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James P. Teufel

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ARRANGING FOR OR DISPOSING OF LIABILITY UNDER CERCLA: EDWARD HINES LUMBER CO. v. VULCAN MATERIALS CO.

I. INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA")\(^1\) was enacted to address ongoing problems resulting from hazardous substance contamination.\(^2\) Congress' major concern was the inability of existing legislation to deal with the numerous environmental disasters, such as the Love Canal incident, which adversely affect the environment and health of the citizens of this country.\(^3\) In order to compel those who control hazardous substances to handle them with the utmost care, one of CERCLA's provisions imposes direct liability on those responsible for the release of hazardous substances.\(^4\) This provision identifies four classes of responsible parties, each of whom are liable for the costs of cleaning up a contamination site.

In *Edward Hines Lumber Co. v. Vulcan Materials Co.,*\(^5\) the defendant, Osmose Wood Preserving Co. of America, Inc. ("Osmose"), supplied hazardous

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5. 685 F. Supp. 651 (N.D. Ill.), aff'd in part, 861 F.2d 155 (7th Cir. 1988). The focus of this Note addresses an issue discussed solely in the trial court decision. See infra notes 208-27 and accompanying text.
chemicals to Edward Hines Lumber Co. ("Hines"). Osmose also designed and built the facility where the chemicals were used under express warranty that the system would prevent the escape or leakage of toxic chemicals. Additionally, Osmose trained the employees who operated the system. Further, the company retained the right of access to the facility, to all chemicals, and to all products to ensure that they conformed to Osmose's standard of quality. Finally, Osmose provided technical information and marketing assistance to Hines. Nevertheless, when the hazardous chemicals sold by Osmose were improperly released into the environment, through the system Osmose built, the court held that Osmose was not a responsible party under section 9607(a)(3) of CERCLA, and therefore, could not be held liable for the costs of the cleanup. This Note discusses why, in spite of strong congressional intent to ensure that those who handle hazardous substances accept responsibility for their contamination of the environment, the court found the facts involved in Edward Hines Lumber Co. were insufficient to impose liability under CERCLA.

To resolve this issue, the Background section first explores the legislative history and congressional intent behind CERCLA. This section also discusses the statutory provisions that impose liability under CERCLA. The next section focuses on judicial interpretation of section 9607(a)(3), which imposes liability on any party who arranges for the disposal or treatment of a hazardous substance. Following the discussion of the judicial interpretation of section 9607(a)(3), the Note discusses the district court's decision, in Edward Hines Lumber Co., to grant a summary judgment motion in favor of a seller of hazardous substances. The Analysis section examines the decision in light of both prior case law and CERCLA's legislative history. Finally, the Note addresses the impact of the decision on the requirements for liability under CERCLA.

9. Id.
10. Id.
11. Id. at 656. Liable parties under CERCLA include:

   [A]ny 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 . . .

13. Id.
In order to understand the district court’s decision in Edward Hines Lumber Co., it is useful to examine CERCLA’s scope, its legislative history, and previous judicial interpretations of the “arranged for disposal” provision.

A. CERCLA’s Legislative History

An examination of the legislative history of CERCLA reveals congressional intent to address the dangerous problems of hazardous substance contamination and cleanup.

1. What is a Hazardous Substance under CERCLA?

CERCLA provides a very comprehensive definition of a hazardous substance. The statutory definition encompasses hazardous substances as defined in several other environmental statutes including: the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, and the Solid Waste Disposal Act. Additionally, section 9602 of CERCLA empowers the Environmental Protection Agency (“EPA”) to designate additional hazardous substances. Pursuant to this provision, the EPA has promulgated a table of hazardous substances.

2. A Historical Perspective

In 1980, both the House of Representatives and the Senate were independently at work on a version of environmental response legislation. The final bill, however, was a compromise, hurriedly put together during the final days of the Carter Administration. This bill became the Comprehensive Environ-
mental Response, Compensation and Liability Act of 1980. Despite struggling with hazardous waste clean-up bills for more than three years, Congress passed CERCLA without any committee reports on the bill itself. In its final enactment, however, the bill contained many provisions which closely resembled those of the bills from which the compromise was derived. Courts have held that the legislative history of those earlier versions is useful to determine congressional intent behind CERCLA.

The report which accompanied the precompromise Senate bill ("Senate Report") and the report which accompanied the precompromise House bill ("House Report") detailed the problems experienced by the United States as a result of hazardous substance contamination. Congress was concerned about the recent growth of the chemical industry and the increasing danger to society from the improper disposal of hazardous substances. Perhaps of even greater concern, however, was the inability of existing legislation to deal with those problems. Both the House and Senate Reports pointed to numerous environmental disasters that were handled inadequately by existing legislation. Perhaps the most infamous environmental tragedy addressed by both bills was a compromise, hurriedly put together "in the closing days of the lame duck session of an outgoing Congress").

24. See Shore Realty Corp., 759 F.2d at 1040 (commenting that the court was without the benefit of committee reports to help determine the congressional intent behind CERCLA); see also Grad, supra note 2, at 1 (stating that "the actual [CERCLA] bill which became law had virtually no legislative history at all").
25. See Shore Realty Corp., 759 F.2d at 1040 (stating that "the compromise contains many provisions closely resembling those from earlier versions of the legislation").
26. See id. at 1040-42, 1042 n.12 (stating that although S. 1480 was a precompromise version of the legislation, the legislative histories of those provisions that received little or no change as part of the final compromise were useful in determining congressional intent); see Grad, supra note 2, at 1-2 (using the legislative histories of S. 1480 and H.R. 7020 to help determine congressional intent).
27. Senate Report, supra note 2.
29. See supra note 2 and accompanying text.
30. Senate Report, supra note 2, at 7; House Report, supra note 2, at 17; Grad, supra note 2, at 7.
31. See Senate Report, supra note 2, at 10-11; House Report, supra note 2, at 17-18; infra notes 42-56 and accompanying text; see also Grad, supra note 2, at 7-8 (discussing the emphasis the Senate placed on the inadequacy of existing legislation to deal with environmental disasters); Superfund: Litigation and Cleanup, supra note 2, at 2 (stating that CERCLA was designed to bring order to the redundant and inadequate federal laws dealing with hazardous substance cleanup).
32. For instance, the Senate Report contains a description of three environmental disasters that occurred prior to the Love Canal tragedy. Senate Report, supra note 2, at 7-8.

The first incident was the kepone contamination of the James River in Virginia. Id. at 7. The careless disposal practices of two kepone manufacturing companies were the cause of the releases of the hazardous substance into the river. Id. The releases could have been controlled at a cost of two hundred thousand dollars. Id. The uncontrolled releases, however, resulted in medical expenses and claims against the industry that were estimated to be in excess of twenty million dollars. Id. In addition, the cost of cleaning the James River was estimated to be eight billion
chambers was the abandoned waste site at Love Canal.

The Love Canal disaster resulted from the uncontrolled disposal of numerous fifty-five gallon drums filled with toxic wastes.\textsuperscript{33} During the 1940s, the Hooker Chemicals and Plastics Corp. ("Hooker Chemicals") disposed of those wastes in an abandoned canal near Niagara Falls.\textsuperscript{34} One of those wastes, trichlorophenol, contained dioxin, one of the world's most deadly chemicals.\textsuperscript{35} An estimated two thousand pounds of dioxin was discarded in the canal and surrounding county.\textsuperscript{36}

In 1953, the waste in the canal was buried, and the property was sold to the city for use as a school and playground.\textsuperscript{37} A residential community was built in the vicinity, but little attention was given to the developing health problems...
until 1978 when homes began to rapidly deteriorate.\textsuperscript{38} It was discovered that toxic chemicals were the cause of this deterioration.\textsuperscript{39} When the New York State Health Department investigated, it discovered startling health problems including birth defects, miscarriages, epilepsy, liver abnormalities, sores, rectal bleeding, headaches, and possible latent illnesses.\textsuperscript{40} President Carter declared a federal emergency, and the community had to be abandoned.\textsuperscript{41}

The Senate Report noted that existing legislation, such as the Resource Conservation and Recovery Act\textsuperscript{42} and the Clean Water Act,\textsuperscript{43} did not provide the tools necessary to respond to and clean up disasters like Love Canal.\textsuperscript{44} The Resource Conservation and Recovery Act was designed to control the disposal of hazardous wastes currently being generated.\textsuperscript{45} It failed to address abandoned waste sites or general releases of hazardous substances into the environment.\textsuperscript{46} Further, the Act did not provide the necessary resources to respond immediately to releases of hazardous substances.\textsuperscript{47} Finally, the legislation was limited to responding to releases of hazardous substances that could be classified as hazardous wastes.\textsuperscript{48}

The Clean Water Act established several funds to provide the resources necessary to allow immediate response to releases.\textsuperscript{49} In reality, however, those

\begin{itemize}
\item[38.] See Senate Report, supra note 2, at 8 (quoting Brown, Love Canal, USA, N.Y. Times, Jan. 21, 1979, § vi (Magazine), at 23); A. Hay, supra note 34, at 230.
\item[39.] Senate Report, supra note 2, at 8 (quoting Brown, Love Canal, USA, N.Y. Times, Jan. 21, 1979, § vi (Magazine), at 23). Residents in the vicinity of Love Canal had complained of "malodorous substances," but no action had been taken. A. Hay, supra note 34, at 230. However, in the spring of 1978, unusually heavy snowfall and subsequent flooding brought the chemicals to the surface. Id. Complaints of the terrible odors emanating from basements of houses on the edge of the canal finally led to an investigation. Id.
\item[40.] Senate Report, supra note 2, at 9 (quoting Brown, Love Canal, USA, N.Y. Times, Jan. 21, 1979, § vi (Magazine), at 23). Extensive medical follow-up and testing has been performed on current and past residents of the Love Canal. A. Hay, supra note 34, at 231-32. Although some conclusions were reached as to the long-term health problems associated with the chemical contamination, the relatively small number of people involved makes statistical comparisons with the general population difficult. Id.
\item[41.] See Senate Report, supra note 2, at 9 (quoting Brown, Love Canal, USA, N.Y. Times, Jan. 21, 1979, § vi (Magazine), at 23).
\item[42.] 42 U.S.C. §§ 6901-6991 (1988) [hereinafter RCRA].
\item[44.] See Senate Report, supra note 2, at 10-11.
\item[46.] See id. §§ 6901-6991 (1988); Senate Report, supra note 2, at 10-11.
\item[47.] See RCRA, 42 U.S.C. §§ 6901-6991 (1988); Senate Report, supra note 2, at 16.
\item[48.] See RCRA, 42 U.S.C. §§ 6902(a)-(b) (1988); Senate Report, supra note 2, at 16 (noting that one limitation of RCRA is that it only applies to hazardous substances that are wastes). Liability under CERCLA was never intended to be so narrowly construed. See infra note 114 and accompanying text.
\end{itemize}
funds were either never financed or depleted. Additionally, even if a party responsible for the release was found, the chemical contamination would continue while litigation progressed and until the necessary funds could be collected.

The Senate Report also revealed that Congress was concerned that no federal law existed that would establish liability for releases of hazardous substances. Under existing legislation, a plaintiff, whether a governmental unit or an individual, was forced to bring suit in state court. These plaintiffs were also faced with the difficult and expensive burden of proving complex causes of action. As a result, compensation was generally inadequate. In addition, the standard of liability varied from state to state, thereby encouraging those who dealt with hazardous substances to locate in states with more lenient laws.

CERCLA's history demonstrates congressional intent to establish a program of immediate response to hazardous substance contamination that could be enforced at the federal level. Congress intended "to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws."

3. The Scope of CERCLA

The Senate Report identified five areas that needed to be included in the CERCLA legislation in order to accomplish its purposes. The legislation needed (1) to establish a fund to finance response action; (2) to provide sources of revenue for that fund; (3) to provide adequate authority to respond to hazardous substance releases; (4) to provide adequate compensation to victims of such releases; and (5) to impose liability on those responsible for hazardous substance releases. This section briefly examines the first four areas. The following section elaborates on the fifth area, liability, which was at issue.
a. Superfund

An integral part of a comprehensive strategy to deal with hazardous substances is providing the resources necessary for immediate response to hazardous substance releases. In order to provide these resources, CERCLA established what is today popularly known as "Superfund." Congress authorized the EPA to use Superfund resources to immediately respond to hazardous waste sites and hazardous substance releases.

b. Superfund financing

The major purpose of the Superfund legislation was to provide adequate financing to ensure that the fund's resources were never depleted, as they were with the Clean Water Act. Congress decided that the most equitable method of allocating the costs of hazardous substance releases was to impose fees on those industries which handled hazardous substances and benefitted from their use. This fee structure as the method of financing the fund, as opposed to taxation, helped ensure that those who had created the risks were not subsidized by those who had been put at risk, namely the general public. In addition to the fee structure, Congress enabled the fund to recover response costs from those parties who were held responsible for hazardous substance releases under CERCLA.

61. Hazardous Substance Superfund, 26 U.S.C. § 9507 (1988). "Superfund" provides the resources necessary to respond immediately to, and effectuate a cleanup of, hazardous substance releases. Prior to the existence of such a fund, response and cleanup often had to wait until the necessary funds could be collected from a solvent perpetrator. SENATE REPORT, supra note 2, at 16-17. "Superfund" provides for immediate response while collection of the funds can wait until later.
63. See New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985) (finding that CERCLA authorizes the federal government to respond to hazardous substance releases); United States v. Farber, 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,854, 20,855 (D.N.J. 1988) (stating that CERCLA authorized the President to provide for governmental action, and the EPA is the agency primarily responsible for undertaking necessary action).
65. See SENATE REPORT, supra note 2, at 72.
66. HOUSE REPORT, supra note 2, at 32-33; SENATE REPORT, supra note 2, at 19-22.
67. SENATE REPORT, supra note 2, at 15; HOUSE REPORT, supra note 2, at 33-34; see, e.g., United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 731 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) (stating that one purpose of imposing liability under CERCLA is to replenish the Superfund); New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985) (stating that Superfund resources allow the EPA to respond immediately to releases of
c. Federal enforcement authority

One of Congress' most urgent concerns was that the legislation provide clear authority to act and respond to emergencies caused by releases of hazardous substances. Prior legislation did not provide such authority. As a result, neither the federal agencies nor the states, both of which were in a position to help, took responsibility for cleaning hazardous substance contamination when they were not responsible for it. CERCLA authorizes federal governmental enforcement powers for both the immediate cleanup of a release and the remedial action required for permanent restoration.

d. Compensation to victims of environmental disasters

Another purpose of CERCLA was to provide adequate compensation to victims of hazardous substance releases. The economic losses borne by victims of chemical contamination are substantial. The rate of compensation to victims, however, was extremely low because existing legislation did not establish federal liability for releases, and recovery under state laws was uncertain and often difficult. Although Congress would have preferred to compensate all injured parties with CERCLA resources, it recognized the need to balance hazardous substances and then later the "EPA can sue for reimbursement of cleanup costs from any responsible party it can locate"). For a discussion of CERCLA's making those parties responsible for hazardous substance releases bear the costs of their actions, see also infra notes 78-88 and accompanying text.

68. Senate Report, supra note 2, at 22 (stating that CERCLA must clearly establish the agency responsible for responding to releases of hazardous substances and the scope of that agency's authority); see supra notes 62-63.

69. Prior legislation did not adequately specify who was to take responsibility for responding to and cleaning up releases of hazardous substances. See Senate Report, supra note 2, at 11. Legislation that did provide authority was usually too narrow to adequately respond. For example, the Clean Water Act only gave authority to respond to chemical spills in navigable water; it did not give authority to respond to most groundwater contamination. Clean Water Act, 33 U.S.C. § 1321 (1988); see Senate Report, supra note 2, at 11.

70. Senate Report, supra note 2, at 22. During his testimony before a joint subcommittee, the President of the Love Canal Home Owners Association stated: "Neither the state nor the federal agencies who could help were responsible for the situation (Love Canal). And neither wanted to take financial responsibility for clearing it up." Id.

71. CERCLA, 42 U.S.C. § 9604 (1988); Grad, supra note 2, at 11; see, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985) (stating that CERCLA authorizes the federal government to respond); United States v. Bliss, 667 F. Supp. 1298, 1304 (E.D. Mo. 1987) (stating that Congress intended to provide the federal government with prompt and effective response authority through CERCLA); Violet v. Picillo, 648 F. Supp. 1283, 1288 (D.R.I. 1986) (finding it an important legislative purpose "to give the federal government the tools necessary for a prompt and effective response to hazardous waste problems"); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) (finding that both the House and Senate committee reports expressed the need for prompt action and, therefore, intended to provide the federal government with the tools necessary for prompt and effective response).


73. Id. at 23.

74. Id. at 16, 23.
compensation against the fiscal restraints of the fund. In the end, Congress restricted Superfund compensation to the victim’s medical expenses and a limited amount of lost wages.

e. Responsible parties

The fifth area that Congress considered necessary in order to achieve a comprehensive strategy was the imposition of liability on parties responsible for hazardous substance releases. CERCLA created four classes of persons subject to liability for the release of a hazardous substance. The next section identifies each of these classes, focusing on the two classes at issue in Edward Hines Lumber.

B. Liability as a Responsible Party under CERCLA

This section explains the scope of liability under CERCLA. First, this section discusses persons liable under CERCLA. Second, this section describes how the courts have determined that persons should be held strictly liable, despite the absence of any express standard of liability in the language of CERCLA. Finally, this section considers the CERCLA provision which expressly authorizes a responsible party to seek contribution from another liable, or potentially liable, party.

1. Who is a Responsible Party?

CERCLA was intended to provide an incentive to “all involved with hazardous substances to assure that such substances are handled with the utmost of care.” As such, the standard of liability was intended to encourage those who transact in hazardous substances to handle those substances with care, rather than simply rely on the government to abate the hazards. In order to accomplish this objective, section 9607(a) of CERCLA imposes liability on four classes of individuals: (1) current owners or operators of a facility at which hazardous substances are released; (2) persons who owned or operated the facility at the time hazardous substances were disposed of at the facility; (3) a person

75. Id. at 23 (stating that “fiscal problems . . . would result if a fee-based fund were required to compensate for all damages due those who have been or might become victims of such losses”).
76. See CERCLA, 42 U.S.C. § 9611 (1988); see also Grad, supra note 2, at 13 (discussing the compensation features of the proposed bill, S. 1480).
78. Senate Report, supra note 2, at 31; see also infra notes 87-88 and accompanying text (discussing liability creating a compelling incentive). Although the Senate Report provides only a precompromise version of the legislative history, courts have found it quite useful in determining congressional intent behind CERCLA. See supra notes 25-26 and accompanying text. The Senate Report’s version of CERCLA imposed liability on substantially the same four classes of individuals as the final CERCLA legislation. See infra note 81. The Senate Report, therefore, should be useful in determining congressional intent. See Senate Report, supra note 2, at 31.
79. See Senate Report, supra note 2, at 31 (stating that this standard is designed to encourage the voluntary mitigation of damages).
who arranged for the disposal or treatment of the hazardous substance; and (4) transporters of hazardous substances to disposal or treatment facilities.

2. Standard of Liability

In order to force those responsible for hazardous substance releases to bear the costs of their activities, Congress imposed broad liability under CERCLA. The Senate Report reflected the position that liability should be

80. Hines Lumber sued to impose liability under the second and third classes alleging that Osmose was an “owner or operator” and had “arranged for the disposal and treatment” of a hazardous substance. Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651, 654-56 (N.D. Ill.), aff’d in part, 861 F.2d 155 (7th Cir. 1988); see infra notes 208-10 and accompanying text (discussing the classes of responsible parties involved in Edward Hines Lumber Co.).

81. CERCLA, 42 U.S.C. § 9607(a) (1988). The final CERCLA legislation imposed liability on four classes of persons:

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

Id.

This final version of the legislation closely resembles the Senate version before the compromise. See supra notes 25-26 and accompanying text. Therefore, reference to the Senate Report, supra note 2, is helpful when interpreting the reach of liability under CERCLA. See supra notes 25-26 and accompanying text. The proposed Senate version, S. 1480, see supra note 21 and accompanying text, imposed liability upon:

(1) the owner or operator of a vessel or facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility or site at which such hazardous substances are disposed of,
(3) any person who by contract, agreement, or otherwise arranged for disposal, treatment, or transportation for disposal or treatment by any other party or entity of hazardous substances owned or possessed by such person, at facilities or sites owned or operated by such other party or entity containing such hazardous substances, and
(4) any person who accepts any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which a hazardous substance is discharged, released, or disposed of or from which any pollutant or contaminant is released resulting in action under section 3(c)(1) of the Act, shall be jointly, severally, and strictly liable for all removal costs and specified damages.

Senate Report, supra note 2, at 31.

This liability standard ensures that those who financially benefit from handling inherently hazardous materials “internalize the health and environmental costs of that activity into the costs of doing business.”

Strict and joint and several liability eases a plaintiff’s burden in recovering damages. In addition, this liability also “creates a compelling incentive for those in control of hazardous substances to prevent releases and thus protect the public from harm.” Parties who create hazardous substances know more about their inherent risks and how to avoid those risks. The incentive, therefore, should be directed at those parties.

Despite the strong policy considerations expressed in the Senate Report, CERCLA does not expressly provide for strict and joint and several liability. The statute’s definitional section provides that the standard of liability under CERCLA is the same as the standard of liability under the Clean Water Act. The Clean Water Act also does not expressly define a standard of liabil-

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83. “Strict Liability” is “liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of duty to exercise reasonable care, i.e., actionable negligence.” PROSSER & KEETON ON TORTS, supra note 4, at 534.

84. SENATE REPORT, supra note 2, at 13. The term “joint and several liability” “[d]escribes the liability of co-principals of the same performance when each of them, individually, has the duty of fully performing the obligation, and the obligee can sue all or any of them upon breach of performance.” BLACK’S LAW DICTIONARY 837 (6th ed. 1990).

85. SENATE REPORT, supra note 2, at 13; see also PROSSER & KEETON ON TORTS, supra note 4, at 537 (stating that a defendant, who seeks to profit by engaging in hazardous activities, is in the best position to administer the risk involved in his activities by incorporating the costs of the risk into the cost of doing business).

86. SENATE REPORT, supra note 2, at 13-15. This report reflects congressional concern that without strict and joint and several liability, a plaintiff would have to identify all responsible parties and then prove what portion of the damages was attributable to each defendant. Id. Strict and joint and several liability, however, allows the plaintiff to recover in full from any responsible party. Id. Further, the burden is then placed on that responsible party to receive contribution from other responsible parties. Id.

87. Id.

88. Id. at 15.

89. See CERCLA, 42 U.S.C. § 9601-9675 (1988); see also New York v. Shore Realty Corp., 759 F.2d 1032, 1042 n.13 (2d Cir. 1985) (finding that the legislative compromise did not include a provision requiring strict and joint and several liability); United States v. Conservation Chem. Co., 619 F. Supp. 162, 204, 223 (D.C. Mo. 1985) (stating that both the terms ‘strict’ and ‘joint and several’ were deleted from a prior draft of CERCLA legislation); S. COOKE, THE LAW OF HAZARDOUS WASTE, § 14.01[6][b], [c], at 93-95 (1987) (stating that “the statute does not expressly define the standard of liability”).


Except where an owner or operator can prove that a discharge was caused solely by
ity. Federal courts, however, have consistently interpreted the Clean Water Act to impose strict liability, and courts have similarly held that CERCLA imposes strict liability.

Federal courts have also concluded that Congress did not intend to preclude joint and several liability under CERCLA. Although all reference to the joint and several standard was deleted from the final legislation, Congress intended to make that standard permissible rather than mandatory. Joint and several liability may be imposed unless it would be inequitable to do so and liability could be apportioned among tortfeasors. In deciding whether the

(A) an act of God, (B) an act of war, (C) negligence on the part of the United States government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection(b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government.

Id.

92. See, e.g., Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979) (holding that the appropriate standard of liability under the Clean Water Act is strict liability); see also S. Cooke, supra note 89, § 14.01[6][b], at 94 (discussing that courts have consistently held that the liability standard under the Clean Water Act is strict liability).
94. For a statutory list of liable parties under CERCLA, see 42 U.S.C. § 9607 (1988).
95. E.g., United States v. Wade, 577 F. Supp. 1326, 1337-38 (E.D. Pa. 1983) (finding that CERCLA "permits, but does not require, the imposition of joint and several liability"); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983); see also S. Cooke, supra note 89, § 14.01[6][b], at 95-100 (discussing the imposition of joint and several liability under CERCLA).

The Chem-Dyne court found:

A reading of the entire legislative history in context reveals that the scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard applicable in all situations which might produce inequitable results in some cases. The deletion was not intended as a rejection of joint and several liability. Rather, the term was omitted in order to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.

Chem-Dyne, 572 F. Supp. at 808 (citations omitted). The court then ruled that joint and several liability was not precluded under CERCLA. Id.
96. See, e.g., United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 731 (8th Cir. 1986) (finding that responsible parties can be held jointly and severally liable under
joint and several liability standard should be applied, Congress intended that federal courts further develop a uniform federal common law.\footnote{97} Although Congress intended CERCLA's liability provisions to create incentives for those who controlled hazardous substances to handle those substances with care, it is not clear from the statute just how far Congress intended to extend liability.\footnote{98} As such, the judicial system has been forced to determine

CERCLA), cert. denied, 484 U.S. 848 (1987); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 n.13 (2nd Cir. 1985) (stating that "joint and several liability standards should be addressed by the courts and interpreted in light of the common law"); United States v. Conservation Chem. Co., 619 F. Supp. 162, 223 (D.C. Mo. 1985) (stating that CERCLA imposes joint and several liability on a case by case basis) (citing both United States v. Chem-Dyne, 572 F. Supp. 802, 808 (S.D. Ohio 1983), and Restatement (Second) of Torts § 433A (1965)). The Restatement provides that a tortfeasor is responsible for the entire harm brought about by his conduct unless the harm can be apportioned among joint tortfeasors where "there are distinct harms, or there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A (1965).

97. E.g., United States v. Conservation Chem. Co., 619 F. Supp. 162, 223-25 (D.C. Mo. 1985); Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1486 (D.C. Colo. 1985); United States v. Wade, 577 F. Supp. 1326, 1337-38 (E.D. Pa. 1983). In Wade, the court found that Congress intended courts to use common law as a guide when deciding whether joint and several liability should apply. Id. at 1332. The court, however, had to decide whether to apply state common law or federal common law. Id. The court found not only that state laws were ineffective in dealing with hazardous substances but also that state common law regarding joint and several liability was not consistent between states. Id. The court reasoned that using state common law could encourage illegal dumping in states with more lenient environmental laws. Id. The court, relying on Texas Indus. Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 640-41 (1981), ruled that federal courts could create federal common law when necessary to protect uniquely federal interests. Wade, 577 F. Supp. at 1338. Noting the strong federal interest in controlling the disposal of toxic wastes, the inability of state law to address this problem, and the need to establish a uniform liability standard, the court concluded that Congress intended that courts develop a federal common law to resolve liability issues under CERCLA. Id. at 1337-38.

Despite a strong presumption against federal courts fashioning common law to decide cases, "[f]ederal common law always has existed and always will exist." E. Chemerinsky, Federal Jurisdiction § 6.1, at 296 (1989). "Federal common law has developed out of [the] necessity" to develop legal rules to apply statutory and constitutional provisions, to decide disputes between states, to fulfill congressional intent, and to prevent state law from frustrating federal interests. Id. at 295-96.

The development of federal common law has been criticized on federalism and separation of powers grounds. Id. at 296. However, neither of these issues has prevented federal common law from continuing to develop. Id. at 297. Although the federal common law can displace state laws and generate objections to such a taking of power, failure to fashion federal common law could allow state law to frustrate federal interests and therefore offend federalism. Id. at 296. In addition, federal common law is often developed in order to fulfill congressional intent, which undermines any separation of powers objection. Id. at 295.

98. Courts struggled to find the appropriate scope of liability under CERCLA, 42 U.S.C. § 9607(a) (1988), and had special difficulties defining the scope of liability under § 9607(a)(3), which imposes liability on persons who arrange for the disposal or treatment of hazardous substances. E.g., United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1378-82 (8th Cir. 1989) (denying a motion to dismiss a suit for the release of hazardous substances by a pesticide manufacturer under the "arranged for disposal" provision because "in some circumstances . . . an arrangement based on acquiescence to certain effects can be considered an arrangement for such effects"); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 743-44 (8th
the scope of liability under CERCLA.99

3. Contribution Among Liable or Potentially Liable Parties

The Superfund Amendments and Reauthorization Act of 1986100 added a provision to CERCLA.101 This provision, section 9613(f), enables a responsible party held liable under CERCLA to seek contribution from other potentially liable parties for response costs properly allocated to those parties.102 Congress expressed two purposes behind the contribution provision. One purpose was to expedite management of litigation by allowing the government to sue only a few of the major responsible parties.103 Those parties, held jointly and severally liable, could then sue to recover from other responsible parties.104 The second purpose was to make responsible parties more willing to assume financial responsibility for the cleanup by allowing them to seek contribution from others.105 As one court stated, "When two or more persons share responsibility for a common injury, 'it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability.'"106

In order to establish a right of contribution, the party seeking contribution must prove that the party from whom contribution is sought is also liable

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99. See, e.g., Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir.) (finding that laws like CERCLA have not only objectives, but also limits, and it is the court's job to find the stopping points), aff'd in part 685 F. Supp. 651 (N.D. Ill. 1988); United States v. Conservation Chem. Co., 619 F. Supp. 162, 223 (D.C. Mo. 1985) (stating that the scope of liability under CERCLA is to be determined by the judiciary on a case-by-case basis).


101. Id. (creating 42 U.S.C. § 9613(f)).

102. CERCLA, 42 U.S.C. § 9613(f) (1988). "The principal of 'contribution' is that a tortfeasor against whom a judgment is rendered is entitled to recover proportional shares of the judgment from other joint tortfeasors whose conduct contributed to the injury and who were also liable to the plaintiff." United States v. Conservation Chem. Co., 619 F. Supp. 162, 224 (D.C. Mo. 1985).

CERCLA, 42 U.S.C. § 9613(f), provides:

Any person may seek contribution from any person who is liable or potentially liable under section [9607(a) of this title], during or following any civil action under section [9606 of this title] or under section [9607(a) of this title]. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

Id.


104. Id.

105. Id.

In resolving contribution claims, courts are expected to allocate costs among the parties using those equitable factors that the court determines are appropriate.

C. Judicial Interpretation of Section 9607(a)(3)

Section 9607(a)(3) imposes liability on "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances." The plain language makes it clear that persons who arrange for the disposal or treatment of hazardous substances will be held liable under CERCLA. Courts, however, have often found it difficult to determine whether a person has arranged for disposal. CERCLA does not define the term "arranged for," but it does provide very broad definitions for the terms "disposal," "treatment," and "hazardous substance." Not surpris-
ingly, courts have also broadly construed the term “arranged for disposal.” The courts have held that CERCLA statutory language should be broadly construed in order to avoid frustrating the beneficial legislative purposes of protecting and preserving the public health.\(^{114}\) Given that congressional intent behind CERCLA was to make all involved with hazardous substances share in disposal” far beyond the typical situation where a person hires someone to dispose of his hazardous waste).

113. CERCLA, 42 U.S.C. § 9601(14) (1988). A hazardous substance is defined under CERCLA as:

(A) any substance designated pursuant to section [1321(b)(2)(A) of Title 33 the Federal Water Pollution Control Act, or Clean Water Act],

(B) any element, compound, mixture, solution, or substance designated pursuant to section [9602 of CERCLA],

(C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress),

(D) any toxic pollutant listed under section [1317(a) of Title 33],

(E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. section 7412], and

(F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to [section 2606 of Title 15, the Toxic Substances Control Act].

Id. (citations omitted).

the costs of their activities,\textsuperscript{116} liability could extend to any and all persons who had any relationship with the hazardous substances. Theoretically, any person who has been involved with hazardous substances is a contributing cause if a release of those substances occurs. Courts, however, have never construed "arranged for disposal" this broadly.

One way courts limited the extent of liability under section 9607(a)(3) is by holding that the sale of a hazardous substance, as a useful product or a useful raw material, does not by itself constitute arranging for the disposal of a hazardous substance.\textsuperscript{116} In \textit{United States v. Westinghouse Electric Corp.},\textsuperscript{117} the seller of a useful hazardous substance was relieved of any liability under CERCLA's "arranged for disposal" provision.\textsuperscript{118} Monsanto manufactured and sold polychlorinated biphenyls ("PCBs") to Westinghouse, which utilized them as a dielectric fluid in the electrical equipment that it manufactured.\textsuperscript{119} Westinghouse then disposed of the waste from its manufacturing process, which included PCBs, at a landfill.\textsuperscript{120}

The United States brought suit against Westinghouse, claiming that Westinghouse had disposed of the PCBs.\textsuperscript{121} Westinghouse sought to bring Monsanto into the suit as a third party defendant, claiming that because Monsanto had manufactured and sold the PCBs it also was responsible for the release of the PCBs.\textsuperscript{122} The court rejected this argument and held that Monsanto had not arranged for the disposal of PCBs but had merely sold a useful raw material to Westinghouse for use as one of its products.\textsuperscript{123} Westinghouse was the party that generated waste and arranged for its disposal.\textsuperscript{124} Monsanto retained no control over the disposal process.\textsuperscript{125} Therefore, according to the court, Monsanto was not liable to Westinghouse under CERCLA.\textsuperscript{126}

A similar result was reached in \textit{Florida Power & Light Co. v. Allis-Chalmers Corp.},\textsuperscript{127} where the court held that the seller of a useful product containing a hazardous substance was not liable for arranging for its disposal.\textsuperscript{128} Allis-Chalmers sold Florida Power electrical transformers, a completed useful product that contained mineral oil in accordance with their design.\textsuperscript{129} The

\begin{footnotes}

\textsuperscript{115} See supra notes 78-88 and accompanying text.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 1233.
\textsuperscript{119} Id. at 1232.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 1231-33.
\textsuperscript{122} Id. at 1232.
\textsuperscript{123} Id. at 1233; see S. Cooke, supra note 89, § 14.01[5][d], at 14-78.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\end{footnotes}
mineral oil contained PCBs. After many years of use, Florida Power disposed of the transformers, and the PCBs leaked into the environment. Florida Power was held liable under section 9607(a)(3) of CERCLA for arranging for the disposal of the transformers. Florida Power attempted to recover contribution from Allis-Chalmers, claiming that Allis-Chalmers should have foreseen that it would eventually need to dispose of the product. The court rejected Florida Power’s claim and held that the sale of a hazardous substance does not, in itself, constitute arranging for disposal under CERCLA. The fact that Allis-Chalmers might have foreseen the eventual need to dispose of the transformers was not sufficient to impose liability. Only the party who determined the method of disposal could be liable. Allis-Chalmers merely sold a useful product to Florida Power. Florida Power, however, decided how the substance would be disposed of and who would dispose of it.

Although the sale of a useful product containing hazardous substances is not, by itself, sufficient to impose liability under CERCLA, the seller may be held liable if the sale was motivated by a need to dispose of the substance. In United States v. A & F Materials Co., the defendant, McDonnell Douglas Corporation, sold its spent caustic solution to A & F Materials Co. (“A & F”), an oil reclamation facility. A & F used the solution at its facility to neutralize acidic oil. The solution, however, was released into the environment from A & F’s facility. McDonnell Douglas claimed that it was not subject to liability under CERCLA because the sale of a useful product did not constitute arranging for the product’s disposal. The court, ruling that the important question was who decided to place the waste at the disposal site, disagreed and denied defendant’s motion for summary judgment. McDonnell Douglas needed to dispose of the spent caustic solution. They chose to do so, however, by selling it to A & F, a facility at which the waste was used and disposed. The sale of the substance to A & F did not absolve McDonnell Douglas from liability because McDonnell Douglas itself decided to place

130. Id.
131. Id.
132. Id.
133. Id. at 20,999.
134. Id. at 20,998.
135. Id.
136. Id.
137. Id.
138. Id.
140. Id.
141. Id. at 844.
142. Id.
143. Id.
144. Id. at 844-45.
145. Id. at 845.
146. Id. at 844-845.
147. Id. at 844.
its waste at the disposal site.\textsuperscript{148}

The District Court for the Northern District of New York circumvented prior case law that provided an exemption from liability where there had been a sale of a useful product. In \textit{New York v. General Electric Co.},\textsuperscript{149} the court, in denying a motion to dismiss, ruled that liability may be imposed where a seller knew, or had imputed knowledge of, the intended use of the hazardous substance and where that use constituted disposal under CERCLA.\textsuperscript{150}

In \textit{General Electric}, the defendant sold used transformer oil, containing PCBs, to a dragstrip.\textsuperscript{151} This dragstrip used the oil to suppress dust by spraying it directly on the ground.\textsuperscript{152} The court held that the dragstrip's use of the oil constituted disposal under CERCLA, and, therefore, the defendant, General Electric, was "not entitled to avoid liability."\textsuperscript{153} General Electric had knowledge, or imputed knowledge, that the dragstrip would place the oil on the ground.\textsuperscript{154} The court, therefore, held that General Electric may have arranged for disposal.\textsuperscript{155}

Two recent cases have extended this knowledge theory further by holding that parties who transfer hazardous substances for a use that would leak, spill, or otherwise dispose of the hazardous substances may be liable under CERCLA.\textsuperscript{156} These courts denied motions to dismiss claims of liability under 9607(a)(3) despite the fact that the transfers themselves did not constitute disposal of a hazardous substance.\textsuperscript{157} \textit{United States v. Aceto Agricultural Chemicals Corp.},\textsuperscript{158} and \textit{United States v. Velsicol Chemical Corp.} both involved pesticide manufacturers who delivered chemicals to a processor.\textsuperscript{159} The processor then "formulated"\textsuperscript{160} the chemicals into pesticides suitable for sale.

\begin{itemize}
\item \textsuperscript{148} \textit{Id.} at 845; see also \textit{New York v. General Elec. Co.}, 592 F. Supp. 291, 297 (N.D.N.Y. 1984) (holding that defendant who intended to dispose of its hazardous waste could not contract away its liabilities by classifying its arrangements as sales).
\item \textsuperscript{149} 592 F. Supp. 291 (N.D.N.Y. 1984).
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.} at 293.
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.} at 297.
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.} The \textit{General Electric} court held that the defendant could be held liable for arranging for disposal under two separate theories. The first theory was that General Electric was motivated to sell its used transformer oil by a need to dispose of it and, under those circumstances, would have arranged for disposal of its waste. \textit{Id.} The second theory was that General Electric knew or should have known that the buyer was going to place the oil onto the ground. \textit{Id.} This use of the oil constituted disposal, and therefore General Electric could be held liable for arranging for disposal. \textit{Id.} General Electric's motion to dismiss was denied because this presented a question to be decided by a jury. \textit{Id.}
\item \textsuperscript{156} \textit{United States v. Aceto Agric. Chems. Corp.}, 872 F.2d 1373 (8th Cir. 1989); \textit{United States v. Velsicol Chem. Corp.}, 701 F. Supp. 140 (W.D. Tenn. 1987).
\item \textsuperscript{157} \textit{Aceto Agric. Chems. Corp.}, 872 F.2d at 1382; \textit{Velsicol Chem. Corp.}, 701 F. Supp. at 143.
\item \textsuperscript{158} 872 F.2d 1373 (8th Cir. 1989).
\item \textsuperscript{159} 701 F. Supp. 140 (W.D. Tenn. 1987).
\item \textsuperscript{160} \textit{Aceto Agric. Chems. Corp.}, 872 F.2d at 1375; \textit{Velsicol Chem. Corp.}, 701 F. Supp. at 142.
\item \textsuperscript{161} In \textit{Aceto}, the court described the process as one in which "[f]ormulators mix the manufac-
and distribution and transferred them back to the manufacturer.\textsuperscript{162} Leakage and spillage of these chemicals was an inherent part of the formulation process.\textsuperscript{163} Each court denied the defendants' motion to dismiss a claim of liability for arranging for the disposal of a hazardous substance.\textsuperscript{164} The courts reasoned that as a result of the industry-wide practices in formulating pesticides, the defendants should have known that chemicals would leak and spill.\textsuperscript{165} The district court in Aceto stated that "an arrangement based on acquiescence to certain inevitable effects can be considered arrangement for those effects."\textsuperscript{166} In each case, the defendants' arrangement with the formulator, and acquiescence to the spills and leaks of formulation, was considered an arrangement for disposal.\textsuperscript{167}

In Aceto, the court also based its denial of defendants' motion to dismiss on the argument that the defendants retained authority to control the disposal of the hazardous substances.\textsuperscript{168} Since the defendants merely transferred the chemicals and did not sell them, the defendant retained authority to control the chemicals because it retained ownership throughout the formulation process.\textsuperscript{169} The court, however, found that such continued ownership is not a prerequisite to extending liability under CERCLA.\textsuperscript{170} Liability under the arranged for disposal provision required only a finding that the defendant retained some authority to control the disposal of the hazardous substances.\textsuperscript{171} Continued ownership, however, lends support to the court's finding that the defendant retained some authority to control the disposal of hazardous substances.\textsuperscript{172}

\textsuperscript{165} Aceto Agric. Chems. Corp., 872 F.2d at 1381-82 ("waste is generated and disposed of contemporaneously with the process"); Velsicol Chem. Corp., 701 F. Supp. at 142. The complaining party in Velsicol Chem. Corp. argued that defendant "knew that there would be losses of pesticide through spills or leaks and that wastes could be generated through the formulation process." \textit{Id.} The court denied defendant's motion to dismiss, ruling that "plaintiff's complaint contain[ed] allegations that [defendants] arranged . . . for disposal of hazardous substances." \textit{Id.}
\textsuperscript{168} Aceto Agric. Chems. Corp., 872 F.2d at 1381-82.
\textsuperscript{169} \textit{Id.} at 1381.
\textsuperscript{170} \textit{Id.} at 1382.
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.; see also} United States v. Aceto Agric. Chems. Corp., 699 F. Supp. 1384, 1389 n.2 (S.D. Iowa 1988) (stating that "the only ownership which is necessary is ownership at the time of the arrangement, which is seldom in dispute") (citing United States v. Northeastern Pharmaceuticals, Inc., 712 F.2d 985, 991 (3d Cir. 1983)).
In summary, courts have consistently refused to find that the mere sale of a useful hazardous substance constitutes an arrangement for disposal under section 9607(a)(3) of CERCLA. There are, however, three instances where a seller of a hazardous substance may be found liable for arranging for disposal: (1) where at least part of the motivation to sell was to dispose of the substance;\(^1\) (2) where the seller should have known the intended use of the substance, and that intended use constituted disposal;\(^2\) or (3) where the seller retained authority to control the disposal process.\(^3\) Recently, the District Court for the Northern District of Illinois narrowed the scope of prior case law in *Edward Hines Lumber Co. v. Vulcan Materials Co.*\(^4\) The court refused to impose CERCLA liability on a seller of hazardous substances because it lacked any motivation to dispose of hazardous substances.


A. Facts

The Hines Lumber Co. ("Hines") owned and operated a wood treatment facility in Mena, Arkansas.\(^5\) It entered into an extensive agreement with Osmose Wood Preserving Co. of America, Inc. ("Osmose"), an experienced supplier of chromated copper arsenate ("CCA"),\(^6\) to build a closed looped wood treatment system at the Hines facility.\(^7\) Pursuant to this agreement, Osmose...
agreed to advise and consult Hines on the selection of an appropriate location for the CCA treatment system. Osmose agreed to design, build, and install a system which would not allow any toxic chemicals to escape. Osmose also agreed to train Hines' employees to operate the system. Finally, Osmose agreed to provide technical information and marketing assistance and to authorize Hines to use Osmose's trademark.

Hines' role in this agreement was to exercise sole responsibility for the operation, maintenance, upkeep, and control of the facility. It was also responsible for keeping the products in compliance with local, state, and federal regulations. Additionally, Hines agreed to purchase all of its CCA from Osmose for a period of five years.

The agreement provided that Osmose retained the right to full and immediate access to the facility. Osmose also retained authority over all chemical processes and products to ensure that they conformed to Osmose's standard of quality control. Although Osmose retained this control, none of Osmose's employees were present at the facility on a regular basis. Hines operated the facility until 1978, during which time it stored the discharge from the wood treatment process in a holding pond at the site. In 1978, Hines sold the facility to Mid-South Wood Products, Inc. ("Mid-South"), which continued to operate the facility.

In 1982, the Arkansas Department of Pollution Control and Ecology found that CCA, among other chemicals, had contaminated the ground water near the plant. In 1985, testing conducted by the United States Environmental Protection Agency confirmed that the Hines facility was the source of such contamination. Hines and Mid-South signed a consent decree promising to clean up the site. By the time the litigation began, these companies had nearly completed the work, which cost approximately five million dollars.

181. Id.
182. Id.
183. Id.
184. Id.
185. Id.
187. Id.
189. Id.
190. Id. at 652.
191. Id.
192. The EPA found that the holding pond also contained creosote and pentachlorophenol. Id. at 653.
194. Id. at 157.
195. Id. at 155.
196. Id. The EPA attributed the CCA contamination to problems with the design of both the
Initially, Hines filed suit against Vulcan Materials Co. ("Vulcan"), a supplier of a wood preserving chemical, pentachlorophenol, in order to seek contribution under section 9613(f) for past and future costs resulting from the contamination.197 Hines subsequently added other defendants as both third-party and direct defendants.198 Most of these defendants, including Vulcan, however, were eventually dismissed from the suit because they merely supplied chemicals to Hines.199 The dismissed defendants did not maintain any control over those chemicals or possess knowledge that the facility might improperly dispose of them.200

Osmose's relationship with Hines, on the other hand, went much further than merely selling supplies.201 Hines, therefore, pursued its claim against Osmose.202 Hines alleged that Osmose designed the system defectively and failed to meet quality control standards,203 that Osmose improperly trained Hines' employees,204 and that Osmose failed to disclose any of these defects to Hines, which prevented Hines from rectifying the problem.205 Hines argued that Osmose was liable as a responsible party under CERCLA because it arranged for the disposal of a hazardous substance within the meaning of section 9607(a)(3).206 Osmose moved for summary judgment.207

B. Procedure

The procedural history of the Edward Hines Lumber Co. litigation is somewhat confusing. Hines Lumber Co., a responsible party under CERCLA, sued Osmose seeking contribution for costs incurred by Hines in cleaning up a con-
tamination site. Hines alleged liability under two of CERCLA's four classes of responsible parties: (1) that Osmose had been an "owner or operator" of Hines' facility, and (2) that Osmose had arranged for disposal of the hazardous substances.

The District Court for the Northern District of Illinois did not find Osmose liable under either the "owner or operator" provision or the "arranged for disposal" provision. Hines appealed the district court's decision, but only raised the issue of whether Osmose was an "owner or operator" of Hines' facility. In an uncontroversial decision, the Court of Appeals for the Seventh Circuit affirmed the district court's decision on the "owner or operator" issue.

The focus of this Note is on the district court's decision with respect to the "arranged for disposal" question. This Note contends that had Hines Lumber appealed the district court's decision on the "arranged for disposal" question, the grant of summary judgment should have been reversed.

C. The District Court Decision

The District Court for the Northern District of Illinois granted Osmose's motion for summary judgment on both issues. The court held that there were no genuine issues of material fact as to whether Osmose had arranged

208. Id.

209. See CERCLA, 42 U.S.C. § 9607(a)(1) (1988). This Note does not focus on the "owner or operator" issue because the district court's finding on this issue was not controversial. See Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651, 656-57 (N.D. Ill.), aff'd in part, 861 F.2d 155 (7th Cir. 1988). The court stated: "The extent of Osmose's involvement went no further than building the treatment system and training personnel in its operation." Id. at 657; see also United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 742-43 (8th Cir. 1986) (holding defendants not liable as "owners and operators" because they "did not own or operate" the actual disposal "facility"); United States v. Conservation Chem. Co., 619 F. Supp. 162, 186-90 (D.C. Mo. 1985) (holding that both a corporate owner and operator and "corporate officers who actively participate in the management of a disposal facility can be held . . . liable under" § 9607(a)).

210. See CERCLA, 42 U.S.C. § 9607(a)(3) (1988); supra note 81 (providing the full text of § 9607(a)).


213. Id. at 158-59. The appellate court's decision, which was confined to the "owner or operator" provision, is not controversial because it is consistent with prior precedent on this issue. See supra note 209.

214. Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651, 656-57 (N.D. Ill.), aff'd in part, 861 F.2d 155 (7th Cir. 1988). Hines had also argued, at the district court level, that if Osmose was not a responsible party under CERCLA, it was still liable for contribution under state law. Id. at 657-59. The court held that CERCLA did not preempt state law, and therefore, a state law action seeking contribution for costs incurred in cleaning a hazardous waste site was permissible. Id. at 658. The court further held, however, that Hines was unable to prosecute the state law claim because Arkansas law governed the case. Id. Even though a state law action was available, Hines did not satisfy the requirements of the Arkansas contribution act. Id.
for the disposal of the hazardous substances.\footnote{215} Osmose was, therefore, entitled to summary judgment.\footnote{216}  

In responding to Osmose’s motion for summary judgment, Hines argued that section 9607(a)(3) imposed liability on all chemical manufacturers who sold a hazardous substance to a party who used the substance in its manufacturing or commercial process and then disposed of it.\footnote{217} According to the district court, Hines sought to impose liability on Osmose merely because Osmose was part of a transaction involving a hazardous substance.\footnote{218} Reasoning that it would circumvent congressional intent, the court rejected Hines’ argument.\footnote{219} According to the court, the purpose of section 9607(a)(3) was to impose liability only on those parties who had arranged for the disposal of a hazardous substance rather than those who merely transferred hazardous substances.\footnote{220} 

Adopting Hines’ argument would have shifted the emphasis from the “arranged for disposal” language to the “hazardous substance” language.\footnote{221} The court attempted to discern the meaning of “arranged for disposal.”\footnote{222} The court found that prior case law consistently held that liability under section 9607(a)(3) “arranged for disposal” language attaches only to those parties who were both motivated to dispose of hazardous waste, and transferred the hazardous waste in order to treat or dispose of it.\footnote{223} The court found that Osmose presented uncontradicted evidence that it sold the chemicals to Hines solely for use in wood treatment and not for the disposal of its own wastes or by-products.\footnote{224} The court found that Hines’ allegations that Osmose had

\footnote{215. Id. at 656.}  
\footnote{216. Id.}  
\footnote{217. Id.}  
\footnote{218. Id. at 654. Osmose contended that a chemical sold for use in a manufacturing process could not be considered a hazardous substance for purposes of establishing § 9607 liability. Id. at 656 n.4. The court rejected this contention, stating that “[t]he statutory definition of hazardous substance is not so limited, 42 U.S.C. § 9601(14), and the courts have recognized that primary products may be hazardous.” Id. The court assumed, for the purposes of the summary judgment motion, that the chemicals Osmose sold to Hines were hazardous substances. Id. at 656.}  
\footnote{219. Id. at 654.}  
\footnote{220. Id.}  
\footnote{221. Id.}  
\footnote{222. Id. at 654, 656.}  
\footnote{223. Id. at 654-57. The court relied on three cases to support its ruling that a motivation to dispose of waste was required before a defendant could arrange for disposal: United States v. A & F Materials Co., Inc., 582 F. Supp. 842 (S.D. Ill. 1984) (holding that a defendant who had the motivation to dispose could be liable under CERCLA); New York v. General Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984) (holding that the defendant could be liable under the theory that it was motivated to dispose of its waste, or under the theory that it knew, or had imputed knowledge, of the intended use of the hazardous substance, and such use constituted disposal); and United States v. Westinghouse Elec. Corp., 22 Env’t Rep. Cas. (BNA) 1230 (S.D. Ind. 1983) (holding that a defendant who lacked motivation to dispose and who lacked control over the disposal process was not liable under CERCLA). Edward Hines Lumber Co., 685 F. Supp. at 654-55. For further discussion of the facts of these cases, see supra notes 116-26, 139-55 and accompanying text.}  
\footnote{224. Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F. Supp. 651, 656 (N.D. Ill.), aff’d in part, 861 F.2d 155 (7th Cir. 1988).}
knowledge of the manner in which the substance was disposed of was immaterial to the issue.\textsuperscript{225} The court concluded that Osmose did not arrange for the disposal of a hazardous substance because Osmose lacked motivation to dispose of the substance it sold, and the substance was not a waste.\textsuperscript{228} The court, therefore, granted the defendant's motion for summary judgment as to the section 9607(a)(3) issue.\textsuperscript{227}

IV. ANALYSIS

This section analyzes the district court's finding that Osmose did not arrange for disposal at the Hines facility in light of prior case law and the legislative history behind CERCLA. There are three arguments that support a result contrary to that reached by the court. First, the district court established a standard for CERCLA liability that is unsupported by prior case law. Second, the court did not construe the facts in a manner most favorable to Hines, as required when hearing a motion for summary judgment. Finally, the district court's holding frustrates the congressional purpose behind CERCLA. This section examines each argument and contends that, under any one of them, the district court should not have granted summary judgment because, at the very least, Hines raised a factual question that should have reached the jury.

A. The District Court Established A New Standard For CERCLA Liability

The district court established a new standard for the "arranged for disposal" language of section 9607(a)(3) that is unsupported by prior case law. The district court ruled that Osmose, as a seller of hazardous substances, could be liable for arranging for disposal only if the sale was motivated by a need to dispose of hazardous waste.\textsuperscript{228} The district court relied on three prior cases to support its motivation requirement.\textsuperscript{229} Those cases support the proposition that the seller can be liable if the proper motivation exists.\textsuperscript{230} They, however, do not support the converse proposition that without the proper motivation, a seller cannot be liable.

The courts, in two of the three cases relied upon by the district court, \textit{United States v. A & F Materials Co.}\textsuperscript{231} and \textit{New York v. General Electric Co.}\textsuperscript{232} found the seller of hazardous substances could be held liable on the

\begin{itemize}
  \item \textsuperscript{225} \textit{Id.}
  \item \textsuperscript{226} \textit{Id.} at 654-56.
  \item \textsuperscript{227} \textit{Id.} at 656.
  \item \textsuperscript{228} \textit{Id.} at 654-56.
  \item \textsuperscript{229} \textit{Id.; see supra note 223.}
  \item \textsuperscript{230} Edward Hines Lumber Co. v. Vulcan Materials Co., 695 F. Supp. 651, 656 (N.D. Ill.), \textit{aff'd in part}, 861 F.2d 155 (7th Cir. 1988).
  \item \textsuperscript{231} 582 F. Supp. 842 (S.D. Ill. 1984).
  \item \textsuperscript{232} 592 F. Supp. 291 (N.D.N.Y. 1984).
\end{itemize}
theory that the seller was motivated to dispose of hazardous waste. The courts, therefore, concluded that those sellers could be found liable for arranging for disposal under section 9607(a)(3). Neither of those cases, however, holds that such motivation is an absolute requirement for liability under section 9607(a)(3). In fact, the General Electric court specifically referred to other theories, which do not require motivation, under which the seller could be liable. One such theory finds the seller could be liable if the seller knew, or had imputed knowledge, that the hazardous waste would be used in a manner constituting disposal.

The district court also relied on United States v. Westinghouse Electric Corp. for the proposition that lack of motivation to dispose places a seller outside the scope of section 9607(a)(3). The Westinghouse court, however, found that the seller lacked more than just motivation; the seller also lacked any control over the disposal decision. The purchaser generated the waste, and the purchaser made the decision of the manner in which to dispose of that waste. The presence of proper motivation might have been sufficient in itself for the court to impose liability under section 9607(a)(3). The court, however, certainly did not rule that other factors, such as authority to control the disposal process, were not sufficient.

These cases, at most, stand for the proposition that if the sale of a hazardous substance was motivated by the need to dispose of waste, the seller can be liable for arranging for disposal under section 9607(a)(3). They do not, however, stand for the converse of that proposition: that a seller who lacks motivation cannot be liable.

237. *Id.* For a further discussion of the *General Elec.* opinion, see * supra* notes 149-55 and accompanying text.
238. 22 Env't Rep. Cas. (BNA) 1230 (S.D. Ind. 1983).
241. *Id.*; For a more detailed discussion of the *Westinghouse* opinion, see * supra* notes 116-26 and accompanying text. For further discussion of the authority to control theory, see * supra* notes 168-72 and accompanying text.
242. Had the seller been motivated to dispose of its hazardous substances, the *Westinghouse* court could have found the sale to have been an arrangement for disposal. *See supra* notes 139-48 and accompanying text.
B. The District Court Did Not Construe Facts In A Manner Most Favorable To The Nonmoving Party

The second reason to deny the motion for summary judgment is that the court did not construe the facts in a manner most favorable to Hines. When a court decides a summary judgment motion, it must construe the facts most favorably to the nonmoving party. Hines alleged that Osmose knew the facility was improperly designed, and the employees were improperly trained. If the district court had followed other cases, such as Aceto or General Electric, which denied defendant's motion to dismiss a claim of liability under the "arranged for disposal" provision where a defendant had knowledge of the disposal process, Hines' allegations should have survived a summary judgment motion. Hines' complaint raised a factual question as to Osmose's knowledge of the disposal process. After all, Osmose designed and built the system, and Osmose trained Hines' employees. If proven, these allegations support the notion that Osmose knew how the hazardous substances would be disposed of and that such disposal would cause environmental harm.

The knowledge theory can be taken one step further. In the Aceto case, the court found that liability under the "arranged for disposal" provision may exist where the defendant had some authority to control the disposal process. In that case, the defendant maintained ownership of the substance but transferred it to be "formulated." Although Osmose did not have any ownership rights in the substance it supplied to Hines, nor did it own the facility, it still had some implicit control in the disposal process. Osmose's implicit control

244. Papasan v. Allain, 478 U.S. 265, 283 (1986) ("We are bound for the purposes of this review to take the well-pleaded factual allegations in the complaint as true."); Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 493 (1986) (same); Kugler v. Helfant, 421 U.S. 117, 125-26 n.5 (1975) (same); New York v. General Elec. Co., 592 F. Supp. 291, 293 n.3 (1984) (same). The appellate court made the following assumptions when deciding Osmose's motion for summary judgment: (1) that Osmose drafted the defective design; (2) that Osmose did not build the plant to standard, (3) that Osmose failed to properly train Hines' employees, and (4) that Osmose could have rectified the problem sooner and cheaper. Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988).

The district court never revealed exactly what facts it was assuming for purposes of summary judgment. Even if the district court assumed the facts most favorable to Hines, however, the court still would not find that Osmose was motivated to dispose of a waste. Osmose's involvement with the Hines facility might have amounted to either knowledge of the use for which the CCA had been purchased or authority to control its disposal. Osmose was not, however, motivated to dispose of waste under any set of conceivable facts. Osmose would not have been liable regardless of what facts the court assumed because the district court's analysis required both motivation and waste.

245. For the assumptions used by the appellate court when it ruled on the motion for summary judgment, see supra note 244.

250. Id. at 1376.
251. See Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir.
is due to the fact that it built the facility and trained those who used it. If Hines' allegations were correct, Osmose knew the facility was substandard, and therefore, arranged for the disposal of hazardous substances through its own negligent design and construction. 262

C. The District Court's Holding Frustrates The Congressional Purpose Behind CERCLA

The third argument to reverse the grant of summary judgment is that the district court's holding frustrates the congressional purpose behind CERCLA. Courts have consistently held that section 9607(a) of CERCLA should not be interpreted in any manner that apparently frustrates the statute's goals without clear congressional intent to do so. 263 Congress intended to impose liability on all responsible parties involved in handling hazardous substances. Congress imposed this liability on all responsible parties in order to provide an incentive to those parties to handle hazardous substances with the utmost care. 264 If Osmose knew of the problems at Hines' facility, but hid that knowledge, while continuing to profit by the sale of its hazardous substances, then Osmose is exactly the type of party upon whom Congress intended to impose CERCLA liability. By granting Osmose's motion for summary judgment, the district court interpreted section 9607(a)(3) in a way that frustrates CERCLA's objectives.

V. IMPACT

The immediate effect of the district court's opinion in Edward Hines Lumber Co. is that it establishes a new standard for imposing liability under section 9607(a)(3) of CERCLA. This standard requires that the defendant possess a motivation to dispose of waste before it can be found to have "arranged for disposal." Although other courts have had little difficulty deciding that liability may exist when such motivation was present, 266 courts have also held that parties may have "arranged for disposal" of a hazardous substance based on other theories. 266

1988).
252. Cf. supra notes 149-67 and accompanying text.
253. E.g., United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989) (holding that in the absence of specific congressional intent to the contrary, § 9607(a)(3) should not be interpreted in any way that frustrates the statute's goals); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (finding the court was obligated to construe CERCLA provisions broadly to avoid frustrating the beneficial legislative purposes); New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) (refusing to interpret CERCLA in any way that frustrates the statute's goals).
254. For a further discussion of congressional intent, see supra notes 78-88 and accompanying text.
255. See supra notes 139-55 and accompanying text.
256. For a discussion of courts that have held defendants may be liable for arranging for disposal because they had retained authority to control the disposal process, or because they had knowledge of the intended improper use of the hazardous substances, see supra notes 149-72.
The district court's analysis creates large loopholes in CERCLA that Congress certainly did not intend.\textsuperscript{257} For example, a manufacturer who feared that hazardous substances used in its manufacturing process would be released could contract with a third party to perform that manufacturing process and transfer the finished product back to the manufacturer.\textsuperscript{258} Because the manufacturer never intended to dispose of wastes, it would be absolved of liability under the motivation standard. In addition, a manufacturer of a hazardous substance, or a product containing hazardous substances, could sell its product for a use that would constitute disposal and not be subjected to liability. For example, a manufacturer could sell a useful product, which is not a waste, to a dragstrip for use as a dust suppressant and not have to worry about liability as long as it was not motivated to dispose of a waste.\textsuperscript{259}

Congress could not have intended such a result. The motivation standard allows sellers of hazardous substances to profit from their transactions while closing their eyes to the outcome of their activities. Those are exactly the persons upon whom Congress intended to impose CERCLA liability.\textsuperscript{260}

In order to effectuate the congressional purpose, other courts have held that a party may have "arranged for disposal" of a hazardous substance under more flexible theories of liability than the motivation requirement. The knowledge theory has been used by numerous courts to deny motions to dismiss claims of liability under section 9607(a)(3) where the seller knew that its hazardous substances would be improperly disposed.\textsuperscript{259} This standard prevents the

\textsuperscript{257} For a discussion of the intended scope of CERCLA liability, see \textit{supra} note 78-108 and accompanying text.
\textsuperscript{258} This factual situation closely resembles the facts of United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373 (8th Cir. 1989) and United States v. Velsicol Chem. Corp., 701 F. Supp. 140 (W.D. Tenn. 1987). In those cases, pesticide manufacturers transferred hazardous chemicals to third party formulators who were to mix the chemicals and return them to the manufacturers. The mixing process necessarily leaked the chemicals into the environment. Each court held that the manufacturer could not escape liability under section 9607(a)(3) simply by contracting their responsibilities away to third parties, who coincidentally turned out to be judgment proof. \textit{See supra} notes 156-72 and accompanying text.
\textsuperscript{259} This hypothetical is a variation of the facts of New York v. General Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984). For further discussion of this case, see \textit{supra} notes 149-73 and accompanying text. In that case, the seller was motivated to dispose of a waste. The hypothetical assumes that the seller was actually manufacturing the hazardous substance, rather than generating it as a waste and was selling the substance solely for a profit rather than to dispose of it. Under the \textit{General Electric} opinion, this seller could be liable because it had knowledge, or imputed knowledge, of the intended use of the product, and that use constituted disposal. \textit{See General Elec. Co.}, 592 F. Supp. at 297 (N.D.N.Y. 1984).
\textsuperscript{260} For further discussion of congressional intent, see \textit{supra} notes 78-88.
\textsuperscript{261} \textit{See}, e.g., \textit{Aceto Agric. Chems. Corp.}, 872 F.2d at 1381-82 (finding defendant may be liable where it retained control over the hazardous substances and knew that the substances it transferred would be leaked and spilled in their normal usage); \textit{Velsicol Chem. Corp.}, 701 F. Supp. at 142 (finding that defendant may have arranged for disposal when it had knowledge that the hazardous substances it transferred would be improperly disposed during their intended use); \textit{General Elec. Co.}, 592 F. Supp. at 297 (finding defendant may be liable when it had knowledge that purchaser of its hazardous substances would use them by spraying them on the ground).
seller of the hazardous substance from simply ignoring the results of its activities. Courts have refused, however, to extend the knowledge theory to include the mere foreseeability of possible future disposal.262

Another theory that courts have used to deny motions to dismiss claims of liability under section 9607(a)(3) is the control theory. The control theory imposes liability on those persons who have some authority to control the disposal process.263 In United States v. Aceto Agricultural Chemical Corp., the court found that the defendant may have retained authority to control the third party's use of the hazardous substances.264 The defendant could be liable for arranging for disposal because the third party's use of the hazardous substances constituted disposal.265 Again, this theory imposes liability on a defendant that is not motivated to dispose of its waste, yet that is clearly the type of party upon whom Congress intended to impose liability.

One important aspect of the court opinions discussed in the Background section is that the theories used to impose liability on the defendant are flexible and do not foreclose the use of alternative theories. For example, the court in New York v. General Electric Co. held that the defendant may have been liable under several theories of liability, including motivation and knowledge theories.266 On the other hand, the Edward Hines Lumber Co. motivation standard forecloses alternative theories of liability.267 Congress used broad language in CERCLA and intended that the statute be interpreted broadly in order to achieve the congressional purpose.268 Congress never expressed an intent that motivation be a prerequisite to CERCLA liability.269

262. E.g., Florida Power & Light Co. v. Allis-Chalmers Corp., 18 Env'l. L. Rep. (Envtl. L. Inst.) 20,998, 20,999 (S.D. Fla. 1988) (finding that the foreseeability of the sold product's eventual need to be disposed some forty years in the future was not sufficient to hold the seller liable for the purchaser's eventual improper disposal); see also Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257 (D.N.J. 1987). In Jersey City, the defendant manufacturer disposed of hazardous waste from its manufacturing process on its own property before it sold the property to a third party. Id. at 1259. The third party transferred fill from the property to another party who deposited the fill on another piece of land. Id. The court denied the third party's motion for summary judgment with respect to the "arranged for disposal" claim. Id. at 1261-62. The court, however, found that the foreseeability of the removal of waste from the original property was insufficient to find the original owner and manufacturer liable for arranging for disposal on another piece of land. Id. at 1259-61. The court reached its decision reluctantly, recognizing that the defendant would certainly have been liable for arranging for disposal on the original piece of property. Id. at 1260. That question, however, was not in issue.

263. For a discussion of courts holding that defendants who have retained authority to control the disposal process may be liable under § 9607(a)(3), see supra notes 168-72 and accompanying text.


265. For further discussion of Aceto Agric. Chems. Corp., see supra notes 156-72 and accompanying text.


268. See supra note 114 and accompanying text.

269. A requirement of motivation is not consistent with congressional intent to hold all liable
The standard set by the Hines district court forecloses the use of any alternative theory once the defendant is found to lack a motivation to dispose of waste. That standard is too rigid to accomplish the congressional purpose behind CERCLA.

VI. CONCLUSION

The district court opinion in Edward Hines Lumber Co. established a precedent which requires that a defendant be motivated to dispose of waste before it can be liable for arranging for disposal under section 9607(a)(3) of CERCLA. Such a prerequisite creates a loophole under CERCLA that will allow persons who were in control of hazardous substances, and who, arguably, were responsible for their release into the environment, to escape CERCLA liability simply because they were not specifically motivated to dispose of the substance that was released.

By taking such a restricted view of section 9607(a)(3), the court's opinion frustrates Congress' purpose behind CERCLA, namely, to create a compelling incentive to handle hazardous substances with the utmost care. Although Osmose might not have exercised much care when it supplied the hazardous substances to Hines, this court allowed Osmose to escape liability when it granted their motion for summary judgment.

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who transact in hazardous substances in order to assure proper handling. See supra notes 78-88 and accompanying text (discussing congressional intent).