

**Case Law Supplement to  
Liability for Hazardous  
Materials Transportation—Are You Protected?**

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When there is a transportation release of hazardous materials that causes personal injury or consequential damages, such as environmental damages, and the liability is in dispute, courts have sorted out the liability based on various common law theories. These theories are discussed below, beginning with the negligence theories, followed by the strict liability theories.

**Liability Based on Negligence**

Negligent carriers and, to a lesser extent, shippers have routinely been held liable to third parties for consequential damages and personal injuries caused by the release of hazardous materials during transport.

1. Duty of Care Theory

Negligence may be found if a party violates its duty of care. For example, in *State v. Southern Refrigerated Transport, Inc.*,<sup>1</sup> the carrier was held liable for the value of the fish killed when a truck carrying a toxic fungicide overturned, spilling the chemical into a nearby river. The court held that negligence had been established under either party's theory of the accident. The plaintiff argued the driver had fallen asleep at the wheel, while the defendant argued that icy road conditions caused the accident. Even under the latter theory, the court noted that "[t]he fact that the tractor/trailer jackknifed establishes by a preponderance of the evidence that [the driver] was not using proper care and was thus negligent" because the driver should have been aware of the road conditions and used extra caution.<sup>2</sup> The court also noted that the carrier could be considered

negligent *per se* under the State's "inattentive driving" statute, which prohibits the operation of a motor vehicle on a public highway in a careless or inattentive manner.<sup>3</sup> The court held the carrier vicariously liable for the negligence of its driver, and granted summary judgment in favor of the shipper, presumably because there was no evidence of negligence on the shipper's part.<sup>4</sup>

Similarly, in *Triche v. Overnite Transp. Co.*, the carrier was held liable for injuries sustained by a motorist splattered with poisonous liquid that had leaked from the carrier's trailer.<sup>5</sup> The court found that the carrier was negligent for failing to adequately secure the hazardous cargo. The shipper, on the other hand, having exercised no control over the shipment, was dismissed from the suit.

In at least one case a court has held that the carrier could be found liable upon a showing of recklessness even if the truck contained no hazardous materials.<sup>6</sup> In *Mary Self v. Illinois Central R.R.*, the court held that a defendant could collect both compensatory and punitive damages for (1) fear and fright, and (2) inconvenience, both stemming from the derailment of a train thought to be carrying hazardous materials, which caused a 21-hour road blockade.<sup>7</sup> The court held that although there were no actual chemicals on board, the causation requirement could still be met because the fear and inconvenience were "caused by the transportation of hazardous materials."<sup>8</sup>

Although liability for consequential damages is often attributed to carriers, it is not so limited. Negligent shippers can also be held liable to third parties for consequential damages. For example, in *Key v. Liquid Energy Corp.* the shipper/consignor was held liable for personal injuries sustained by the carrier's drivers.<sup>9</sup> The shipper loaded pressurized flammable gas into an inadequate tanker and the carrier's drivers were injured when the tanker exploded during unloading. The jury found that the shipper was negligent and awarded damages to the drivers.

In *Union Pacific R.R. Co. v. Forexport, Inc.*, plaintiff railroad sued both the shipper and loader for damages arising from an allegedly improper loading of lumber which caused one of plaintiff's trains to derail.<sup>10</sup> The carrier sought \$5 million in damages to cover the costs of the derailment, \$3 million of which was for an environmental clean-up of a flammable liquid which spilled from a tanker that derailed on the train.<sup>11</sup> Although the loader, a foreign resident, was dismissed for lack of personal jurisdiction, the case nonetheless illustrates the broad spectrum of liability risks that parties other than carriers may face in transportation accidents involving hazardous materials.<sup>12</sup>

Sometimes carriers and shippers are found jointly liable. For example, in *Symington v. Great Western Trucking Co., Inc.*,<sup>13</sup> liability for the cleanup costs, of a toxic chemicals spill at a truck stop, was allocated equally between the shipper/consignor and the carrier where each bore some degree of fault. In *Great Western*, the shipper had improperly loaded the barrels of the toxic chemical onto the carrier's truck, and failed to properly warn the carrier's driver of the harmful nature of the chemical cargo. The court noted the general rule that when the shipper loads the cargo, the carrier is liable for open and obvious loading defects, while the shipper remains liable for latent and concealed loading defects. The court concluded the loading defect "was not as open and obvious as [the shipper] might contend."<sup>14</sup> The shipper's failure to warn was cited as an alternative basis for a finding of negligence and allocation of liability.<sup>15</sup> The carrier was held jointly liable because it continued driving after discovering the leaking cargo, and parked the truck in front of the plaintiff's business, instead of in a more remote area, thus exacerbating the amount of damages. Each negligent party was found liable for one-half of the cleanup costs.<sup>16</sup>

## 2. The Negligence *Per Se* Theory

A violation of the Hazardous Materials Transportation Act or the Department of Transportation's (DOT) regulations promulgated under the Act constitutes a breach of the duty of care and is also another way for establishing carrier or shipper negligence. In many jurisdictions a violation of a safety statute constitutes negligence *per se*.<sup>17</sup> DOT and the other regulations place pervasive responsibilities on the carrier, and, thus, establishing negligence *per se* upon a showing of carrier non-compliance can be relatively easy.

The DOT regulations on transportation of hazardous materials typically place responsibility on the carrier for proper handling and transportation from the time it receives the goods until delivery. These responsibilities include proper care of the hazardous materials, maintenance and inspection of appropriate equipment, and observance of safety regulations such as observing speed limits, not leaving materials unattended during loading or unloading, posting of appropriate signs, and adhering to proper emergency procedures.<sup>18</sup> Other statutes, rules and ordinances place on the carrier additional legal responsibilities governing the possession and transportation of hazardous materials. For example, a regulation under the Resource Conservation and Recovery Act requires a transporter to clean up hazardous waste that is spilled during transportation.<sup>19</sup>

Many DOT regulations are also applicable to shippers. The regulations usually specify the responsibilities that shippers must complete before delivering the goods to the carrier, such as the proper labeling, documentation and packaging of the hazardous materials.<sup>20</sup> Thus, a consignor, *i.e.*, the entity that provides the hazardous materials to the carrier for transportation, could be liable for negligence *per se* by violating one of the DOT regulations covering these pre-shipment responsibilities.<sup>21</sup> For example, in *Poliskie Line Oceaniczne v. Hooker Chemical*

*Corp.*,<sup>22</sup> the shipper was found liable under a negligence *per se* theory for improperly loading its drums of corrosive material into the plaintiff's storage container, in violation of applicable regulations. Another example is *Key v. Liquid Energy Corp.*,<sup>23</sup> in which the shipper was found negligent *per se* for loading high pressure flammable gas into an improperly rated trailer that exploded upon unloading and injured the carrier's drivers. The hazardous materials transportation regulations established a duty to the carrier's drivers, the breach of which warranted the damage award to the carrier's drivers.

In this regard, DOT recently imposed on the shipper the responsibility to ensure that the closures on rail tank cars are properly closed before hazardous materials are transported from their facilities.<sup>24</sup> In addition, DOT adopted a rule that a finding of an improperly secured enclosure gives rise to the presumption that the shipper failed to meet its closure obligations. This presumption will control unless the shipper provides evidence to the contrary – *i.e.* that the closure was not secure because of an event not within the shipper's control, like vandalism.<sup>25</sup> This rule was challenged on the ground that, among other things, it is inconsistent with the Carmack Amendment,<sup>26</sup> which codified the common law rule that a carrier is liable for damage to the goods that are being transported (as opposed to consequential damages) unless it can show that it was the result of, among other things, the negligent act of the shipper.<sup>27</sup> The D.C. Circuit rejected that challenge finding that the rule merely creates a presumption of shipper responsibility in a DOT enforcement action, and does not change the Carmack presumption of carrier liability in a civil proceeding between the shipper and carrier. Despite the Court's reasoning, however, carriers are likely to rely on this new rule to argue successfully that if a release results from a non-secured closure, the shipper should be presumed negligent and liable for all resulting damage due to its DOT obligation to ensure that the closures are secure.

### 3. Presumed Negligence

With respect to liability for loss or damage to the goods being transported, even when negligence cannot be established, there is a rebuttable presumption of carrier negligence holding the carrier liable for the value of the lost or damaged goods if such loss or damage arises while the goods are in the carrier's possession.<sup>28</sup> This rebuttable presumption assumes that the carrier is best able to ascertain the facts and circumstances that can vindicate it, such as, the loss or damage was caused by an act of God, act of a public authority or enemy, act of the shipper, or the nature of the goods. If the carrier cannot establish an exculpatory defense, it must then bear the burden of the loss.<sup>29</sup> Accordingly, "the carrier bears a heavy burden of proof akin to *res ipsa loquitur* because it has peculiarly within its knowledge the facts which may relieve it of liability."<sup>30</sup>

Logic would suggest that this burden of proof and presumption of negligence should apply as well in cases involving personal injuries and consequential damages, like damages to the environment. Although no cases have directly applied or refused to apply this presumption to the carrier in the context of consequential damages, two cases have flirted with the proposition. First, in *Siegler v. Kuhlman*, the Washington Supreme Court ruled that a carrier could be held strictly liable for the wrongful death of a motorist killed by an explosion from a gasoline trailer that had detached and spilled its contents on a highway.<sup>31</sup> The Court noted that the doctrine of *res ipsa loquitur* could properly be applied to the carrier, since the carrier was in the best position to gather evidence to disprove the presumption and concluded that the lower court should have instructed the jury that it could presume the carrier's negligence. The court maintained, however, that a more compelling reason for imposing liability was that the carriage of gasoline by tankers on the highways was an ultrahazardous activity for which carriers should be strictly liable.<sup>32</sup> Thus, while approving a *res ipsa loquitur* presumption in this case, the court's

primary basis for reversal was the doctrine of ultrahazardous activity, which is discussed later in this article.

Second, in *Exquisite Form Industries, Inc. v. Transportes Ragat, S.A.*,<sup>33</sup> the court rejected the corollary proposition that a shipper should be held liable on a presumed negligence theory when its drums of poisonous chemicals leaked and damaged another shipper's cotton while in transit. While the shipper had "a duty to exercise adequate care in packaging and labeling its cargo," the plaintiff could not establish the shipper's liability by *res ipsa loquitur* for damages caused by leakage, where the shipper had no control over the drums at the time they leaked."<sup>34</sup> At least one court has found that the shipper may be liable, however, where the shipper is contractually responsible for preparing, packing and bracing the shipment, and where there is some pattern of chemical spills. For example, in *Marten Transport, Ltd. v. MacDermid, Inc.*, ruling on a motion to strike, the court held that a shipper may violate the Connecticut Unfair Trades Practices Act (CUTPA), where on three separate occasions, the shipper's storage drums leaked, resulting in damage to the carrier's trucks and environmental clean-up costs.<sup>35</sup> The court held that this could constitute a pattern of unfair conduct under CUTPA.<sup>36</sup>

Since establishing carrier fault is often difficult, costly, or uncertain, a shipper would be well advised to protect itself by incorporating the presumption of carrier liability into its transportation contracts. This can be done by the inclusion of an indemnity clause that makes the carrier liable for both damage to goods, consequential damages and personal injuries that arise while the carrier has possession of the goods, unless the damages are shown to have been the result of the shipper's negligence or an intervening *force majeure* event. Such contractual protection will undoubtedly save the parties a great deal of time and expense in establishing liability in the event of a transportation spill. On the other hand, carriers will likely want to

resist inclusion of this contractual presumption and instead require a finding of its fault before being held liable for such losses.

4. Negligence For Failing to Meet Industry Standards

The standard of care, for negligence purposes, may also be established by reference to the industry's standard practices.<sup>37</sup> For example, in *E S Robbins Corp. v. Eastman Chemical Co.*,<sup>38</sup> the plaintiff, Robbins, sought to impose liability on one of its suppliers, Eastman, for investigation and cleanup costs associated with spills of a toxic product at Robbins's plant. Eastman did not deliver any of the product but rather shipped it with an independent carrier, and the spills had occurred during the product's off-loading.

Robbins argued that the industry code of conduct developed by the Chemical Manufacturers Association, now the American Chemistry Council (ACC), through its Responsible Care Program imposed a duty of care upon Eastman.<sup>39</sup> Robbins relied upon the Product Stewardship Code wherein Eastman, as a member of ACC, agreed to undertake a program designed to evaluate and minimize the risk associated with the handling, use and storage of Eastman's products. The court perceived the Code as simply encouraging Eastman and other ACC members to study and evaluate a wide variety of safety and health matters concerning their products and rejected Robbins' argument that the Code created an industry standard that imposed a duty upon Eastman to ensure that the trucking companies deliver their product without spills.

Similarly, ACC's Responsible Care Distribution Code of Management Practices dated January 15, 1991 ("Distribution Code"), is intended to, among other things:

help member companies to evaluate the risks associated with chemical distribution and methods to reduce those risks; meet or exceed all regulations and industry standards governing chemical



distribution ... and develop new technologies and methods to improve chemical distribution safety. [The code is also intended to:] promote improvements in ... the safety performance of carriers and other providers of distribution services.

The Distribution Code encourages each company to regularly evaluate its chemical distribution risks, keep up with new and existing regulations, train employees in the proper implementation of applicable regulations, and maintain procedures for the selection and use of containers that are appropriate for the chemical being shipped. The Distribution Code does not, however, require a company to exceed existing DOT regulations. It only encourages ACC members to “meet or exceed all regulations in industry standards governing chemical distribution.” Consequently, an ACC member or subscriber to the Distribution Code would appear to meet the industry duty of care if it engages in the evaluation processes encouraged by the Distribution Code and meets existing regulations. Conversely, failure to do these things could be viewed as a violation of a chemical manufacturer’s duty of care and, therefore, a basis for establishing negligence against it.

### **Strict Liability Theories**

Even if negligence is not established, several courts have assigned liability without fault based on the various strict liability theories that are discussed below:

1. “Ultrahazardous” or “Abnormally Dangerous” Activity

The ultrahazardous activity doctrine was adopted in 1938 by the American Law Institute's ("ALI") Second Restatement of Torts and a majority of jurisdictions have adopted it.<sup>40</sup> Under section 519 of the Restatement, strict liability will be applied when a third party is injured by an abnormally dangerous activity, so long as the injury is the kind of harm "the possibility of which makes the activity abnormally dangerous."<sup>41</sup> When strict liability is applied, those engaging in the ultrahazardous activity will be held liable regardless of fault.<sup>42</sup>

Section 520 of the Restatement lists the following six factors that should be considered to determine whether an activity is “abnormally dangerous”:

- (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.

Several courts have found carriers strictly liable applying these factors.<sup>43</sup> For example, in *Siegler v. Kuhlman*, the court concluded that “[h]auling gasoline as cargo is undeniably an abnormally dangerous activity . . . that calls for the application of principles of strict liability.”<sup>44</sup> At least one

court has tried to limit the boundaries of the ultrahazardous activity doctrine as it applies to gasoline. In *Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.*, the court held that “although transporting gasoline is an ultrahazardous activity, strict liability would attach only to harm arising from the risk which, being incapable of elimination by utmost care, makes the activity ultrahazardous.”<sup>45</sup> Because the court reasoned that transporting fuel is only deemed ultrahazardous due to its “volatility,” the court “refused to extend strict liability to harm falling outside the scope of the risk of explosion.”<sup>46</sup> Thus, the court refused to hold the carrier liable for environmental damage resulting from the fuel’s delivery.<sup>47</sup>

Some courts have altogether refused to apply the doctrine to carriers. For example, in *Triche v. Overnite Transp. Co.*, the court refused to apply Louisiana’s ultrahazardous activity

doctrine to hold the carrier strictly liable where the plaintiffs had not shown that the chemical, a poisonous liquid, could not be transported safely, and the accident was caused by the carrier's negligence.<sup>48</sup>

In contrast to its occasional application to carriers, courts generally do not apply the doctrine of ultrahazardous activity to shippers. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*<sup>49</sup> is illustrative. In *American Cyanamid* the Seventh Circuit held that a shipper, particularly a passive shipper, is not engaging in an ultrahazardous activity by offering a hazardous material for transportation, even if the carrier of the hazardous material is engaged in an ultrahazardous activity. Another federal court applying Louisiana law also held that there is a clear distinction between a "hazardous substance," and an "ultrahazardous activity."<sup>50</sup> Though goods being transported might be classified as "hazardous," the transportation of the goods will not trigger the strict liability that is applied to ultrahazardous activity unless the *transportation* is abnormally dangerous.<sup>51</sup>

One rationale for applying the doctrine to carriers, but not to shippers is that the shipper has no control over the product while it is being transported by the carrier. This reasoning was applied in *Hawkins*, where the court declined to impose liability on a shipper for damages caused when a drum fell out of the carrier's truck, spilling poisonous chemicals that injured a third party. The court maintained that the shipper could not be held strictly liable for the negligence of an independent contractor where the activity was not ultrahazardous, and where the shipper did not exercise control over the contractor.<sup>52</sup>

Nonetheless, it is possible that this doctrine of liability for ultrahazardous activity could be extended to shippers on the grounds that they too are engaged in the ultrahazardous activity of

shipping hazardous materials. If so extended, the shipper could be liable to third parties regardless of whether the carrier is negligent or whether the contract assigns liability otherwise. Once again, the most effective method of safeguarding the shipper from such liability is through a contractual indemnification clause.

## 2. Risk Distribution Theory

Several jurisdictions have also imposed strict liability on carriers under the risk distribution theory.<sup>53</sup> For example, in *Chavez* the court addressed a strict liability claim brought against a common carrier for damages resulting from an explosion of eighteen bomb-laden boxcars.<sup>54</sup> The *Chavez* court concluded that public policy favored distributing the losses resulting from ultrahazardous activity among the general public by imposing strict liability on the carrier, since it was best positioned to pass the costs of such losses onto its customers.<sup>55</sup> While at first glance the *Chavez* decision appears to support the argument that liability should rest upon the carrier, the risk distribution line of reasoning could be easily extended in the future to impose strict liability on shippers, as was attempted in *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*<sup>56</sup>

In *American Cyanamid*, a railroad yard operator and an individual brought a strict liability action for damages resulting from a chemical spill. The strict liability claim was brought against American Cyanamid Co. (Cyanamid), which was shipping flammable liquids, and not against Missouri Pacific Railroad, the carrier.<sup>57</sup> Cyanamid moved for summary judgment in defense of the strict liability claim, but the district court rejected the motion and commented favorably upon the risk distribution analysis used in *Chavez*. The court then granted the plaintiff's summary judgment motion, and held that a corporation engages in an unreasonably dangerous activity, for which it is strictly liable, when it ships chemicals through an area adjoining a residential area.<sup>58</sup>

The district court's holding of strict liability was reviewed and reversed by the Seventh Circuit.<sup>59</sup> The court reasoned that the assignment of strict liability against Cyanamid was inappropriate because: (1) strict liability was not necessary since the district court could likely adduce negligence by the shipper, carrier, tank car manufacturer and/or switching yard; (2) shipping hazardous materials through an urban rail shipping yard is commonplace and not abnormally dangerous; (3) a shipper, particularly a passive shipper, is not engaging in an ultrahazardous activity by offering a hazardous material for transportation, even if the carrier of the hazardous material is engaged in an ultrahazardous activity; and (4) the deep pockets of the shipper are of dubious legal relevance.

### 3. The “Peculiar Risk” Doctrine

Plaintiffs have also attempted to hold a shipper strictly liable for the carrier’s negligence under the “peculiar risk doctrine” which rests on the theory of *respondeat superior*. Specifically, Sections 416 and 427 of the Second Restatement of Torts provide that an employer of an independent contractor engaged to perform inherently or intrinsically dangerous work will remain liable for “physical harm” caused by the independent contractor’s negligence.

This peculiar risk doctrine was rejected in *E S Robbins Corp. v. Eastman Chemical Co.*, because the plaintiffs did not establish that “merely transporting and off-loading the chemical product was inherently or intrinsically dangerous, such that [the shipper] could not delegate that duty . . . .”<sup>60</sup> In fact, no reported cases have applied this theory to hold a shipper liable for the carrier’s negligence in transporting hazardous materials. Nonetheless, it is similar to the “ultrahazardous activity” strict liability theory discussed above, and might be used in the future as the basis for imposing liability upon shippers who contract for transportation with an independent carrier.

#### 4. CERCLA Strict Liability

Environmental regulations and statutes may also impose liability for cleanup costs on the shipper or the carrier depending on the circumstances. For example, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA),<sup>61</sup> imposes strict liability for cleanup costs necessitated by the release of hazardous substances upon four classes of persons, including the “owner and operator” of a “facility” from which there is a release of hazardous substances, and anyone who “arranges” for the disposal of hazardous substances.<sup>62</sup> Rarely will CERCLA “arranger” liability be relevant in the transportation context unless hazardous waste (as opposed to a hazardous material) has been shipped, or there has been a transportation spill and a party arranges for disposal of the contaminated soil or other waste. In other words, shipment of a product is not arranging for disposal of a waste.

With regard to CERCLA liability as an owner and operator of a facility, the definition of “facility” includes any “storage container, motor vehicle, [or] rolling stock,” but excludes “any consumer product in consumer use.”<sup>63</sup> In defining “owner or operator,” CERCLA specifies, with regard to carriers and shippers, as follows:

(B) In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term “owner or operator” shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.<sup>64</sup>

Thus, a carrier can be liable under CERCLA for releases from its “facilities” unless it is transporting a “consumer product in consumer use,” and a shipper can be liable for release from its “facilities” unless the release resulted solely from circumstances beyond its control.

*State v. Southern Refrigerated Transport, Inc.*,<sup>65</sup> is a good example of CERCLA liability attaching to the carrier as owner or operator. In *Southern Refrigerated*, the carrier was found liable as an owner/operator of a CERCLA facility (its truck) for damages to natural resources caused by an accident involving its truck which caused drums containing a toxic fungicide to rupture.

When a shipper acts as the carrier, it too can be liable as an owner and operator. For example, one court decided that under CERCLA a shipper/carrier was liable for poisonous chemicals that spilled when it used its own trucks to transport products, but not for chemicals spilled when it used a third-party carrier's trucks.<sup>66</sup> To reach these conclusions, the court first determined that the tanker truck constituted a “facility.”<sup>67</sup> The court next concluded that the product being shipped, a poisonous liquid, did not qualify as a “consumer product in consumer use,” which would have been exempt from the definition of “facility.” The court said that “the exception is for facilities that are consumer products in consumer use, not for consumer products contained in facilities,” such as the tanker truck.<sup>68</sup> Based on these findings, the court concluded that the shipper/carrier would be considered liable as an “owner or operator” with respect to the trucks it owned, but not with respect to the independent carrier’s trucks.<sup>69</sup>

In *E S Robbins Corp. v. Eastman Chemical Co.*, the court similarly rejected the plaintiff’s attempt to impose CERCLA liability on a shipper that was merely operating as a shipper of a toxic product. Because the shipper did not own the trucks, and did not participate in or exercise control over the transportation or off-loading of the hazardous materials, the court concluded the shipper was not an owner or operator of the transportation vehicle/facility, and therefore not liable under CERCLA.<sup>70</sup>

Although shippers that use third-party carriers are generally not liable under CERCLA, since they do not own or operate the transportation vehicle/facility, they often own the drums and other packages of chemicals that are transported in the transportation vehicle/facility. Such a package may qualify as a “storage container,” which would make it a CERCLA “facility.” More likely, however, the drums would be considered “consumer products in consumer use,” as they have been considered historically. As such, they would fall under a statutory exception of CERCLA.<sup>71</sup>

Two recent cases suggest, however, that in the future shippers could be found liable more often for owner/operator liability under CERCLA. First, in *United States v. M/V Santa Clara I*,<sup>72</sup> drums of a reactive flammable solid on the carrier’s vessel were first spilled on-board and then lost over-board during a storm at sea. The carrier, having incurred expenses in cleaning the ship and recovering the lost drums, attempted to recover its costs from the shippers/consignors as well as the consignees under a CERCLA theory and under the terms of the bill of lading. The court rejected the carrier’s attempt to recover its costs, holding that “nonculpable shippers” who arrange for the shipment of hazardous substances from which there is a later release or threatened release . . . cannot be held liable for any release during transportation that resulted from circumstances beyond [their] control.”<sup>73</sup> The court noted, however, that CERCLA and bill of lading “liability could be imposed on the shipper if the facts reveal some culpability or lack of due care which contributed in any way to the release, or a failure of the shipper to exercise reasonable action which would have prevented the release.”<sup>74</sup> By so ruling, the court necessarily determined that drums of chemicals are CERCLA “facilities,” not exempt “consumer products in consumer use,” and thus, a shipper of drums of virgin chemical product could be subject to CERCLA liability as an owner and operator of a facility from which there is a release.<sup>75</sup>



A similar conclusion was reached by the Fifth Circuit, which held that a flammable product being transported for use by an industrial customer is not a “consumer product in consumer use.” As such, the owner and operator of the truck that carried the chemical and from which a release occurred could be liable under CERCLA as the owner and operator of a CERCLA facility.<sup>76</sup>

### **Conclusion**

Courts have relied on various theories in assigning liability for consequential damages and personal injuries resulting from a release of hazardous materials. When the transportation contract is silent, various common law theories have been applied by the courts, such as: (1) the carrier has a duty of care to transport safely the hazardous materials and the shipper has a duty of care to package properly the goods; (2) the carrier and shipper will have duties of care to comply with the pervasive DOT regulations surrounding hazardous materials transportation; (3) the carrier may be presumed negligent if consequential damages or personal injuries result while it controls the goods, even if actual negligence cannot be established; and (4) several theories of strict liability. Because courts rely on a number of different theories of liability, it is often difficult to predict which party will be liable in a particular case. Thus, anyone engaged in the shipping or transportation of hazardous materials is well advised to avoid uncertainty in the apportionment of this potentially very costly liability by explicitly addressing liability in their transportation contracts.

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<sup>1</sup> 1991 WL 22479 (D. Idaho 1991).

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2 *Id.* at \*8.

3 *See Id.* at \*9.

4 *See id.* at \*1.

5 1996 WL 396041 (E.D. La. 1996).

6 *Mary Self v. Ill. Cent. R.R.*, 1999 WL 1138490, \*1 (E.D.La. 1999) (ruling on a motion for summary judgment, the court found that the cars were empty, but contained some amount of residue. Either way, the Louisiana Department of Environmental Quality “determined that no chemical release occurred”).

7 *Id.* at \*4 (framing the issue as whether plaintiffs could recover punitive damages under a provision of the Louisiana Code “without being ‘physically’ injured by the hazardous material.”).

8 *Id.*

9 906 F.2d 500 (10th Cir. 1990).

10 1999 WL 1206758 (D. Or. 1999).

11 *Id.* at \*4.

12 *Union Pac. R.R. Co. v. Forexport, Inc.*, 2000 WL 1780346 (D. Or. 2000).

13 668 F. Supp. 1278 (S.D. Iowa 1987).

14 *Id.* at 1283.

15 *Id.* at 1282-1284.

16 *See also Haydel v. Hercules Transp., Inc.*, 654 So.2d 408 (La. Ct. App. 1995) (dismissing suit against shipper/consignee who had no involvement in the transportation or the accident causing the injuries, and where injuries were caused by carrier’s negligence).

17 *See generally* PROSSER & KEETON, LAW OF TORTS § 36, 229-30 (5th ed. 1984) (explaining that “[o]nce the statute is determined to be applicable – which is to say, once it is interpreted as designed to protect the class of persons, in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation – and once its breach has been established, probably a majority of the courts hold that the issue of negligence is thereupon conclusively determined, in the absence of sufficient excuse, and that the court must so direct the jury.”). Although a violation of a safety statute constitutes negligence *per se* in many jurisdictions, compliance with DOT hazardous materials regulations does not, however, prove the absence of negligence. *See, e.g., Howell v. Lehigh Valley R.R.*, 109 A. 309 (N.J. 1920); *Lehigh Valley R. v. Allied Machinery Co. of Am.*, 271 F. 900 (2d Cir. 1921).

18 *See generally* 49 C.F.R. Part 174 (regulating carriage by rail); 49 C.F.R. Part 177 (regulating carriage by public highway).

19 *See* 40 C.F.R. § 263.31.

20 *See generally* 49 C.F.R. Part 173 (regulating shippers).

21 In contrast, negligence *per se* would rarely apply to a consignee, *i.e.*, the entity that receives the transported hazardous materials, since few DOT rules apply to it.

22 499 F. Supp. 94 (S.D.N.Y. 1980).

23 906 F.2d 500, 505-506 (10<sup>th</sup> Cir. 1997).

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24        *See* 49 C.F.R. § 173.31(d)(1)(iv).

25        *See* 49 C.F.R. § 173.31(d)(2).

26        *See* 49 U.S.C. § 11706.

27        *See* Chem. Mfrs. Ass’n v. Dept. of Transp., 105 F.3d 702 (D.C. Cir. 1997).

28        *See* Shippers Nat’l. Freight Claim Council, Inc. v. Interstate Commerce Comm’n., 712 F.2d 740, 745 (2d Cir. 1982); *see also* Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134 at 143-44 (1964).

29        *See* Missouri Pacific R.R. v. Elmore & Stahl, *supra*.

30        Kaiser Aluminum & Chem. Co. v. Ill. Cent. Gulf R.R. Co., 615 F.2d 470, 474 (8th Cir.), *cert. denied*, 449 U.S. 890 (1980) (quoting *Fulton v. Chicago, Rock Island & Pac. R.R.*, 481 F.2d 326, 333 (8th Cir.), *cert. denied*, 414 U.S. 1040 (1973)).

31        502 P.2d 1181 (Wash. 1972), *cert. denied*, 411 U.S. 983 (1973).

32        *Id.* at 1184.

33        585 F. Supp. 473 (S.D. Tex. 1984).

34        *Id.* at 476.

35        *Marten Transp., Ltd. v. MacDermid, Inc.*, 2001 WL 438826, \*1-2 (Conn. 2001) (ruling based on CUTPA, Conn. Gen. Stat. § 42-110a *et seq.*, providing that “no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce”).

36        *Id.* at \*11.

37        *See generally* PROSSER & KEETON, LAW OF TORTS, § 33, 193-195 (5th ed. 1984).

38        912 F. Supp. 1476 (N.D. Ala. 1995).

39        Robbins also claimed that Eastman assumed a duty of care by instructing the trucker where and when to deliver product to Robbins. The court, however, found that Eastman had not assumed a duty since Eastman did not actively direct or control the trucking company. *Id.* at 1492.

40        *See* RESTATEMENT (SECOND) OF TORTS §§ 519-21. *But see* Parks Hiway Enters., LLC v. CEM Leasing, Inc., 995 P.2d 657, 665 (AL 2000) (adopting the First Restatement’s “ultrahazardous” standard over the “abnormally dangerous” standard of the Second Restatement).

41        RESTATEMENT (SECOND) OF TORTS § 519(2). This ultrahazardous activity doctrine has its roots in *Rylands v. Fletcher*, a nineteenth century English case where a landowner who had built a reservoir was held liable for damages caused when the water escaped. L.R.1 Ex. 265 (1866), *aff’d* House of Lords, 3 H.L. 330 (1868).

42        It is possible that those engaged in an ultrahazardous activity may be relieved of liability if they can affirmatively show that the damages were caused by an intervening force outside of the control of those engaged in the ultrahazardous activity. *See* Kuhlman, 502 P.2d at 1188 (J. Rosellini, concurring).

43        Some jurisdictions have exempted common carriers from the strict liability applied under the ultrahazardous activity doctrine. First, Section 521 of the Second Restatement of Torts provides an exemption when the carrier is compelled to provide transportation as a common carrier. Under current transportation law, except for household goods, carriers are free to accept or deny a shipper’s request for transportation. Consequently, this exception probably has little effect in today’s transportation environment. Second, some jurisdictions have also exempted carriers from strict liability for certain

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ultrahazardous activities on the grounds that the activity has been sanctioned or authorized by statute or regulation. *See, e.g.,* Pope v. Edward M. Rude Carrier Corp., 75 S.E.2d 584 (W. Va. 1953) (licensed contract carrier had right to transport high explosives on the public highways under regulations promulgated by the Interstate Commerce Commission); Hertz v. Chicago, I. & S.R. Co., 154 Ill. App. 80 (1910) (carrier was authorized under state law to transport dynamite). *See generally* Chavez v. S. Pac. Transp. Co., 413 F. Supp. 1203, 1209-12 (E.D. Cal. 1976) (describing but declining to follow his "statutory authorization" exception to strict liability where 18 bomb-laden boxcars exploded causing property damage and personal injuries). This exception also is not likely to be given much weight in today's transportation environment.

44 502 P.2d 1181, 1187 (Wash. 1972), *cert. denied*, 411 U.S. 983 (1973) (applying Washington law). *Accord* Nat'l Steel Serv. Ctr. v. Gibbons, 693 F.2d 817 (8th Cir. 1982) (applying Iowa law and holding carrier transporting flammable gas strictly liable for abnormally dangerous activity).

45 Parks Hiway Enters., LLC v. CEM Leasing, Inc., 995 P.2d 657, 665 (AL 2000) (internal quotations omitted).

46 *Id.*

47 *Id.*

48 1996 WL 396041, \*13 (E.D. La. 1996).

49 916 F.2d 1174, 1182 (7th Cir. 1990).

50 Bouy v. Transcon. Gas Pipe Line Co., 645 F. Supp. 109, 110 (M.D. La. 1986).

51 *See id.* *See also* Toledo v. Van Waters & Rogers, Inc., 92 F. Supp. 2d 44, 56 (D.R.I. 2000) ("strict liability under [Restatement (Second) Torts] 427A attaches only to ultra-hazardous activities and not to ultra-hazardous materials").

52 *See* Hawkins v. Evans Cooperage Co., 766 F.2d 904, 907-08 (5<sup>th</sup> Cir. 1985). *See also* Triche v. Overnite Transp. Co., 1996 WL 396041, \*13 (E.D.La. 1996) (refusing to apply Louisiana's ultrahazardous activity doctrine to hold carrier strictly liable where the plaintiffs had not shown the poisonous liquid could not be transported safely, and the accident was caused by the carrier's negligence).

53 Nat'l Steel Serv. Ctr. v. Gibbons, 693 F.2d 817, 819 (8th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); Chavez 413 F. Supp. 1203, 1214. *See also* Kuhlman, 502 P.2d at 1188 (J. Rosellini, concurring).

54 413 F. Supp at 1203.

55 *Id.* at 1208-14.

56 662 F. Supp. 635 (N.D. Ill. 1987), *reversed and remanded* 916 F.2d 1174 (7th Cir. 1990).

57 *See* 517 F. Supp. 314, at 319-20 & n.3 (N.D. Ill. 1981).

58 Am. Cyanamid, 662 F. Supp. at 635.

59 Am. Cyanamid, 916 F.2d 1174.

60 912 F. Supp. 1476, 1491 (N.D. Ala. 1995). *See also* Key v. Liquid Energy Corp., 906 F.2d 500 (10th Cir. 1990) (refusing to extend the peculiar risk doctrine to hold parent corporation of negligent shipper liable).

61 42 U.S.C. §§ 9601-9675. CERCLA does not expressly impose strict liability, but provides that "the terms 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which

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obtains under section 1321 of Title 33.” James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVTL. L. & POL’Y 217, 217-221 (2000/2001) (citing 33 U.S.C. § 1321 (1994)). MacAyeal argues that courts and commentators “have failed to clarify that the concept of strict liability has different meanings in different contexts, and it is necessary to take into account the correct paradigm of strict liability to properly interpret CERCLA.” *Id.* He draws a distinction between the criminal law/public welfare offense concept of strict liability and strict liability for ultrahazardous activity, which he says “encompasses important concepts of causation that make it a significantly different conceptual paradigm.” *Id.* at 219. Most importantly, CERCLA liability focuses on the harm caused by an instrumentality (the CERCLA vessel or facility) as opposed to the harm caused by an individual defendant. *See id.* at 220.

62 *See* 42 U.S.C. § 9607(a).

63 *Id.* at § 9601(9).

64 *Id.* at § 9601(20)(B) (emphasis added).

65 1991 WL 22479 (D. Idaho 1991).

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

67 *Id.* at 749.

68 *Id.* at 750.

69 *Id.* at 751.

70 912 F. Supp. 1476, 1483-84 (N.D. Ala. 1995).

71 *See* 42 U.S.C. § 9601(9).

72 887 F. Supp. 825 (D.S.C. 1995).

73 *Id.* at 839. This reasoning is consistent with the CERCLA exception to shipper liability at 42 U.S.C. 9601(20)(B)(ii).

74 *Id.* at 842.

75 *Id.*

76 *See* *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238 (5th Cir. 1998).