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David Brose

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COMMENT

ENDING THE ARRANGER DEBATE: INTEGRATING CONFLICTING INTERPRETATIONS IN SEARCH OF A UNIFORM APPROACH

I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ authorizing the federal government to respond to any threatened or actual release of any hazardous substance that may pose an imminent and substantial public health threat.² The Legislature created a "Superfund" to finance the government authorized cleanup operations.³ These cleanup decisions are guided by the National Contingency Plan, which prescribes methods for investigating health and environmental problems resulting from an actual or threatened release of a hazardous substance, and establishes criteria for determining the appropriate extent of response activities.⁴

Many courts have criticized the congressional drafting⁵ of the CERCLA.⁶ Some critics believe the poor language of the statute was a result of a lame-duck Congress,⁷ and a lame-duck President,⁸ intent on passing comprehensive environmental legislation before the end of the ninety-sixth Congress.⁹ The sponsors of CERCLA crafted the liability scheme with anticipation that the common law would provide guidance in interpreting the legislation.¹⁰ Consequently, courts have generally interpreted CERCLA to provide broad coverage based on the remedial nature of the statute.¹¹ However, as a consequence of the unusually rapid passage of this legislation, there is little legislative history to guide the courts in interpreting the statute.¹² "Lacking direction from the traditional tools of statutory construction, and unable to wait for Congress to correct the errors, the

¹ 42 U.S.C. § 9601-75 (2000).

² 42 U.S.C. § 9604.

³ See 26 U.S.C. § 9507 (2000); 42 U.S.C. § 9601(11).

⁴ 42 U.S.C. § 9605.

⁵ See John Copeland Nagle, *CERCLA's Mistakes*, 38 Wm. & Mary L. Rev. 1405, 1405 & n. 3 (1997) (citing multiple cases).

⁶ Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended in 42 U.S.C. §9601-9675). The Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) amended CERCLA.

⁷ See Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 Colum J. Envtl. L. 1, 19 (1982).

⁸ See Allan J. Topol & Rebecca Snow, *Superfund Law and Procedure* §1.1, at 2 (West 1992).

⁹ See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080 (1st Cir. 1986) ("CERCLA was . . . enacted as a 'last-minute compromise' between three competing bills . . . ;" Nagle, 38 Wm. & Mary L. Rev. at 1405-06 (stating the usual explanation for CERCLA's poor drafting as a rush to pass "the hazardous waste law. . . before President-elect Reagan and a Republican Senate majority assumed office.")).

¹⁰ See e.g., *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988) (stating that the sponsors expected courts to turn to common law analogies).

¹¹ See e.g., *Dedham Water Co.*, 805 F.2d at 1081; See e.g., Norman J. Singer, *Statutes and Statutory Construction* §45.02, 45.05 (5th ed. 1992); See Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv. Envtl. L. Rev. 199, 262 (1996).

¹² See Topol & Snow, *Superfund Law and Procedure* at 4-5.

courts interpreting CERCLA muddle along.”¹³ This has resulted in inconsistent decisions and significant jurisdictional differences.¹⁴

One of the key issues on which the courts are split is the interpretation of the term “arranged for,” as provided in 42 U.S.C. §9607(a)(3). Congress did not define the term “arranged for.” Further complicating the problem is the lack of legislative history defining this phrase,¹⁵ and the inability of the lower federal courts to turn to past Supreme Court cases or to existing administrative interpretations for guidance.¹⁶ “Interpretation of this term, however, is critical” to the determination of liability.¹⁷ Modern courts have adopted three approaches in applying arranger liability: (1) a strict liability approach; (2) a specific intent approach; and (3) a “totality of the circumstances,” case-by-case approach.¹⁸

This article sets forth the various approaches that courts currently apply in determining arranger liability, and provides an analysis of the approaches within the context of the overall scheme of CERCLA. Further, this article proposes the incorporation of all three approaches in the creation of a uniform process for determining arranger liability.

II. BACKGROUND

A. Purposes of CERCLA

There were two main legislative purposes for creating CERCLA. First, Congress intended that the federal government would be given the necessary tools and resources to respond to the problems associated with hazardous waste disposal.¹⁹ Secondly, Congress intended that those parties responsible for proper disposal of hazardous waste bear the costs and responsibility for any harmful conditions that they create.²⁰

B. Liability Under CERCLA

CERCLA provides the federal government with two basic mechanisms to respond to the release or threat of release of a hazardous substance.²¹ First, the government may use funding from the “Superfund” to clean up the site, and then file a cost-recovery action against a broadly defined group of potentially responsible parties.²² Second, the government may issue an order requiring any

¹³ See Nagle, 38 Wm. & Mary L. Rev. at 1410.

¹⁴ Maralyn Milne Reger, *A Uniform Approach For Determining Arranger Liability Under CERCLA*, 1998 BYU L. Rev. 1241, 1242 (1998).

¹⁵ *U.S. v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989). For a brief legislative history see *id.* at 1380. n.8.

¹⁶ Nagle, 38 Wm. & Mary L. Rev. at 1409.

¹⁷ *Matthews v. Dow Chem. Co.*, 947 F. Supp. 1517, 1523 (D. Colo. 1996).

¹⁸ See *U.S. v. Gordon Stafford, Inc.*, 952 F. Supp. 337, 339-40 (N.D. W. Va. 1997).

¹⁹ *U.S. v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982), quoted in *Dedham Water Co.*, 805 F.2d at 1081. (Many courts have cited this passage when defining the two main policy concerns of CERCLA).

²⁰ *Id.*

²¹ 42 U.S.C. § 9604.

²² *Id.* § 9607(a)(1)-(4).

party liable under section 9607(a) to clean up the site.²³ Parties ordered to clean up the site may then seek to recover costs incurred in the cleanup from other potentially responsible parties.²⁴

To establish liability, the government must prove that there has been a release or threat of release of a hazardous substance, as a result of which the government has incurred response costs that were necessary and consistent with the National Contingency Plan, and that the defendants fall within one of four listed categories of responsible parties.²⁵ The categories of responsible parties include: (1) current owners and operators of a site at which a release or threatened release occurred; (2) owners or operators of such a site at the time of disposal of hazardous material; (3) generators who arranged for disposal at such a site; and (4) transporters of hazardous waste to such a site.²⁶ An “arranger” is defined in the statute as:

any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.²⁷

However, CERCLA does not provide a definition of “arranged for.” This has subjected CERCLA arranger liability to substantial judicial interpretation.²⁸ As evidence of the confusion, more “arrangers” have been held liable under CERCLA than parties in any of the other three classes subject to CERCLA’s prohibitions.²⁹ “Although some lines of demarcation can be identified, questions remain concerning the minimum connections that a person must have with a transaction that ultimately results in disposal of hazardous substances before that person is liable as an arranger.”³⁰

Liability under CERCLA is strict,³¹ and is typically joint and several.³² Where multiple defendants are involved, the initial liability finding is followed by a contribution proceeding to allocate damages among responsible parties.³³

²³ *Id.* § 9606(a).

²⁴ *Id.* § 9607(a)(4)(b).

²⁵ *Id.* § 9607(a); See also *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 934 (8th Cir. 1995).

²⁶ *Id.*

²⁷ *Id.* §9607(a)(3).

²⁸ Jeffrey M. Gaga, *Interpreting Section 107(A)(3) of CERCLA: When Has a Person “Arranged for Disposal?”*, 44 Sw. L. J. 1313, 1314 (1991).

²⁹ Richard H. Mays, *CERCLA Litigation, Enforcement, and Compliance*, § 7.05 at 7-7.

³⁰ Anna Marple Buboise, *Expanding the Scope of Arranger Liability Under CERCLA*, 43 U. Kan. L. Rev. 469, 474 (1995).

³¹ See *Carson Harbor Village, Ltd. v. Unocal Crop.*, 227 F.3d 1196, 1207 (9th Cir. 2000); *N.J. Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 104 (3rd Cir. 1999); *U.S. v. Township of Brighton*, 153 F.3d 307, 312 (6th Cir. 1998); and *U.S. v. N.E. Pharm. & Chem. Co.*, 810 F.2d 726, 732 n. 3 (8th Cir. 1986).

³² See *N.E. Pharm. & Chem. Co.*, 810 F.2d at 732 n. 3; *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 653 (6th Cir. 2000); and *U.S. v. Occidental Chem. Corp.*, 200 F.3d 143, 147 (3rd Cir. 1999).

³³ *Control Data Corp.*, 53 F.3d at 934.

III. JUDICIAL INTERPRETATIONS OF "ARRANGED FOR"

A. The Strict Liability Approach

The first interpretation, which is considered the broadest interpretation, was set forth in *U.S. v. Aceto Agric. Chem. Corp.*,³⁴ by the Eighth Circuit. It stated that arrangers are subject to strict liability under CERCLA.³⁵ In *Aceto*, the EPA and the State of Iowa alleged that six pesticide manufacturers who contracted with the defendant to formulate their pesticides into commercial grade "arranged for" hazardous waste disposal.³⁶ The manufacturers retained ownership of the pesticides and supplied the specifications for the commercial grade products.³⁷

The court began its analysis by stating that "most courts have held [that] CERCLA imposes strict liability,"³⁸ and added that the broad language used in the statute to describe arranger liability indicated that "a liberal judicial interpretation [is] consistent with CERCLA's 'overwhelming remedial' statutory scheme."³⁹ Further, the court stated that "[other] courts have not hesitated to look beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance."⁴⁰ The court also stated that the defendant is not required to have actual knowledge that the substance would be deposited illegally to be held liable for "arranging for" waste disposal.⁴¹ Therefore, the Eighth Circuit determined that "arranged for" does not require intent to dispose of hazardous waste,⁴² reasoning that requiring proof of intent would frustrate the goals of CERCLA.⁴³

Direct support for the Eighth Circuit's approach can be found in both CERCLA's statutory language and legislative history. The legislative proposals⁴⁴ that led to the enactment of CERCLA contemplated two different schemes of liability.⁴⁵ One of the bills considered by the House of Representatives, imposed liability on those who "caused or contributed" to release of hazardous materials.⁴⁶ The Senate version that was ultimately adopted imposed liability on all "responsible parties."⁴⁷ Thus, the choice of "responsible parties," as opposed to elements of causation, suggest that Congress intended CERCLA to incorporate a scheme of strict liability based upon the difficulty

³⁴ 872 F.2d 1373 (8th Cir. 1989).

³⁵ *See id.*

³⁶ *Aceto Agric. Chem. Corp.* 872 F.2d at 1376.

³⁷ *Id.* at 1383.

³⁸ *Id.* at 1377 (citing *N.E. Pharm. & Chem. Co.*, 810 F.2d at 732 n. 3; *N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2nd Cir. 1982); *U.S. v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-10 (S.D. Ohio 1983)).

³⁹ *Aceto Agric. Chem. Corp.* 872 F.2d at 1380 (quoting *N.E. Pharm. & Chem. Co.*, 810 F.2d at 733).

⁴⁰ *Aceto Agric. Chem. Corp.* 872 F.2d at 1381 (citing *U.S. v. Conservation Chem. Co.*, 619 F. Supp. 162, 237-41 (W.D. Mo. 1985)).

⁴¹ *Aceto Agric. Chem. Corp.* 872 F.2d at 1381 (citing *N.Y. v. General Elec. Co.*, 592 F. Supp. 291, 297 (N.D.N.Y. 1984); *U.S. v. A&F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984)).

⁴² *Aceto Agric. Chem. Corp.* 872 F.2d at 1380.

⁴³ *Id.*

⁴⁴ *See* Grad, 8 Colum. J. Envtl. L. at 2 (1982) (identifying the three bills that contributed to the enactment of CERCLA: H.R. 7020, 96th Cong. (1980); H.R. 85, 96th Cong. (1980); and S. 1480, 96th Cong. (1980)).

⁴⁵ *See* John Copeland Nagle, *CERCLA, Caution and Responsibility*, 78 Minn. L. Rev. 1493, 1493 (1994).

⁴⁶ H.R. 7020, 96th Cong. §3071(a)(1)(D) (1980); (The bill states that "any person who 'caused or contributed' to the release or threatened release shall be strictly liable for such costs.")

⁴⁷ S. 1480, 96th Cong. §4 (a) (1980) ([T]hose actually 'responsible for any damage' . . . [may be forced to assume] the cost of their actions.")

of applying traditional tort causation doctrines to such cases.⁴⁸ Further, support may be found in Congress' explicit instruction⁴⁹ that the standard of liability should be construed in accordance with those established under Section 311 of the Clean Water Act.⁵⁰ Courts have interpreted the liability scheme under the Clean Water Act as one of strict liability.⁵¹ The courts have generally interpreted CERCLA to provide broad coverage based on the remedial nature of the statute.⁵²

The Eighth Circuit also finds indirect support for its interpretation based upon evidence of legislative intent. "CERCLA's liability provision, which seeks to establish the responsibility of persons to pay the cost to remedy the harmful effects of their [activities] was critical to Congress's choice to implement the new, strict standard of care."⁵³ Although the final bill eliminated the term "strict liability," opting instead to refer to the scheme as interpreted under the Clean Water Act, evidence remains to support that CERCLA implicitly incorporated the strict standard.⁵⁴

The Chairman of the Committee on Environment and Public Works, and manager of the compromise bill that ultimately was enacted, specifically pointed out that the statute still imposes strict liability despite any change in statutory wording.⁵⁵ Further, other sponsors of the bill similarly articulated the inclusion of strict liability.⁵⁶ Finally, Congress addressed this concern in a more apparent manner when considering amendments to the statute in 1985.⁵⁷

However, the Eighth Circuit interpretation has not escaped criticism. Critics have claimed that the statute is "harsh"⁵⁸ and may lead to an "unfair imposition of liability."⁵⁹ This has led to other interpretations of "arranged for" as courts attempt to reintroduce fairness into the equation.⁶⁰

B. The Specific Intent Approach

The second interpretation, considered the narrow interpretation, was set forth by Judge Richard Posner writing for the Seventh Circuit in *Amcast Industrial Corp. v. Detrex Corp.*⁶¹ In this

⁴⁸ See Nagle, 78 Minn. L. Rev. at 1503-06. "The Senate bill specified in the statute itself the precise elements of liability instead of simply relying on the common law understanding of those who 'caused or contributed' to hazardous waste contamination." *Id.* at 1504.

⁴⁹ 42 U.S.C. §9601(32). ("[L]iability under this subchapter shall be construed to be the standard of liability which obtains under Section 1321 of Title 33.")

⁵⁰ 33 U.S.C. § 1321 (2000).

⁵¹ See Brian J. Pinkowski, *Simplifying CERCLA Defenses to Liability*, 28 Urb. Law. 197, 202 (1996) (citing to multiple cases interpreting Clean Water Act as imposing strict liability.).

⁵² See, e.g., *Dedham*, 805 F.2d at 1081; See, e.g., Norman J. Singer, *Statutes and Statutory Construction* §45.02, 45.05; See Watson, 20 Harv. Envtl. L. Rev. at 262.

⁵³ Michael P. Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 Case W. Res. L. Rev. 65, 78 (1992).

⁵⁴ See Grad, 8 Colum. J. Envtl. L. at 9

⁵⁵ See *id.* at 21-22 (describing Senator Randolph's comments (citing 126 Cong. Rec. 30, 932 (1980)).

⁵⁶ See Grad, 8 Colum. J. Envtl. L. at 21-30.

⁵⁷ See H.R. Rep. No. 99-253 (I), at 74, reprinted in 1986 U.S.C.C.A.N. 2835, 2856.

⁵⁸ *U.S. v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2nd Cir. 1993).

⁵⁹ *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252, 267 (3rd Cir. 1992).

⁶⁰ See, e.g., *Alcan*, 990 F.2d at 716; *O'Neil v. Picallo*, 883 F.2d 176, 179 (1st Cir. 1989); John M. Hyson, "Fairness" and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA, 21 Harv. Envtl. L. Rev. 137, 143 (1997) (CERCLA's liability scheme is inconsistent with basic notions of culpability and causation, and for that reason it is often determined to be unfair.).

⁶¹ 2 F.3d 746 (7th Cir. 1993).

case, the defendant, a chemical manufacturer, allegedly contracted for transportation of hazardous waste, which was subsequently spilled while filling the purchaser's storage tanks.⁶²

The Seventh Circuit held that the defendant was not liable as an arranger because the defendant did not contract with the transporter for the purpose of spilling the hazardous waste on the premises.⁶³

The court found that the critical words in governing liability as an arranger are "arranged for," implying "intentional action."⁶⁴ Judge Posner found that the words "arranged with a transporter for transport for disposal or treatment"⁶⁵ appeared to contemplate a case in which an entity that desired to rid itself of its hazardous wastes hired a transporter to deliver the waste to a disposal site, not a case in which the entity provided a useful product.⁶⁶ Therefore, the court concluded that a party does not "arrange for" disposal of hazardous waste unless it intentionally arranged for the disposal on the site.⁶⁷

Judge Posner's approach followed a period of at least a decade following CERCLA's enactment where courts accepted the strict liability scheme without controversy.⁶⁸ However, the supporters of this interpretation argue that incorporating an intent requirement does not frustrate the strict liability nature of CERCLA.⁶⁹ "Strict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct."⁷⁰ Even though CERCLA incorporates a scheme of strict liability "it would be error for us not to recognize the indispensable role that state of mind must play in determining whether a party has [arranged for disposal of hazardous substances]."⁷¹

Supporters argue that in incorporating this intent element, there is no need "to depart from the language of the statute."⁷² "[G]iven its plain meaning, the verb 'to arrange' arguably implies a person has the intent to accomplish that which they are 'arranging' to do."⁷³

However, while Posner's approach introduced more fairness into the imposition of response costs, his approach was not immune to criticism. The main criticism of his approach is that the deviation from the judicially accepted CERCLA liability scheme represents plain judicial activism.⁷⁴ In announcing his definition of arranged for, Posner cited no source, while ignoring existing precedent as to the interpretation of the term.⁷⁵ Also, by relying solely on the language of the statute in his interpretation, he turns his back on the theory of statutory interpretation that he continually

⁶² *Id.* at 748.

⁶³ *Id.* at 751.

⁶⁴ *Id.*

⁶⁵ 42 U.S.C. §9607(a)(3).

⁶⁶ See *Amcast*, 2 F.3d at 751.; David W. Lannetti, "Arranger Liability" Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Judicial Retreat From Legislative Intent, 40 Wm. & Mary L. Rev. 279, 297 (1998).

⁶⁷ *Id.*

⁶⁸ See Topol & Snow, *Superfund Law and Procedure* §4.2, at 337.

⁶⁹ See Reger, 1998 BYU L. Rev. at 1251.

⁷⁰ *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 712 (1995) (O'Connor, J., concurring).

⁷¹ *R.R. Street & Co., Inc. v. Pilgrim Enterprises, Inc.*, 81 S.W.3d 276, 292 (Tex. App. 2001)

⁷² *Exxon Corp. v. Hunt*, 475 U.S. 355, 371 (1986).

⁷³ *Chatham Steel Corp. v. Brose*, 858 F. Supp. 1130, 1138 (N.C. Fla. 1994).

⁷⁴ See Topol & Snow, *Superfund Law and Procedure* §4.2, at III (Supp. 1998).

⁷⁵ *Amcast*, 2 F.3d at 751.

fought for; imaginative reconstruction.⁷⁶ Under this theory the goal of the judge is to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him.⁷⁷ Thus, the judge will be looking at more than just the plain meaning of the statute.⁷⁸ Rather, the judge must also attempt to discern the intent of the legislature.⁷⁹ Opponents of this approach cannot square the legislative intent of strict liability.⁸⁰ Despite the criticisms, other courts have relied on Posner's narrow approach to interpreting CERCLA arranger liability.⁸¹ Similarly, Posner's approach opened the door for the creation of the Eleventh Circuit's "modern" approach.⁸²

C. The "Totality of the Circumstances" Case-by-Case Approach

The third approach, the middle ground interpretation, was set forth by the Eleventh Circuit in *South Fla. Water Mgt. Dist. v. Montalvo*.⁸³

The defendant, a pesticide manufacturer and aerial spraying service, sought contribution for incurred response costs from landowners who had contracted them for their services.⁸⁴ The response costs were due to contamination of the airstrip and storage site following spillage during mixing and loading operations, and rinsing of the airplane's application tanks.⁸⁵

The court held that "when determining whether a party has 'arranged for' the disposal of a hazardous substance, courts must focus on all of the facts in a particular case."⁸⁶ The court found that for the landowners to have "arranged for" disposal of the pesticide wastes, "they must have done more than simply contract" for the services.⁸⁷ The court recognized that factors such as knowledge of the disposal, ownership of the hazardous substances, and intent are germane to the determination of whether the hazardous substance disposal had been "arranged for."⁸⁸ The court noted, however, that the stated factors are neither exhaustive nor determinative.⁸⁹

This approach represents a compromise between the broad and narrow approaches listed above. The compromise is based upon a belief that either of the existing approaches is inadequate. Proponents of this approach argue that the Eighth Circuit's strict liability approach "stretch[ed] the meaning 'arranged for' too far,"⁹⁰ while the Seventh Circuit's specific intent approach was "too limited and [did] not adequately consider the remedial nature of CERCLA."⁹¹ This approach has

⁷⁶ See Richard A. Posner, *Statutory Interpretation-In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800 (1983).

⁷⁷ *Id.* at 817.

⁷⁸ *Id.* at 818.

⁷⁹ *Id.*

⁸⁰ *Supra* nn. 43-56.

⁸¹ See *South Fla. Water Mgt. Dist. v. Montalvo*, 84 F.3d 402 (11th Cir. 1996).

⁸² See *id.*

⁸³ 84 F.3d 402.

⁸⁴ *Id.* at 405.

⁸⁵ *Id.*

⁸⁶ *Id.* at 407.

⁸⁷ *Id.* (citing *AM Intl., Inc. v. Intl. Forging Equip. Corp.*, 982 F.2d 989, 999 (6th Cir. 1993)).

⁸⁸ *Montalvo*, 84 F.3d at 407

⁸⁹ *Id.*

⁹⁰ *Matthews*, 947 F. Supp. at 1525.

⁹¹ *Id.*

come to be known as the “totality of the circumstances” or “case-by-case” approach.⁹² Other courts have quickly adopted this approach, and hence this approach has become the modern trend.⁹³

IV. RECONCILING THE APPROACHES INTO A UNIFORM PROCESS

The question must be, are the three approaches wholly irreconcilable? Most commentators have taken an all or nothing approach to selecting an interpretation of the term “arranged for.”⁹⁴ However, such an approach is not required, as there is evidence that the three interpretations can at least co-exist, if not work together as a uniform process. Thus, the problem becomes, how can we incorporate the liability scheme as imposed by each interpretation, without frustrating the foundation for each interpretation?

Since the Eighth Circuit’s approach represents the most expansive interpretation of the phrase “arranged for,” a process that satisfies proponents of this approach should be acceptable to all. Under the strict liability approach, the main concern is that “responsible parties” are held strictly liable for their actions.⁹⁵ Thus, the scheme of liability seems unalterable. However, a consensus may be reached through redefining who may be a responsible party. This is the opportunity to integrate the three approaches.

By starting with the “totality of the circumstances” approach,⁹⁶ a court would be able to identify objective criteria establishing minimum contacts necessary for parties to subject themselves to consideration as a possible responsible party.⁹⁷ Once these minimum contacts are established by the plaintiff(s), the Eighth Circuit’s strict liability approach⁹⁸ would then attach the response costs to the responsible parties subject to one of the defenses set forth by the defendant.

Liability is subject to three defenses explicitly stated in the statute: (1) an act of God; (2) an act of war; and (3) an act or omission of a third party who is neither an employer or agent of the defendant, nor in a contractual relationship with the defendant.⁹⁹ Several courts have stated that these defenses are the only absolute defenses to CERCLA liability.¹⁰⁰ However, CERCLA’s language and a growing body of case law have set forth at least fourteen defenses to liability in addition to those set forth in section 9607(b).¹⁰¹

⁹² See *U.S. v. Gordon Stafford, Inc.*, 952 F. Supp. 337, 340 (N.D. W.Va. 1997).

⁹³ See, e.g., *Briggs & Stratton Corp. v. Concrete Sales & Servs., Inc.*, 990 F. Supp. 1473, 1479 (M.D. Ga. 1998); *U.S. v. North Landing Line Constr. Co.*, 3 F. Supp. 2d 694 (E.D. Va. 1998).

⁹⁴ See e.g., Lannetti, 40 Wm. & Mary L. Rev 279.

⁹⁵ *Supra* nn. 43-56.

⁹⁶ *Supra* nn. 80-90.

⁹⁷ See Buboise, 43 U. Kan. L. Rev. at 474.

⁹⁸ *Supra* nn. 34-56.

⁹⁹ 42 U.S.C. § 9607(b).

¹⁰⁰ See e.g., *Dedham*, 889 F.2d at 1154; *Aceto Agric. Chem. Corp.*, 872 F.2d at 1378; *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 90 (3rd Cir. 1988), cert. denied, 488 U.S. 1029 (1989).

¹⁰¹ These fall within the categories of causation or divisibility of harm, constitutional, consumer/useful product exception, federally permitted releases, inconsistency with the National Contingency Plan, innocent landowner/purchaser defense, methane recovery exclusion, naturally occurring substances defense, necessary costs of response and causation, pesticide exclusion, petroleum exclusion, recycler exclusion, secured creditor defense, and statute of limitations. See SF97 ALI-ABA 547 (brief discussion and case cites for each of these defenses).

The final key to the integration is the creation of another judicially created defense to CERCLA liability, lack of intent. Thus, the specific intent approach¹⁰² as set forth by Judge Posner is changed slightly, as proof of specific intent under the integrated approach is no longer a necessary part of the plaintiff's prima facie case. Rather, the burden of proof shifts to the defendant. Application of the concept of intent as an affirmative defense removes some of the harshness of the Eighth Circuit's approach while not burdening the plaintiff, typically the government, with the duty to force traditional concepts of causation and culpability into the remedial framework of CERCLA.

V. CONCLUSION

Have the various circuits failed the sponsors of CERCLA in providing guidance in interpreting the legislation, especially as to interpreting "arranger" liability? When, and if, the United States Supreme Court weighs in on the issue, that question may finally be answered. The approach that the Supreme Court selects may speak more to the broad concepts of statutory interpretation and the viability of progression of the law, than simply attaching a uniform definition to the terms "arranged for."

The Supreme Court may select one of the three judicial approaches,¹⁰³ finding solace in the simplicity of such action. For example, the Court may select the Eighth Circuit's Strict Liability approach,¹⁰⁴ relying upon the legislative history. Further supporting adoption of this approach is the attractiveness of only requiring courts to apply the simplistic mechanisms of this strict approach.

The Court may allow common sense to prevent it from adopting such a harsh approach, instead deciding to adopt Judge Posner's Specific Intent approach.¹⁰⁵ Such action would allow courts to maintain application of strict liability, however it would reduce the number of possible responsible parties. Also, this approach increases the burden upon the plaintiffs, requiring proof of specific intent before liability may attach.

The Court may realize that neither of the above approaches alone produces a satisfactory scheme of liability. Thus, it may adopt the middle ground interpretation known as the Totality of the Circumstances approach.¹⁰⁶ Adoption of this approach would allow the Court to "split" the difference between the above approaches. Thus, in theory, incorporating a little of the best from each approach, while hopefully eliminating most of the worst of each. However, such action incorporates costs, especially to defendants, as it becomes increasingly difficult to predict what actions may lead to the imposition of liability.

However, if the Supreme Court takes a step back from "selecting" an approach, the choice should become obvious. The optimal choice in this circumstance is to make no choice at all. The sponsors of CERCLA crafted the liability scheme with anticipation that the common law would provide guidance in interpreting the legislation.¹⁰⁷ Where was it decided that interpretation could only be accomplished by adoption of one meaning, rather than allowing the true meaning of statutory terms to be defined as the area of law evolves?

¹⁰² *Supra* nn. 60-79.

¹⁰³ *Supra* nn. 34-91. (The approaches: Strict Liability, Specific Intent, and Totality of the Circumstances).

¹⁰⁴ *Supra* nn. 34-59.

¹⁰⁵ *Supra* nn. 60-80.

¹⁰⁶ *Supra* nn. 81-91.

¹⁰⁷ See e.g., *Edward Hines Lumber Co.*, 861 F.2d at 157 (stating that the sponsors expected courts to turn to common law analogies).

The proposed uniform process¹⁰⁸ represents the present state of evolution. By incorporating the fundamental reasoning behind each approach, one can create an integrated approach allowing courts to impose “strict liability” under “objective circumstances” on those parties who are “responsible” for the damages. Creation of this uniform approach would allow the Supreme Court to recognize progression in the law, while maintaining the fundamental principles underlying its application, which have been developed over the past two decades.

DAVID BROSE

¹⁰⁸ *Supra* nn. 92-99.