Ann H. Whitmore, Thomas E. Schick, and Kenneth M. Kastner, "Liability from Hazardous Materials Transportation: Are You Protected?" *ACCA Docket* 20, no. 10 (2002): 90–107.

Liability from Hazardous Materials Transportation: Are You Protected?

By Ann H. Whitmore, Thomas E. Schick, and Kenneth M. Kastner

More than 40,000 companies are registered with the U.S. Department of Transportation ("DOT") as shippers, rail carriers, or truck carriers of hazardous materials.[1] They ship or transport thousands of different products that the DOT classifies as "hazardous materials," ranging from very toxic chemicals to common products and supplies, such as printing ink, cleaners, and industrial solvents. In 2001, more than 15,000 reported highway incidents and nearly 900 reported rail incidents occurred involving hazardous materials, too many of which resulted in death, serious injury, and substantial property and environmental damage.[2] If your company is one of the many shippers or carriers, you should consider whether it is adequately protected against the inherent risks of such transportation. This article will identify measures that you can take as in-house counsel through both a compliance program and specific contract terms to minimize your company's liability from hazardous materials transportation by motor or rail carriers.

Ann H. Whitmore is a senior corporate counsel at Univar USA Inc., the largest chemical distributor in North America. She advises the company on transportation and commercial transactional matters. She is available at ann.whitmore@univarusa.com.

Thomas E. Schick is counsel at the American Chemistry Council, the trade association of the business of chemistry. He is responsible for all legal matters associated with the transportation and distribution of chemicals, including their regulation as hazardous materials. He also is counsel to the Chemical Transportation Emergency Center, Chemtrec®. He is available at tom_schick@americanchemistry.com.

Kenneth M. Kastner is a partner in the Washington, D.C., office of the international law firm Hogan & Hartson L.L.P., where he is a member of the transportation and environmental practice groups. He was formerly the assistant general counsel of the Chemical Manufacturers Association (now the American Chemistry Council), where he was responsible for transportation and hazardous waste matters. He is available at kmkastner@hhlaw.com.

COMPLIANCE

You must ensure that your company is complying with the extensive federal DOT regulations. Use the following four-step process and the accompanying checklist.

1. Identify Hazardous Materials

The first step of ensuring compliance is to confirm that your company has identified all of the products or raw materials that it ships that are hazardous materials as defined in the DOT table at 49 C.F.R. §172.101. In our experience, companies often do not realize how many things that they ship are regulated hazardous materials, and this lack of knowledge and resultant instances of noncompliance can cause those companies to incur increasingly large DOT penalties.

2. Confirm Compliance

Once you have properly identified all hazardous materials, you should take the second step of confirming that your company is actually complying with the many DOT regulations. For example, you will want to make sure that your company is in compliance—for each hazardous material identified in step one above that your company ships—with requirements relating to proper hazard classification, United Nations identification numbers, packaging, shipping papers, certifications, emergency response information, marking, labeling, placarding, reporting, and other requirements. An extensive hazardous materials transportation compliance checklist for most of the potentially applicable requirements appears in the sidebar on pages 94, 96–97. Look for additional DOT requirements specific to motor, rail, air, and water carriers in 49 C.F.R. Parts 177, 174, 175, and 176, respectively.

3. Check Compliance Systems

Step three is to make sure that your company has in place management systems to comply with these regulations. Find out who in your company is in charge of compliance for each identified hazardous material and for each set of requirements. Make sure that you understand the systems of compliance that your company relies on. Assess whether each system is adequate to ensure compliance. Find out who is in charge of the corporate records pertaining to that compliance, where those records are, and whether the records contain all of the information necessary to prove that your company is in compliance. Fix anything that you find broken in the systems.

4. Audit Compliance Systems

Step four is to conduct periodic audits that evaluate whether those systems are still working and whether your company is in fact still achieving compliance. Take appropriate remedial action for any system that may need revision because of changed laws or other circumstances.

CONTRACTS

Beyond taking the above basic four steps to compliance with hazardous materials transportation regulations, you should focus on the potentially much greater liability that can arise when hazardous materi-

(*continued on page 98*)

HAZARDOUS MATERIALS CHECKLIST

To help make sure that your company is in compliance, use the following checklist to determine which 49 C.F.R. sections apply to each hazardous material that your company ships.

❒ Is the material subject to the hazardous materials regulations?	Yes___	No___	172.101
❒ Is the material a hazardous substance?	Yes___	No___	172.101 App. A
❒ Is the material a hazardous waste?	Yes___	No___	171.8
❒ Is the material a marine pollutant?	Yes___	No___	171.8 & .4 App. B

❒ Shipping name _____ 172.101, Col. 2
❒ Hazard class/division _____ 172.101,Col. 3
❒ UN identification number _____ 172.101, Col. 4
❒ Packing group _____ 172.101, Col. 5
❒ Subsidiary hazard _____ 172.101, Col.6
❒ Special provisions _____ 172.101, Col. 7
❒ Subsidiary hazard label codes _____ 172.101, Col. 6
❒ Special provisions _____ 172.101, Col. 7
❒ Packaging exceptions _____ 172.101, Col. 8A
❒ Nonbulk packaging allowed _____ 172.101, Col. 8B
❒ Bulk packaging allowed _____ 172.101, Col. 8C
❒ Quantity limitations on passenger aircraft/rail _____ 172.101, Col. 9A
❒ Quantity limitations on cargo aircraft _____ 172.101, Col. 9B
❒ Vessel storage location _____ 172.101, Col. 10A
❒ Vessel storage other _____ 172.101, Col. 10B

	YES	NO	N/A	Reference
Shipping Paper				
❒ Contents				
❒ Order/color/"X"				172.201(a)(1)
❒ Legible English				172.201(a)(2)
❒ No code/abbreviations				172.201(a)(3)
❒ Continuation pages				172.201(c)
❒ Emergency phone number				172.201(d)
❒ Shipping name				172.202(a)(1)
❒ Hazard class/division				172.202(a)(2)
❒ Identification number				172.202(a)(3)
❒ Packing group				172.202(a)(4)
❒ Total quantity (weight or volume)				172.202(a)(5) & (c)
❒ Sequence (basic description)				172.202(b)

	YES	NO	N/A	Reference
❒ Additional description				
❒ Exemption number				172.203(a)
❒ Limited quantity				172.203(b)
❒ Hazardous substance/waste				172.203(c)
❒ Residue				172.203(e)
❒ Dangerous when wet				172.203(j)
❒ Technical names				172.203(k)
❒ Marine pollutant				172.203(l)
❒ Poison materials				172.203(m)
❒ Elevated temperature material				172.203(n)
❒ Organic peroxides				172.203(o)
Certification				
❒ Basic certification paragraph				172.204(a)(1) or (2)
❒ Signature				172.204(d)
Hazardous Waste				
❒ Manifest				172.205
Emergency Response Information				
❒ Hazard information				172.602
❒ Contact phone number				172.604
General Packing Requirements				
❒ General requirements				173.24
❒ Additional general nonbulk				173.24(2)
❒ Quantity limitations				173.26
Marking				
❒ Nonbulk				
❒ Shipping name				172.301(a)
❒ Identification number				172.301(a)
❒ Technical names				172.301(b)
❒ Exemption packagings				172.301(c)
❒ Name/address of consignee/consignor				172.301(d)
❒ Bulk				
❒ Identification number				172.302(a)
❒ Size				172.302(b)

	YES	NO	N/A	Reference
❒ Exemption packagings				172.302(c)
❒ Empty				172.302(d)
❒ Nonbulk/bulk				
❒ Prohibited markings				172.303
❒ Specs. in English				172.304(a)(1)
❒ Not obscured				172.304(a)(3)
❒ Radioactive materials				172.310
❒ Liquids marking				172.312
❒ Poisonous by inhalation				172.313
❒ Otherwise regulated material-domestic				172.316
❒ Explosives				172.320
❒ Marine pollutant				172.322
❒ Hazardous substance/waste				172.324
❒ Elevated temperature materials				172.325
❒ Standard marking specifications				178.3
Labeling				
❒ Table label				172.400(a)
❒ One material—two hazards				172.400(b)
❒ Exceptions				172.400a
❒ Prohibited labeling				172.401
❒ Additional requirements				172.402
❒ Radioactive materials				172.403
❒ Mixed packages				172.404
❒ Label modifications				172.405
❒ Placement				172.406
Placards				
❒ Prohibited/permissive placard				172.502
❒ General placarding requirements				172.504
❒ Multiple hazard/placarding				172.505
❒ Carrier requirement				172.506, .508
❒ Visibility and display				172.516
❒ General placard specifications				172.519
Training				
❒ Various				172.704

(*continued from page 92*)
als are released during transportation by motor or rail carriers and injure persons or damage property or the environment. The best way to minimize this liability is to address it in your transportation contracts. Shippers and carriers of hazardous materials often do not expressly identify in their contracts which party will be responsible for such liabilities and under what circumstances. Indeed, shippers and motor carriers often do not even have contracts beyond the traditional bills of lading that cover the transportation of hazardous materials. In the absence of express contractual language regarding liability, disputes over liability often end up in court. The courts have applied widely varying theories in assigning liability, and that variation makes it hard to predict what will be the outcome of these cases. The best way to reduce this uncertainty and to minimize liability is for shippers and carriers to agree upfront in contracts how to assign the risks under what circumstances and not to leave such decisions with potentially dramatic monetary ramifications to the divergent jurisprudence of the courts. Because somewhat different liability regimes govern air and water carriers, we limit the scope of the rest of this article to only motor and rail transportation.

THE COURTS HAVE APPLIED WIDELY VARYING THEORIES IN ASSIGNING LIABILITY, AND THAT VARIATION MAKES IT HARD TO PREDICT WHAT WILL BE THE OUTCOME OF THESE CASES.

Potential Liability: A Case Study

A 1987 hazardous materials release in Louisiana illustrates the potential liabilities that can arise and why it is important to address them beforehand in contracts.[3] The release occurred when a flammable gas, which had leaked from a rail tank car, ignited and caused an enormous explosion on CSX tracks. A National Transportation Safety Board ("NTSB") investigation concluded that the probable cause of the incident was the misalignment and subsequent tearing of an improperly installed gasket on the tank car's bottom outlet. The NTSB found that the owner of the tank car, the company that had loaded the tank car, and the shipper, all of whom had certified on the bill of lading that the tank car was in proper condition for safe transportation, had not performed an adequate inspection of the tank car, which would have disclosed the improper and misaligned gasket. The fire caused thousands of nearby residents to be evacuated from their homes for 36 hours. Fortunately, no deaths or serious injuries occurred, and only limited property damage resulted from the release.

Despite these relatively modest losses, a jury awarded a record $3.4 billion in compensatory and mostly punitive damages.[4] The original $2.5 billion punitive damage award imposed on CSX was reduced to $850 million on appeal and reportedly was settled for less than that amount. But this damage award was huge by any measure, especially considering that the NTSB had absolved CSX of any wrongdoing.[5] Even more startling were the expansive findings of liability not only against the rail carrier, but also against the shipper, the manufacturer of the tank car, the company that had performed routine maintenance on the tank car, the loader of the tank car, the terminal companies involved in moving the cars, and the owner of the flammable gas. All of them were named defendants in the case, and the court held all of them liable to some extent.

This case illustrates the enormous financial and reputation risks associated with accidents involving the transportation of hazardous materials. In your efforts to minimize those risks, first look at the relatively settled law regarding who pays for the value of the hazardous materials goods themselves when they are lost or damaged. Second, look at the much less settled law regarding who pays for consequential damages to property or the environment and injuries to persons arising from releases of hazardous materials during transportation. If you need a more extensive, detailed discussion of the case law relating to damage to goods or consequential damages, which would be beyond the scope of this article, please go to the Virtual Library℠ on ACCA Online℠ to read the supplement to this article at www.acca.com/protected/legres/environmental/hazmatliability.pdf.

Liability for Damage to Goods

Generally, courts normally presume that the carrier is liable even if they cannot determine its fault because the carrier is generally in control of the shipment and courts expect the carrier to be able to transport the goods without loss.[6] The U.S. Supreme court

explained the rationale for this rule in *Missouri Pacific R.R. v. Elmore & Stahl:*

> The general rule of carrier liability is based upon the sound premise that the carrier has peculiarly within its knowledge all the facts and circumstances upon which [it] may rely to relieve [it] of [its] duty * * *. In consequence, the law casts upon [it] the burden of the loss which [it] cannot explain . . . .[7]

This rebuttable presumption of the carrier's negligence arises when the shipper establishes a prima facie case that (1) goods were delivered to the carrier in good condition, (2) the carrier delivered the goods in damaged condition, and (3) the shipper suffered damages. Merely showing that the carrier was not negligent is not a sufficient defense. To overcome this presumption of negligence, the carrier must establish by a preponderance of the evidence that the damage was caused "by an act of God, a public authority, a public enemy, or the shipper, or was caused by the inherent vice or nature of the goods themselves."[8] The U.S. Supreme Court has defined "inherent vice"

IF YOUR COMPANY IS IN A LAWSUIT INVOLVING HAZARDOUS MATERIALS TRANSPORTATION, YOU AND YOUR OPPOSING PARTY WILL HAVE AMPLE OPPORTUNITY TO BE CREATIVE.

as "any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time," and this exception has generally arisen in cases involving spoilage of perishable commodities.[9] We have found no cases in which the carrier claimed that the hazardous material had inherent vice in order to give the carrier a defense to its presumed liability under this "inherent vice" exception.

The Carmack Amendment to the Interstate Commerce Act codified these common law rules.[10] The presumption of the carrier's negligence when a shipper establishes a prima facie case, as described above, was codified in 49 U.S.C. § 14706(a).[11] Courts have applied this statutory presumption in cases involving loss of or damage to hazardous materials, in addition to normal goods.[12] But note that companies conduct most transportation today under bills of lading or other contracts, which generally are not governed by the Interstate Commerce Act.[13] Thus, this presumption no longer applies as a matter of statutory law, but it still exists under common law. Moreover, most standard bills of lading, which often constitute the governing contract, and separately drafted transportation contracts reflect this liability regime. Thus, unless a contract specifically provides otherwise, rail or track carriers are presumptively liable for the declared value of the hazardous materials that are lost or damaged during their possession, unless a court finds another party's negligence to be the cause of the loss.

Liability for Consequential Damages

The liability for consequential damages, such as injuries to persons, property, or the environment, resulting from a release of a hazardous material during transportation was never addressed in the Interstate Commerce Act, and transportation contracts seldom address it. Thus, when transportation releases involve consequential damages, courts have often sorted out the liability issues based on various theories of common law liability. Courts have found carriers and, in some cases, shippers liable on a negligence theory when they have failed to meet their standard of care or when they have violated a regulation, a statute, or an ordinance and such violation has caused the damage or injury. Courts have also presumed the carrier to be liable for negligence when the court cannot establish fault. Several courts have also imposed strict liability regardless of fault against carriers and occasionally shippers on finding that the transportation of the hazardous material was an "ultrahazardous activity" or on public policy "risk distribution" grounds. Courts have also found carriers and shippers of hazardous materials released into the environment to be strictly liable for environmental cleanup under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). See the sidebar on page 102 for a chart of the negligence and strict liability theories of liability that have appeared in reported cases to help you assess the risks that your company may be facing.

(*continued on page 104*)

Theories of Liability

Use the following chart to get an idea of the kinds of acts that courts have determined can produce findings of negligence or strict liability.

NEGLIGENCE	STRICT LIABILITY

• A party that violates its duty of care is liable, for example, for the following acts:
  • Falling asleep at the wheel.[1]
  • Driving too fast in icy conditions.[2]
  • Carrier failing to secure properly hazardous materials cargo on truck.[3]
  • Shipper failing to load hazardous materials into an adequate tanker.[4]
  • Joint shipper and carrier liability for shipper improperly loading hazardous materials and carrier continuing to drive after discovering a leak and parking leaking cargo in front of the plaintiff's business.[5]
• A party that violates a state or federal law or rule is negligent per se and thus liable for damages caused thereby, such as in these examples:
  • Violation of federal hazardous materials transportation regulations.[6]
  • Violation of state's "inattentive driving" statute.[7]
  • If a court cannot determine fault, the court may presume that a carrier was negligent if the damages resulted while the hazardous materials were under its control. For example, a court presumed that a tank trailer of gasoline detached and exploded, killing a motorist.[8]
	• Parties involved in "ultrahazardous" or "abnormally dangerous" activities can be strictly liable for injuries and damages that result, regardless of fault.
	  • See American Law Institute's Second Restatement of Torts, § 520, which a majority of jurisdictions have adopted.
	  • Carrier was strictly liable for the death of a motorist from an explosion of gasoline that it was hauling,[9] but not liable where gasoline resulted in environmental damage because gasoline is "abnormally dangerous" as a flammable explosive only.[10]
	  • Carrier not strictly liable where a poisonous chemical could have been transported safely.[11]
	  • Carrier can be strictly liable for the ultrahazardous activity of transporting a hazardous material, but shipper will not be strictly liable for merely offering the hazardous material for shipment.[12]
	• Public policy favors holding carrier strictly liable because it can pass costs onto its shippers.[13]
	• Carrier and shipper can be strictly liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for releases from facilities (trucks, railcars, drums, and so forth) that they own or operate unless the hazardous substance is a "consumer product in consumer use."[14]

NOTES

1. *See* State v. Southern Refrigerated Transport, Inc., 1991 WL 22479, at *8 (D. Idaho 1991).
2. *See id.*
3. *See* Triche v. Overnite Transp. Co., 1996 WL 396041, at *12 (E.D. La. 1996).
4. *See* Key v. Liquid Energy Corp., 906 F.2d 500 (10th Cir. 1990).
5. See Symington v. Great Western Trucking Co., Inc., 668 F. Supp. 1278 (S.D. Iowa 1987).
6. *See* PROSSER & KEATON, LAW OF TORTS § 36, 229–330 (5th ed. 1984); Howell v. Lehigh Valley R.R., 109 A. 309 (N.J. 1920); Lehigh Valley R.R. v. Allied Machinery Co. of Am., 271 F. 900 (2d Cir. 1921); Poliskie Line Oceaniczne v. Hooker Chemical Corp., 499 F. Supp. 94 (S.D.N.Y. 1980); Key v. Liquid Energy Corp., 906 F.2d 500, 505–506 (10th Cir. 1990).
7. *See* State v. Southern Refrigerated Transport, Inc., 1991 WL 22479, at *9 (D. Idaho 1991).
8. *See* Siegler v. Kuhlman, 502 P.2d 1181 (Wash. 1972), *cert. denied*, 411 U.S. 983 (1973); *compare with* Exquisite Form Industries, Inc. v. Transportes Ragat, S.A., 585 F. Supp. 473 (S.D. Tex. 1984).
9. *See* Siegler v. Kuhlman, 502 P.2d 1181, 1187 (Wash. 1972), *cert. denied*, 411 U.S. 983 (1973).
10. *See* Parks Hiway Enterprises, LLC v. CEM Leasing, Inc., 995 P.2d 657, 665 (Alaska 2000).
11. *See* Triche v. Overnite Transp. Co., 1996 WL 396041, at *13 (E.D. La. 1996).
12. *See* Indiana Harbor Belt R.R. v. American Cynamid Co., 916 F.2d 1174, 1182 (7th Cir. 1990); *see also* Bouy v. Transcon. Gas Pipe Line Co., 645 F. Supp. 109, 110 (M.D. La. 1986); *see also* Toledo v. Van Waters & Rogers, Inc., 92 F. Supp. 2d 44, 56 (D.R.I. 2000).
13. *See* Chavez v. S. Pac. Transp. Co., 413 F. Supp. 1203, 1208–14 (E.D. Cal. 1976); *see also* Nat'l Steel Serv. Ctr. v. Gibbons, 693 F.2d 817, 819 (8th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).
14. *See* State v. Southern Refrigerated Transport, Inc., 1991 WL 22479 (D. Idaho 1991); *see also* United States v. M/V Santa Clara I, 887 F. Supp. 825, 842 (D.S.C. 1995); *see also* Uniroyal Chem. Co. v. Deltech Corp., 160 F.3d 238 (5th Cir. 1998).

(*continued from page 100*)

Lessons Learned

As the case study above and the cases in the negligence/strict liability sidebar demonstrate, many divergent theories for imposing liability for hazardous material transportation incidents exist. Thus, if your company is in a lawsuit involving hazardous materials transportation, you and your opposing party will have ample opportunity to be creative. As you may imagine, your choice of liability theory may depend not only on precedent in your jurisdiction and the facts of your case, but also on expectations that you may have regarding the judge's or jury's fears and views of hazardous materials transportation.

BECAUSE CARRIERS PREPARE TARIFFS, YOU CAN EXPECT TARIFFS TO FAVOR CARRIERS. IF YOUR COMPANY IS A SHIPPER, MAKE SURE THAT YOUR COMPANY DOES NOT BLINDLY AGREE TO TARIFFS.

But rather than wait for the day when you are in court to see what theory of liability will be acceptable, we suggest reducing such uncertainty now by clearly assigning the risks in the master contract that your company uses—or should use, if you have none now—to ship or transport hazardous materials. Consider the following matters when assigning risks in your contracts for shipping and transporting hazardous materials:

- Identify all documents and verbal communications that might be considered contracts for the shipment of hazardous materials. You should find a shipping document, typically referred to as a bill of lading, that will constitute a contract between the shipper and the carrier for the transportation of specific hazardous materials between an origin and a destination. You may also find documents or communications reflecting day-to-day requests for specific transportation services, which probably also constitute a contract. Finally, you may find a master contract, typically prepared by the carrier, that covers the relationship between the shipper and the carrier.
- Review the contracts and their liability provisions. Most standard bills of lading fail to address liability for consequential damages, except to say that the shipper is strictly liable unless it fully discloses to the carrier the fact that the shipment is a hazardous material.[14] The day-to-day requests are typically silent on liability, as well. The master contract may or may not address liability for consequential damages. In any event, we recommend that the shipper and carrier enter into a written master contract that clearly sets forth risk of loss and liability terms. Normally, an indemnification provision in the contract would cover the assignment of risk and liability terms. To help prevent disputes later as to which document controls, draft your contract so that it clearly states that such terms in the master contract will trump any inconsistent terms in the bill of lading or any other shipping document agreement.
- Beware of references to tariffs. Most standard bills of lading and carrier-prepared contracts will incorporate by reference certain carrier-prepared tariffs, which, consequently, become binding contractual terms. Some contracts even allow the carrier to modify its tariffs in the future without shipper consent, and such modified tariffs become contractually binding terms. Largely relics from the time before the modern era of transportation contracts, tariffs often include provisions relating to liability. Because carriers prepare tariffs, you can expect tariffs to favor carriers. If your company is a shipper, make sure that your company does not blindly agree to tariffs. First, obtain copies of all referenced tariffs. Second, either ensure that the terms are acceptable, or delete all tariffs from the contract and replace them with language that both your company and the carrier have agreed upon.
- The contract should address liability for all costs associated with consequential damages and personal injuries. The indemnity provision should cover all losses and costs not only with respect to the value of the lost or damaged goods, but also with respect to all damages to property and the environment, all injuries to persons, and all defense and consulting costs associated with investigating, evaluating, and defending such claims.
- Negotiate a fair assignment of risk. Shippers will naturally want to push as much liability onto the carriers as possible and vice versa. We have found that the following balance of risk is typically con-

From this point on . . .
Explore information related to this topic.

ONLINE:

- Dangerous Goods Advisory Council ("DGAC"), an international, nonprofit, educational organization devoted to promoting safety in domestic and international transportation of hazardous materials/dangerous goods, at http://dgac.org.
- Hazardous materials regulations in 40 C.F.R. Parts 100 to 185, in addition to major Research and Special Programs Administration ("RSPA") rulemakings and interpretations, at http://hazmat.dot.gov/rules.htm.
- Donald W. Kiel, "Negotiating Insurance Settlements for Long-tail Exposure Claims," presented at ABA/ACCA conference for Corporate Counsel, "The Legal Department's Role in Enhancing the Corporate Bottom Line," June 6, 2002, available on ACCA Online℠ at www.acca.com/protected/legres/environmental/negotiate_insurance.pdf.
- Office of Hazardous Materials Enforcement ("OHME"), which carries out the Research and Special Programs Administration's ("RSPA") hazardous materials inspection and enforcement program and which produces yearly Penalty Action Reports, which summarize violations and penalties assessed to companies, in addition to civil penalty guidelines for HAZMAT violations, at http://hazmat.dot.gov/hmenforce.htm.
- Research and Special Programs Administration ("RSPA"), general hazardous materials incident and spill data and summary statistics for 1993 through 2002, at http://hazmat.dot.gov/files/hazmat/hmisframe.htm.
- Research and Special Programs Administration ("RSPA"), publications and reports, at http://hazmat.dot.gov/pubs.htm.
- Mark Siwik, Lori Siwik, and Robert Mitchell, "Environmental and Toxic Tort Claims: Are You Covered?" *ACCA Docket* 18, no. 6 (2000): 26–41, available on ACCA Online℠ at www.acca.com/protected/pubs/docket/jj00/toxictort.html.
- Lynne J. Tomeny, "Extracting Insurance Company Dollars for Environmental Liabilities," available on ACCA Online℠ at www.acca.com/protected/legres/environmental/extract_insurance.pdf.
- Transportation Safety Institute ("TSI"), which operates under Research and Special Programs Administration ("RSPA") and which is a federal cost recovery agency that develops and conducts worldwide safety, security, and environmental training, products, and/or services for both public and private sectors, at www.tsi.dot.gov.
- U.S. Department of Transportation ("DOT"), Office of Hazardous Materials Safety, at http://hazmat.dot.gov/.
- U.S. Department of Transportation's ("DOT"), Office of Hazardous Materials Safety, several HAZMAT training materials that outline basic regulatory requirements in training modules and in separate formats designed for both trainees and instructors, at http://hazmat.dot.gov/pubtrain/mod.htm.
- Jean Warshaw and Miriam V. Gold, "Bringing Down the Green Wall: Integrating EHS Compliance into the Business," *ACCA Docket* 20, no. 4 (2002): 24–40, available on ACCA Online℠ at www.acca.com/protected/pubs/docket/am02/ehs1.php.
- Jo Lynn White, Vernon Thomas Meador III, and Deanne L. Miller, "Managing Mass Toxic Tort Litigation Risks: Effective Pretrial Tactics," *ACCA Docket* 20, no. 4 (2002): 58–73, available on ACCA Online℠ at www.acca.com/protected/pubs/docket/am02/toxic1.php.

sidered reasonable and readily attainable in good faith negotiations: the shipper (the consignor) and the carrier would each be liable for costs resulting from their respective negligence or intentional acts or omissions. For costs that are not shown to be the result of the shipper's or carrier's fault, the shipper would be liable while it or its customer (the consignee) has possession of the hazardous materials, and the carrier would be liable after it has taken possession of the hazardous materials from the shipper and until it delivers it to the consignee. This contract language presumes that the party in possession of the goods is liable unless it can demonstrate otherwise. Note that this allocation of risk in cases in which courts cannot establish fault is similar to the allocation that has prevailed with respect to lost or damaged goods, as described earlier in this article. Thus, there is precedent for this approach. We also think that it is reasonable because it encourages the party that

is in control of the hazardous materials to undertake due care. Note that the shipper/consignor can separately agree with its customer/consignee regarding who will bear the risk of losses and costs while each is in possession of the goods.

- Focus on the representations and warranties in the contract. Most transportation contracts will contain representations and warranties, such as that the shipper and carrier will comply with their respective obligations under the DOT hazardous materials transportation rules, as well as other laws. Other common representations and warranties state that the hazardous materials have been properly identified, packaged, labeled, marked, and so forth and that the carrier's equipment will be in good working order. It is important that the contract provide that a breach of one of the representations and warranties does not disqualify recovery under the indemnification provision, except to the extent that the breach contributes to the losses or costs. For example, if a shipper has failed to comply with the hazardous materials transportation rule requiring identification of a 24-hour emergency response contact and this noncompliance does not contribute to the damages that may have resulted from a transportation release, the noncompliance should not bar the shipper from recovering under the indemnity provision for damages resulting from carrier negligence.

CONCLUSION

Well beyond the penalties for noncompliance, the liability for consequential damages or personal injuries resulting from a release of a hazardous material can be very high because of the inherent nature of the material and its potential to injure persons and contaminate the environment. Most often, transportation contracts fail to address assignment of these potentially huge risks. This failure to address liability in contracts can result in expensive and unpredictable litigation, such as those cases in which courts have relied on a number of different theories of liability. If your company is engaged in the shipping or transportation of hazardous materials, you should seriously consider minimizing these uncertainties and potential litigation by explicitly addressing such risks and liability in your transportation contracts.

NOTES

1. Information from the United States Department of Transportation, Research and Special Programs Administration, Office of Hazardous Materials Planning and Analysis, Registration Program. The registration requirements are in 49 C.F.R. §§ 107.601 and 107.620.
2. *See* U. S. Department of Transportation's Office of Hazardous Materials Safety at www.hazmat.dot.gov/. *See also* 49 C.F.R. §§ 171.15 (immediate notice of certain incidents).
3. *See In re* New Orleans Train Car Leakage Fire Litigation, 795 So.2d 364 (4th Cir. 2001).
4. *Id.* at 372.
5. *Id.* at 373.
6. *See* Shippers Nat'l Freight Claim Council, Inc. v. Interstate Commerce Comm'n, 712 F.2d 740, 745 (2d Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984).
7. Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134 at 143–44 (1964) (brackets in original).
8. Shippers Nat'l Freight, 712 F.2d at 745–46 (citing Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. 134). *See also* Conair Corp. v. Old Dominion Freight Line, Inc., 22 F.3d 529, 531 (3d Cir. 1994); Fine Foliage of Fla., Inc. v. Bowman Transp., 901 F.2d 1034, 1037 (11th Cir. 1990); Johnson & Johnson v. Chief Freight Lines, 679 F.2d 421 (5th Cir. 1982); Frosty Land Foods Int'l, Inc. v. Refrigerated Transp. Co., 613 F.2d 1344, 1346 (5th Cir. 1980).
9. Missouri Pacific R.R. v. Elmore & Stahl, 377 U.S. at 134–36 (melons).
10. *See* 49 U.S.C.A. § 14706(a) (2002)
11. The rules are different for ocean carriers operating under the Carriage of Goods by Sea Act ("COGSA"), 46 App. U.S.C.A. § 1300, *et seq.* In a 1985 decision, the Second Circuit held that, "[u]nder COGSA, carriers can be liable for loss of or damage to cargo only on the basis of fault." Allied Chemical Int'l Corp. v. Compania de Navegacao Lloyd Brasileiro, 775 F.2d 476, 483 (1985), *cert. denied*, 475 U.S. 1099 (1986). *See also* 46 App. U.S.C.A. § 1304(2)(q). Indeed, under COGSA, the ship owner is not liable if he or she can show that the damage resulted from the crew's negligence.
12. *See, e.g.*, Reichhold Chems., Inc. v. United States, 11 Cl. Ct. 150, 151–52 (1986) (carrier's liability for damage to a shipment of isocyanate is governed by former 49 U.S.C. § 11707); Air Prods. and Chems., Inc. v. Ill. Cent. Gulf R. Co., 721 F.2d 483 (5th Cir. 1983)), *cert. denied*, 469 U.S. 832 (1984) (the Interstate Commerce Act governs contract action brought against carrier to recover damages caused by misdelivery of chemicals).
13. *See* 49 U.S.C. § 14101(b).
14. *See e.g.*, Uniform Straight Bill of Lading, National Motor Freight Classification, § 1 and 6 of Terms and Conditions, available through the American Trucking Association, Washington, D.C.