 (Congress intended CERCLA to "establish a comprehensive mechanism . . . to abate and control [problems of] abandoned and inactive hazardous waste disposal sites").

Liability has been imposed on PRPs under § 107(a)(3) of CERCLA for contracting for the "deposit or placement" of their hazardous substances on another site, regardless of whether the generator thought the disposal would occur on a different site. See, e.g., [United States v. Conservation Chem. Corp.](#), 619 F.Supp. 162, 234 (W.D. Mo. 1985) (generator can be held liable for response costs at a facility regardless of whether this was the site selected by the generator); [United States v. Ward](#), 618 F. Supp. 884, 895 (E.D.N.C. 1985) ("assertion that CERCLA requires a generator . . . to know where the disposal is to take place before liability is established is unfounded"); [Missouri v. Independent Petrochem. Corp.](#), 610 F. Supp. 4, 5 (E.D. Mo. 1985) (same); [United States v. Wade](#), 577 F. Supp. 1326, 1333 n.3 (E.D. Pa. 1983) (same). Liability has been imposed for arrangements with another person which were characterized as a sale but in fact resulted in disposal. See, e.g., [Ward](#), 618 F. Supp at 895 (liability under CERCLA cannot be avoided by merely characterizing the transaction as a sale); [New York v. General Elec. Co.](#), 592 F. Supp. 291, 297 (N.D.N.Y. 1984) (a generator selling drums of used transformer oil containing hazardous substances to drag strip for dust control was held liable for response costs at the drag strip because "a waste generator's liability under CERCLA is not to be so facily circumvented by its characterization of its arrangements as 'sales' "); [A & F Materials](#), 582 F. Supp. at 845 (even though the waste was "sold" by the generator, the generator is still responsible for its proper disposal).

The only situation in which courts have refused to impose liability under the "arranged for" language in § 107(a)(3) of CERCLA is when a "useful" substance was sold to a third party who then incorporated it into a product and later disposed of it. See, e.g., [Florida Power & Light Co. v. Allis-Chalmers Corp.](#), 893 F.2d 1313 (11th Cir. 1990) (seller was not held liable for contamination after disposal of transformers containing PCBs that were used for 40 years after the sale); [Edward Hines Lumber Co. v. Vulcan Materials Co.](#), 685 F. Supp. 651, 656 (N.D. Ill. 1988), *aff'd on other grounds*, 861 F.2d 155 (7th Cir. 1988) (holding that defendant who sold hazardous substance to third party for use in manufacturing was not liable for response costs even though the substance was found in effluent from that manufacturing process); [United States v. Westinghouse Elec. Corp.](#), 22 Env't Rep. Cas. (BNA) 1230 (S.D. Ind. 1983) (same).

[FN24]. One commentator has noted that the [Aceto](#) decision "marks the first time in which a federal appeals court has held that companies may be liable [under CERCLA] for the actions of third parties absent an alleged intent to dispose of waste or the authority to control disposal." [Garrett, The Aceto Case: CERCLA Liability for Products?](#), 20 Env't Rep. (BNA) 704 (1989) (emphasis added). This, however, is not the first time that a court has ruled that a supplier of a useful and valuable product may be liable even in the absence of an intent to dispose. [Thornhill, The Aceto Case: Suppliers of Hazardous Substances Being Held to Their Common-Law Duties](#), 20 Env't Rep. (BNA) 1148, 1149 (1989). See, e.g., *infra* notes 71-76 and accompanying text.

The question of whether an intent to dispose is a dispositive issue of liability is generally a settled issue. This issue was settled in [United States v. Aceto Agric. Chem. Corp.](#), 872 F.2d 1373 (8th Cir. 1989) and in [Florida Power](#), 893 F.2d 1313. In the [Aceto](#) case, the court recognized the shortcomings of any standard based on whether or not there was an intent to dispose because such a standard would allow transactions in which generators could simply contract away their responsibilities under CERCLA. [Aceto](#), 872 F.2d at 1381. Instead, the court looked beyond the characterization of the transaction and determined that common-law standards of vicarious liability would allow courts to avoid the limitations of § 107(a)(3) of CERCLA and the issue of intent. [Id.](#) at 1378-82. Similarly, the Court in [Florida Power](#) rejected the notion that any kind of per se rule can be formulated on the issue of whether a party "arranged for" the disposal of hazardous waste. [Florida Power](#), 893 F.2d at 1318 (even though a manufacturer did not make the critical decision as to how, when, and by whom a hazardous substance was to be disposed, the manufacturer still may be liable).

[FN25]. See infra notes 106-42 and accompanying text.

[FN26]. See infra text accompanying notes 30-78.

[FN27]. See infra text accompanying notes 79-91.

[FN28]. See infra text accompanying notes 92-113.

[FN29]. See infra text accompanying notes 114-42.

[FN30]. [United States v. Aceto Agric. Chem. Corp.](#), 872 F.2d 1373, 1375 (8th Cir. 1989).

[FN31]. Aidex became insolvent in 1981. [Id.](#) at 1375.

[FN32]. [Aceto](#), 699 F. Supp. 1384, 1385 (S.D. Ia. 1988), aff'd in part, rev'd in part, 872 F.2d 1373 (8th Cir. 1989).

[FN33]. *Id.*

[FN34]. *Id.*

[FN35]. *Id.*

[FN36]. [Aceto](#), 872 F.2d at 1375.

[FN37]. *Id.*

[FN38]. CERCLA empowers the EPA, under authority granted to the President, to clean up sites in response to imminent and substantial dangers to the public health or welfare created by the release of hazardous substances. [42 U.S.C. § 9604\(a\)](#) (1988). The State of Iowa Department of Natural Resources possesses similar authority under Iowa law. [Iowa Code § 455B.418](#) (1987).

[FN39]. [Aceto](#), 699 F. Supp. at 1385-86.

[FN40]. [Id.](#) at 1386.

[FN41]. *Id.*

[\[FN42\]](#). Id.

[\[FN43\]](#). Id.

[\[FN44\]](#). [Aceto](#), 872 F.2d at 1375.

[\[FN45\]](#). Id. Manufacturers of pesticide ingredients rarely produce products that are ready for use by farmers and other customers. Garrett, *supra* 24, at 704. Rather, the manufacturers contract for the formulation or packaging of the pesticides by independent contractors. Id. There are currently over 1,000 independent contractors that provide formulation services in the United States. Id.

[\[FN46\]](#). Id.

[\[FN47\]](#). Id. at 1376.

[\[FN48\]](#). [Aceto](#), 699 F. Supp at 1387.

[\[FN49\]](#). [42 U.S.C. § 9607\(a\)\(3\) \(1988\)](#). For text of this section, see *supra* text accompanying note 20.

[\[FN50\]](#). Plaintiffs also brought a claim for response costs based on § 7003(a) of the Resource Conservation and Recovery Act (RCRA). [Aceto](#), 699 F. Supp. at 1390. See *infra* note 64.

[\[FN51\]](#). The defendants argued that the complaint should be dismissed for failure to state a claim. [Aceto](#), 699 F. Supp. at 1385.

[\[FN52\]](#). [Aceto](#), 872 F. Supp. at 1376.

[\[FN53\]](#). Id. at 1389. See [United States v. NEPACCO](#), 810 F.2d 726, 743 (8th Cir. 1986), cert. denied, 484 U.S. 848 ("requiring proof of personal ownership . . . of hazardous substances as a precondition for liability under CERCLA would be inconsistent with the broad remedial purposes of [the statute]").

[\[FN54\]](#). The district court never explicitly said that liability was imposed because the defendants still owned the hazardous substance. This can be implied, however, because of the court's statement that "the reasoning necessary to extend § 107(a)(3) liability to cover these defendants cannot necessarily be limited to defendants who owned the pesticides throughout the process." [Aceto](#), 699 F. Supp. at 1389.

[\[FN55\]](#). The district court reasoned that liability does not require an intent to dispose by arguing that § 107(a)(3) liability extends to generators who did not "make the crucial decision of how it would be disposed or treated, and by whom." [Aceto](#), 699 F. Supp. at 1389.

[\[FN56\]](#). [Aceto](#), 699 F. Supp. at 1389-90. See 126 Cong. Rec. 30,930 (1980) (statement of Sen. Randolph) ("[i]t is intended that issues of liability not resolved by this Act . . . shall be governed by principles of common law"); 126 Cong. Rec. 31,966 (1980) (letter to Rep. Florio from Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs) (issues of liability not resolved by CERCLA shall be governed by common law); see also [United States v. Chem-Dyne Corp.](#), 572 F. Supp. 802, 808 (S.D. Ohio 1983) (joint and several liability is example of use of common law in determining liability under CERCLA).

[\[FN57\]](#). The district court cites to §§ 413, 416, 427, 427A and 427B of the Restatement (Second) of Torts. [Aceto](#),

[699 F. Supp. at 1389.](#)

[FN58]. Section 520 of the Restatement of Torts (Second) (1965) defines "abnormally dangerous activities." For full text of the section, see *infra* text accompanying note 105.

[FN59]. The full text of § 427A of the Restatement (Second) of Torts (1965) states:

One who employs an independent contractor to do work which the employer knows or has reason to know to involve an abnormally dangerous activity, is subject to liability to the same extent as the contractor for physical harm to others caused by the activity.

[FN60]. [Aceto, 699 F. Supp. at 1389](#) (citing [Restatement \(Second\) of Torts §§ 427A, 427B, 427, 413 & 416](#)).

[FN61]. [Aceto, 699 F. Supp. at 1390.](#)

[FN62]. [Id. at 1389-90.](#)

[FN63]. [Id. at 1390.](#)

[FN64]. [Aceto, 699 F. Supp. at 1390.](#) The district court, relying on a narrow reading of RCRA, held that because the defendants did not have authority to control the manner in which Aidex handled or disposed of its wastes, there was no cause of action, and the court thus granted the motion to dismiss the RCRA claim. [Id. at 1391-92.](#) The district court distinguished the refusal to grant the motion to dismiss the CERCLA claim by asserting that the goals of RCRA do not demand as broad an interpretation of the text as those of CERCLA. [Id. at 1390-91.](#) The district court's holding on the RCRA claim was overturned by the Eight Circuit. The Eight Circuit could not distinguish the § 7003 RCRA liability provision from the § 107(a)(3) liability provision of CERCLA in the context of the case, and thus held that for the same reasons plaintiff's claims were enough to establish a claim under § 107(a)(3) of CERCLA that defendants "arranged for" the disposal of hazardous wastes, they were also sufficient to state a claim that defendants "contributed to" the disposal of solid or hazardous wastes under § 7003 of RCRA. [Aceto, 872 F.2d at 1384.](#)

[FN65]. [Aceto, 872 F.2d at 1382.](#)

[FN66]. [Id. at 1380-81.](#)

[FN67]. The lack of an intent to dispose was never a basis to escape liability under CERCLA. See *supra* note 24.

[FN68]. [Aceto, 872 F.2d at 1381-82.](#)

[FN69]. [Id. at 1382.](#)

[FN70]. See, e.g., [Florida Power & Light Co. v. Allis Chalmers Corp.](#), 893 F.2d 1313, 1315-18 (11th Cir. 1990) (transformers containing the hazardous substances PCBs were sold by a generator to a party who used the transformers in the ordinary course of business for forty years and then disposed of them); [Edward Hines Lumber Co. v. Vulcan Materials Co.](#), 685 F. Supp. 651, 653 (N.D. Ill. 1988) (generator sold the hazardous substances creosote, pentachlorophenol, and chromated copper arsenate to a party who used them in the normal course of its business of wood treatment), *aff'd* on other grounds, 861 F.2d 155 (8th Cir. 1988); [United States v. Westinghouse Elec. Corp.](#), 22 *Env't Rep. Cas. (BNA)* 1230, 1232 (S.D. Ind. 1983) (PCBs were sold by the generator to a party for use as a dielectric fluid in the manufacturing of electrical equipment).

[FN71]. See *supra* note 24. See also Thornhill, *supra* note 24, at 1149. Courts impose liability even if the generator

intended that the waste be disposed of at a facility other than the one at which the release occurred. See, e.g., [United States v. Conservation Chem. Co.](#), 619 F. Supp. 162, 234 (W.D. Mo. 1985) (generator can be held liable for arranging disposal or treatment at any facility regardless of whether this is actually the site that was selected by the generator); [United States v. Ward](#), 618 F. Supp. 884, 895 (E.D. N.C. 1985) ("the assertion that CERCLA requires a generator who arranges for disposal to have knowledge of where the disposal is to take place before liability is established is unfounded"); [State of Missouri v. Independent Petrochem. Corp.](#), 610 F. Supp. 4, 5 (E.D. Mo. 1985) (claim can be asserted against generator even if wastes were deposited at site other than that chosen by generator); [United States v. Wade](#), 577 F. Supp. 1326, 1333 n.3 (E.D. Pa. 1983) (court rejects argument that plaintiffs must establish generator selected site at which wastes were dumped).

[FN72]. See [Conservation Chem.](#), 619 F. Supp. at 240 (generator held liable even though it was alleged that fly ash and lime slurry were sold for use to neutralize and precipitate waste); [United States v. A & F Materials Co.](#), 582 F. Supp. 842, 844-45 (S.D. Ill. 1984) (generator was liable even though substance sold was used to neutralize acid).

[FN73]. See, e.g., [Florida Power & Light Co. v. Allis-Chalmers Corp.](#), 27 Env't Rep. Cas. (BNA) 1558 (S.D. Fla. 1988) (seller of transformers containing PCBs, subsequently used for 40 years and then disposed of, was not held liable for contamination after disposal); [Westinghouse Elec.](#), 22 Env't Rep. Cas. (BNA) 1230 (Monsanto, which sold PCBs to Westinghouse for use as a dielectric fluid in electrical equipment that it manufactured, was not held liable); see also [Edward Hines Lumber](#), 685 F. Supp. at 656 (sellers of hazardous substances used in wood treatment processes were not held liable for contamination caused by processor's leaky holding ponds). This is intended to reflect the recognition by Congress that CERCLA liability is not intended to apply to hazardous substances that are consumer products in consumer use. See [42 U.S.C. § 9601\(9\)\(B\) \(1987\)](#) (definition of "facility" exempts any consumer product in consumer use). See generally Barr, supra note 6, at 962 (discussing legislative history that shows Congress exempted consumer products in consumer use to prevent an individual consumer from being liable under CERCLA).

[FN74]. "CERCLA does not impose liability on a bona fide sale of a hazardous material." [A & F Materials](#), 582 F. Supp. at 845 (dicta citing [United States v. Westinghouse Elec. Corp.](#), 22 Env't Rep. Cas. (BNA) 1230, 1233 (S.D. Ind. 1983)).

[FN75]. Compare [Edward Hines v. Vulcan Materials Corp.](#), 685 F. Supp. 651, 656 (N.D. Ill. 1988) (hazardous substances used to treat wood in wood treatment process is considered bona fide sale of product) and [Westinghouse Electric](#), 22 Env't Rep. Cas. (BNA) at 1233 (PCBs sold for use as dielectric fluid in manufacture of electrical equipment considered bona fide sale of product) with [Conservation Chem.](#), 619 F. Supp. at 241 (lime slurry by-product, used as useful product was not bona fide sale of product) and [New York v. General Electric Co.](#), 592 F. Supp. 291, 297 (N.D. N.Y. 1984) (waste oil containing PCBs sold to operator of drag strip for dust control was not considered bona fide sale of product).

[FN76]. [Florida Power & Light Co. v. Allis Chalmers Corp.](#), 893 F.2d 1313, 1315-18 (11th Cir. 1990) (seller of transformers containing PCBs subsequently used for 40 years before disposal, was not held liable for contamination after disposal).

[FN77]. "No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer . . . from any person who may be liable for a release or threat of release under this section, to any other person . . ." [42 U.S.C. § 9607\(e\)\(1\) \(1988\)](#).

[FN78]. Developments in the Law--Toxic Waste Litigation, supra note 1, at 1465.

[FN79]. CERCLA was enacted to redress the problems caused by leaking waste sites. Id. at 1472. For one court's discussion of CERCLA's remedial goals, see supra note 23.

[FN80]. [United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 \(D. Minn. 1982\).](#)

[FN81]. **CERCLA** embodies the theory of corrective justice. This theory stands for the proposition that it is "unfair" for A to benefit at B's expense, even though A means no harm. Thus, the law restores fairness by requiring that A compensate for B's losses. See *Developments in the Law--Toxic Waste Litigation*, supra note 1, at 1477.

[FN82]. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 Colum. J. Envtl. L. 1, 1-2 (1982); Frank & Atkeson, supra note 3, at 6. The bill that eventually became law was hastily put together as a compromise by an informal, bipartisan group of senators in lieu of all other pending measures on the subject. *Id.* at 6-7.

[FN83]. *City of Philadelphia v. Stepan Chem Co.*, 173 F. Supp. 1484, 1488 n.11 (E.D. Pa. 1989) ("**CERCLA** is hardly a paradigm of clarity or precision") (citing [Artesian Water Co. v. Gov't of New Castle County, 851 F.2d 643, 648 \(3d Cir. 1988\)](#); [United States v. Mottolo, 605 F. Supp. 898, 902 \(D. N.H. 1985\)](#); [United States v. Wade, 577 F. Supp. 1326, 1331 \(E.D. Pa. 1983\)](#) ("[**CERCLA**] leaves much to be desired from a syntactical point of view, perhaps due to compromises which were pushed through Congress before the close of its 96th Session.")).

[FN84]. Grad, supra note 82, at 1-2. The passage of **CERCLA** resulted from six years of work in the House of Representatives and three years of work in the Senate toward enacting legislation that would provide compensation for injuries and damages resulting from releases of oil and hazardous substances. *The Environmental Law Institute, 1 Superfund: A Legislative History* xiii (1982).

[FN85]. See [42 U.S.C. § 9607\(a\)\(4\) \(1988\)](#).

[FN86]. See supra notes 14, 56 and accompanying text.

[FN87]. [33 U.S.C. § 1251 et seq. \(1982\)](#). "Unless otherwise provided in [**CERCLA**], the standard of liability is intended to be the same as that provided in section 311 of the FWPCA [[33 U.S.C. § 1321](#)]. I understand this to be a standard of strict liability." 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph).

[FN88]. See supra notes 14, 56 and accompanying text.

[FN89]. See supra text accompanying notes 57-59.

[FN90]. For text of this section, see supra note 59. The Eighth Circuit appears to rely largely on [Restatement \(Second\) of Torts § 427A](#) by its affirmation of the district court's reliance on that section. [Aceto, 872 F.2d at 1379](#).

[FN91]. [Aceto, 872 F.2d at 1379](#).

[FN92]. The District Court and the Eighth Circuit Court of Appeals cite to [Restatement \(Second\) of Torts §§ 413, 416, 427, and 427A](#). [Aceto, 872 F.2d at 1382](#); [Aceto 699 F. Supp. at 1389](#).

The Eighth Circuit Court of Appeals cites to [Restatement \(Second\) of Torts § 427A](#), which states that liability may be placed on employers for the harm that results from the abnormally dangerous activities of their independent contractors. [Aceto, 872 F.2d at 1379](#). For text of [§ 427A](#), see supra note 59.

[FN93]. [42 U.S.C. § 9607\(a\)\(3\) \(1988\)](#).

[FN94]. See [Fed. R. Civ. P. 12\(b\)\(6\)](#).

[FN95]. [Aceto, 872 F.2d at 1376](#) ("A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.") (citing [Conley v. Gibson, 355 U.S. 41, 45-46 \(1957\)](#); [May v. Commissioner of Internal Revenue, 752 F.2d 1301, 1303 \(8th Cir. 1985\)](#); [Fusco v. Xerox Corp., 676 F.2d 332, 334 \(8th Cir. 1982\)](#)).

[FN96]. In particular, see [Restatement \(Second\) of Torts §§ 413, 416, 427, 427A and 427B \(1965\)](#).

[FN97]. [Restatement \(Second\) of Torts § 427A \(1965\)](#). For text of this section, see supra note 59. The liability concepts under [§ 427A](#) are consistent with the existing CERCLA liability scheme. However, there are some very important differences. See supra and infra notes 92-141 and accompanying texts. [Restatement \(Second\) of Torts § 413, 416 and 427 \(1965\)](#) set forth the negligence standards under vicarious liability. Considering the strong precedents that CERCLA imposes only strict liability, it is unlikely that the Eighth Circuit meant to imply that these negligence standards applied CERCLA. See supra notes 14, 56 and accompanying texts.

[FN98]. Courts that have decided issues of joint and several liability under CERCLA have adopted the Restatement formulation of such liability. See, e.g., [United States v. Argent Corp., 14 Env'tl. L. Rep. \(Env'tl. L. Inst.\) 20,497, 20,497 \(D. N.M. 1984\)](#); [United States v. S.C. Recycling and Disposal, Inc., 14 Env'tl. L. Rep. \(Env'tl. L. Inst.\) 20,272, 20,275-76 \(D. S.C. 1984\)](#); [United States v. Conservation Chem. Co., 14 Env'tl. L. Rep. \(Env'tl. L. Inst.\) 20,207, 20,209 \(W.D. Mo. 1984\)](#); [United States v. Wade, 14 Env'tl. L. Rep. \(Env'tl. L. Inst.\) 20,096, 20,100 \(E.D. Pa. 1983\)](#); [United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810-11 \(S.D. Ohio 1983\)](#).

[FN99]. [Aceto, 872 F.2d at 1382](#) (citing [Restatement \(Second\) of Torts §§ 413, 416, 427, and 427A \(1965\)](#)). Indeed, the [Aceto](#) facts support the imposition of liability both under CERCLA case law and under [§ 427A](#) of the Restatement (Second) of Torts. It remains to be seen what will happen when a court faces a factual situation in which existing CERCLA liability seems to impose liability but the Restatement (Second) of Torts does not.

[FN100]. [Restatement \(Second\) of Torts § 427A \(1965\)](#). For text of this section, see supra note 59.

[FN101]. See Developments--Toxic Waste Litigation, supra note 1, at 1615-17.

[FN102]. See infra note 105 and accompanying text.

[FN103]. An argument exists that the Eighth Circuit in [Aceto](#) did not intend for § 520 of the Restatement (Second) of Torts to be relevant in determining liability under CERCLA because they did not cite this section in their opinion. See [Aceto, 872 F.2d at 1382](#). A plain reading of [§ 427A](#), however, clearly shows that liability under 427A is not strict liability unless the activity is determined to be "abnormally dangerous."

[FN104]. For the text of § 520 entitled "Abnormally Dangerous Activities," see infra text accompanying note 105. [Restatement \(Second\) of Torts § 519](#) explains that strict liability for abnormally dangerous activities subjects a person to liability even though the person "has exercised the utmost care to prevent the harm" but is limited to "the kind of harm, the possibility of which makes the activity abnormally dangerous."

[FN105]. [Restatement \(Second\) of Torts § 520 \(1965\)](#).

[FN106]. Developments in the Law--Toxic Waste Litigation, supra note 1, at 1616.

[FN107]. See supra text accompanying note 105.

[FN108]. Many toxic waste sites are currently located in residential areas. Developments in the Law--Toxic Waste Litigation, supra note 1, at 1617 n.79. Thus, PRPs would usually fall under the liability provisions of [Restatement \(Second\) of Torts § 427A](#), meeting the cost-shifting goals of **CERCLA**.

[FN109]. See supra note 23. Application of [Restatement \(Second\) of Torts § 427A](#) would only meet the effective response goals of **CERCLA** if the sites were initially located in residential areas. If the sites are located outside of residential areas, where they are not a threat to a population, EPA's option to order the responsible party to clean up their own site would not be available. Under the Restatement, the party would not be "responsible," thus enhancing one of the options **CERCLA** gives the EPA to ensure rapid responses.

[FN110]. This situation is in contrast with the facts in **Aceto**, where the release of hazardous substances posed a direct threat to the health of area residents due to the location of the site. See [Aceto, 872 F.2d at 1375](#) ("[h]azardous substances were found . . . in the shallow zone of the groundwater, threatening the source of irrigation and drinking water for area residents").

[FN111]. **CERCLA** liability provisions have a reputation for vagueness. See Rich, supra note 18, at 655.

[FN112]. See supra note 23.

[FN113]. See supra notes 14.

[FN114]. If location is found to be a factor, not only will it effect the scope of liability under **CERCLA**, but more importantly, it will effect the process of determining what sites should be selected for cleanup. If location is a factor, then the EPA would be reluctant to cleanup areas in which recoument costs would be difficult to recover.

[FN115]. See infra note 116. It is not irrelevant, however, to the timeliness of government response actions. See infra notes 132-36 and accompanying text.

[FN116]. See [42 U.S.C. § 9601\(8\)\(B\) \(1988\)](#) (defining "environment" to include any surface water, groundwater, land surface, or ambient air within the jurisdiction of the United States). "Whenever . . . any hazardous substance is released . . . into the environment, or . . . there is a release . . . which may present [a] . . . danger to the public health or welfare, the President is authorized to act . . . to remove . . . provide for remedial action . . ." [42 U.S.C. § 9604\(a\)\(1\) \(1988\)](#) (emphasis added). "The terms 'remove' or 'removal' means . . . the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment . . ." [42 U.S.C. § 9601\(23\) \(1988\)](#) (emphasis added). "The terms 'remedy' or 'remedial action' means [sic] . . . to prevent or minimize the release of hazardous substances so they do not migrate to cause substantial danger to present or future public health or welfare or the environment . . ." [42 U.S.C. § 9601\(24\) \(1988\)](#) (emphasis added).

[FN117]. See supra notes 23, 116.

[FN118]. [Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 \(1st Cir. 1986\)](#) (quoting [New York v. Shore Realty Corp., 759 F.2d 1032, 1045 \(2d Cir. 1985\)](#)). For a discussion of this interpretation, see supra note 23.

[FN119]. [42 U.S.C. § 9601\(8\)\(B\) \(1988\)](#).

[FN120]. See 126 Cong. Rec. S12917, S13365, S14715 (1980), reprinted in 2 Superfund: A Legislative History 196, 205, 215 (1982); Hearings on S. 1480, Environmental Emergency Response Act, Senate Finance Committee, 126 Cong. Rec., 2d Sess. S30,898 (1980).

[FN121]. See *infra* note 130 and accompanying text.

[FN122]. See [Aceto, 699 F. Supp. at 1390](#).

[FN123]. See *supra* note 3 and *infra* note 130 and accompanying texts.

[FN124]. Grad, *supra* note 82, at 2.

[FN125]. [50 Fed. Reg. 5035 \(1985\)](#). CERCLA provides procedures by which the EPA can negotiate for PRPs to clean up the sites themselves. See *supra* note 18 and accompanying text.

[FN126]. [50 Fed. Reg. at 5035](#).

[FN127]. Most of the sites used to store waste liquids pose a direct threat to groundwater and surface water supplies. See *Developments in the Law--Toxic Waste Litigation*, *supra* note 1, at 1463. The sites are very difficult and expensive to clean up because groundwater is so inaccessible. See Conservation Foundation, *State of the Environment 13* (1982) (water in aquifer is stored in pore space of rocks and sediments which makes it virtually inaccessible); See also *Developments in the Law--Toxic Waste Litigation*, *supra* note 1, at 1463 n.8 ("The average cost of cleaning up a contaminated groundwater site is estimated to be \$5 to \$10 million; total restoration of a badly contaminated aquifer could take decades and might cost \$500 million to \$1 billion").

[FN128]. See *supra* text accompanying notes 104-07 (an industry can escape liability if it serves the broad public interest and locates away from residential areas).

[FN129]. See *supra* notes 23, 125-26 and accompanying texts.

[FN130]. Dangerous hazardous waste sites often occur when residential areas expand onto land where the sites are located. For example, in Love Canal, New York, a canal was dug in the 1890s in a rural area by William Love. In 1942, the Hooker Chemical Company began filling in the canal with hazardous waste. By 1953, the city of Niagara Falls was growing to the northeast, expanding closer and closer to the canal. In 1953, Hooker covered the dump. The increasing need for land in the area and the need for a new elementary school prompted the city board of education to approach Hooker about buying the land. The land was sold, and the rest is history. See Danzo, *The Big Sleazy; Love Canal Ten Years Later*, 20 Wash. Monthly, Sept. 1988, at 11, 12.

[FN131]. See *supra* note 127 and accompanying text.

[FN132]. Superfund Manual, *supra* note 17, at 6-11.

[FN133]. 40 C.F.R. § 300.65 (1989).

[FN134]. [42 U.S.C. § 9605 \(1988\)](#). Under the National Priorities List (NPL), the EPA is required to establish a national inventory of hazardous waste sites, ranked by priority, with the most hazardous sites at the top of the list. The order of this list is determined through the application of criteria set forth in the Hazard Ranking System. See [42 U.S.C. § 9605\(c\) \(1988\)](#); 40 C.F.R. Part 300, Appendix A (1989). The HRS procedure was upheld against challenges in [Eagle-Picher Industries Inc. v. EPA, 759 F.2d 905, 910-911 \(D.C. Cir. 1985\)](#). The HRS is "designed to estimate the potential hazard presented by releases or threatened releases or [hazardous substances, pollutants, and contaminants](#)." [47 Fed. Reg. 31,187 \(1982\)](#).

[FN135]. See [Eagle-Picher Industries](#), 759 F.2d at 910.

[FN136]. Any site with a total score of 28.50 or more is included on the [NPL](#). 48 Fed. Reg. 40,658, 40,660 (1983).

[FN137]. See generally, Developments in the Law--Toxic Waste Litigation, supra note 1, at 1464 (noting that over time and at varying rates, certain methods of storing hazardous waste fail); Barr, supra note 6, at 924-25 (stating CERCLA's goal as maintaining prosperity by cleaning up the environment).

[FN138]. Developments in the Law--Toxic Waste Litigation, supra note 1, at 1469-73.

[FN139]. Because of the difficulties of proving causation in common-law toxic tort suits, most disposers of hazardous substances knew that their costs for improper disposal and anticipated liability were less than avoidance costs. See Developments in the Law--Toxic Waste Litigation, supra note 1, at 1630.

[FN140]. Developments in the Law--Toxic Waste Litigation, supra note 1 at 1616.

[FN141]. See supra notes 97-113 and accompanying text.

[FN142]. See [Aceto](#), 872 F.2d at 1382 ("Any other decision . . . would allow defendants to simply 'close their eyes' to the method of disposal of their hazardous substances, a result contrary to the policies underlying CERCLA.").

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