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Once again, like the proverbial mouse in the maze, it is time to delve into the convoluted ambiguities embodied in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[1] This comment examines the Seventh Circuit's attempt in *Amcast Industrial Corp. & Elkhart Products Corp. v. Detrex Corp.*[2] to decide an issue of first impression at the appellate level.[3] The question before the court was "whether . . . the Act [CERCLA] extends to *any* chemical spill that creates an environmental hazard."[4]

This statute "was designed 'to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws.' "[5] Congressional intent in enacting this statute was "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."[6] In general, cases have consistently interpreted CERCLA in light of these purposes:

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[1] CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (1988).

[2] Amcast Indus. Corp. & Elkhart Products Corp. v. Detrex Corp., 2 F.3d 746 (7th Cir. 1993).

[3] *Id.* at 747. "This is an important question that has not until now been the subject of an appellate case." *Id.*

[4] *Id.* (emphasis added).

[5] State of New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985) (quoting FREDERIC R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984)).

[6] 3550 Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355, 1357 (9th Cir. 1991) (quoting the original text of CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (1980)), *cert. denied*, 111B S.Ct. 2014 (1991).

> First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.[7]

Essentially, CERCLA is "a remedial statute designed . . . to protect and preserve public health and the environment."[8]

Despite Congressional intent, "CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history."[9] In fact, many courts have criticized the statute as an inept piece of federal drafting.[10]

> Depending on what definitions are accorded to various words and phrases within the statute, sections, subsections, and even sentences within CERCLA seem to contradict themselves with little or no internal consistency. Indeed, those courts which have attempted to unravel CERCLA's definitions have found no solace in either the "plain meaning" of the statute or the reams of legislative history. Instead, in an attempt to glean legislative intent, courts seem to resort to a sort of "Purkinje phenomenon,"[11] hoping that if they stare at CERCLA long enough, it will burn a coherent afterimage on the brain.[12]

It is against this background that decisions concerning CERCLA must be viewed.

CERCLA provides several types of liability provisions[13] so that the cost of cleanup will ultimately be borne by those parties

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[7] Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (citing United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982)).

[8] *Id.* (citing United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985); United States v. Conservation Chem. Co., 619 F. Supp. 162, 192 (D.C. Mo. 1985)).

[9] *Mottolo*, 605 F. Supp. at 902.

[10] *See, e.g.*, Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 677 (5th Cir. 1989); *Dedham Water Co.*, 805 F.2d at 1080; Roe v. Wert, 706 F. Supp 788, 792 (W.D. Okla. 1989); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983).

[11] "An optical illusion named for Johannes E. Purkinje (1787-1869), whereby the eye retains an afterimage of an object in a different color from the original." C.P. Holdings, Inc. v. Goldberg-Zoino & Assoc., Inc., 769 F. Supp. 432, 435 n.3 (D.N.H. 1991).

[12] *Id.* at 435.

[13]

> After identifying a responsible party and a release that causes the incurrence of response costs as the two major prerequisites for a cost recovery suit, the

responsible for the hazardous waste site. Applicable to this comment is Section 9607(a) of CERCLA, which imposes strict liability[14] on the following responsible parties: (1) generators of hazardous waste; (2) present or past owners at the time of disposal of facilities where hazardous wastes are disposed; (3) transporters of hazardous waste; and (4) those who arrange for the disposal or transport of hazardous waste.[15] These potentially responsible parties are liable under CERCLA for cleanup costs incurred at a facility[16] "from which there is a 'release, or a threatened release' "[17] of a hazardous substance.[18] The Environmental Protection Agency

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> next question to consider is the nature of the liability which Section [9607] imposes. Although the language of Section [9607](a) provides little guidance, courts have articulated two main principles in the area. First, responsible parties are to be *strictly liable*—the government is not required to establish any degree of fault. Second, responsible parties may be held *jointly and severally liable* for the government's response costs, but liability may also be apportioned in appropriate cases.

SUSAN M. COOKE, THE LAW OF HAZARDOUS WASTE - MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION §14.01[6][b], 14-141 (emphasis added). For an examination of these liability provisions, *see id.* §§ 14.01[6][b] - 14.01 [6][c], 14-141 to 14-149.

[14] *See* CERCLA § 101, 42 U.S.C. § 9601 (32) (1988). This provision stipulates that the standard of liability shall be the same as the standard under the Clean Water Act § 2, 33 U.S.C. § 1321 (1988)), *amended by* 42 U.S.C. § 7412.

[15] 42 U.S.C. § 9607 (a)(4); *see also* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992); Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990).

[16] The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601 (9).

[17] 42 U.S.C. § 9607 (a)(4).

[18] The term "hazardous substance" means (A) any substance designated pursuant to section 1321 (b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (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.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. §6901 §6901 - 69] 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.A. § 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 term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subpara-

(EPA), at the President's direction, is to respond when a release or threat of release of a hazardous substance has occurred.[19]

CERCLA also enables private parties to recover the costs of cleanup, known as "response costs,"[20] against responsible parties.[21] Furthermore, in order to establish a private cause of action under CERCLA, the plaintiffs must prove that: (1) the defendant is within one of the four statutory categories of covered parties liable for such costs;[22] (2) there has been a release or threatened release of any hazardous substance from a facility;[23] (3) such release or threatened release has caused plaintiff to incur costs;[24] and (4) the response costs were necessary and consistent with the national contingency plan.[25]

This comment will discuss the background cases applicable to the particular sections of CERCLA involved in *Amcast Industrial Corp.*, the facts and holding of that case and an analysis of the impact this case may have on future CERCLA decisions.

I. THE STATUTORY SECTIONS INVOLVED IN *AMCAST INDUSTRIAL CORP.*

A. Section 9607(a)(4): The "Consumer Product in Consumer Use" Exception to "Facility" and Applicable Background Cases

CERCLA, "so far as [it] bears on this case, imposes liability for 'response costs' (the costs of eliminating an environmental hazard) on the 'owner and operator of a . . . facility' from which a hazardous substance has been released."[26]

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graphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601 (14).

[19] 42 U.S.C § 9604 (a)(1).

[20] 42 U.S.C. § 9607 (a)(4).

[21] 42 U.S.C. § 9607 (a)(4)(B).

[22] 42 U.S.C. § 9607 (a).

[23] 42 U.S.C. § 9607 (a)(4).

[24] *Id.*

[25] *Id.* For a discussion of the four elements of the prima facie case for response cost recovery, see, e.g., C.P. Holdings, Inc. v. Goldberg-Zoino & Assoc., Inc., Prudential Ins. Co. of America v. United States Gypsum, 711 F. Supp. 1244, 1251 (D.N.J. 1989); *cf.* National R.R. Passenger Corp. v. New York Hous. Auth., 819 F. Supp. 1271, 1275-76 (S.D.N.Y. 1993) (stating a fifth element necessary to a private cause of action which appears to be implicit in the above elements).

[26] Amcast Indus. Corp. & Elkhart Products Corp. v. Detrex Corp., 2 F.3d 746, 748 (7th Cir. 1993) (citing CERCLA § 107, 42 U.S.C. § 9607 (a)(1) (1988)).

> Facility [is broadly defined as] "(A) any building, structure, installation, equipment, pipe or pipeline . . . , well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.[27]

However, the statutory definition of facility excludes "a consumer product in consumer use . . . . "[28] The interpretation of this phrase and its relationship to a facility is the first of two issues discussed by the court in *Amcast Industrial Corp.*

A review of prior cases and their handling of the "consumer product" exception to the definition of "facility" leads to the conclusion that there are three distinct lines of cases, each interpreting the exception in a different manner.[29] The first line of cases is the "location line." In these cases, the key to interpreting the consumer product exception to facility depends on where the "consumer product in consumer use" has come to be located. For example, in *National Railroad Passenger Corp. v. New York City Housing Authority*,[30] the plaintiffs brought suit under CERCLA to recover the removal costs incurred after the plaintiffs removed asbestos-containing material flaking off the undersides of buildings erected over the plaintiff's tracks. The court concluded that since the " 'consumer products' exclusion is located in the definition of 'facility,' a definition clearly addressing locations covered by CERCLA, the relevant question actually pertains to the location of the hazardous substance which is a consumer product in consumer use, not merely the use to which the substance was put."[31] The court then proceeds to back into the interpretation of this ex-

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[27] *Id.* (citing 42 U.S.C. § 9607 (a)(4)(B)).

[28] 42 U.S.C. § 9601 (9).

[29] An exhaustive search of treatises and journals provided nothing illustrative on this narrow point. Therefore, this comment uses the applicable body of case law to formulate three distinct lines of cases.

[30] National R.R. Passenger Corp. v. New York Hous. Auth., 819 F. Supp. 1271, (S.D.N.Y. 1993).

[31] *Id.* at 1276; *see* People v. Blech, 976 F.2d 525, 527 n.1 (9th Cir. 1992) (explaining the holding of 3550 Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355 (9th Cir. 1991); C.P. Holdings, Inc. v. Goldberg-Zoino & Assoc., 769 F. Supp. 432, 438-39 (D.N.H. 1991) (holding a hotel constructed with asbestos is a facility); Electric Power Bd. v. Westinghouse Elec. Corp., 716 F. Supp. 1069 (E.D. Tenn. 1988) (holding a transformer containing PCB is not a facility); New York v. General Electric Co. 592 F. Supp. 291 (N.D.N.Y. 1984) (holding a drag strip sprayed with transformer oil is a facility).

ception by explaining what it does not exclude from the statutory definition of facility:

> [T]he proper approach is to construe the "consumer product in consumer use" exclusion from the broad definition of "facility" to mean the term does not encompass consumer products in consumer use which are, in effect, containers of hazardous substances, such as transformers which contain PCB's.
>
> In this case, the support pillars and the undersides of buildings were themselves coated with ACM (asbestos containing material). The ACM was not, for instance, contained in drums waiting to be put to a consumer use, in which case the drums would not be facilities. Therefore, the consumer products exception does not apply.
>
> Thus, the buildings and tracks are facilities for CERCLA purposes, since, as defendants conceded at argument, they were sites where a hazardous substance had come to be located.[32]

Therefore, the consumer product exception to facility, as interpreted in the location line of cases, is not applicable if the facility is one where a hazardous substance has come to be located.

The second line of cases may be referred to as the "productive use" line. The crucial factor to interpreting the consumer product exception to facility in these cases is what utility is derived from the activity at hand. For example, in *Dayton Independent School District v. U.S. Mineral Products Co.*,[33] the plaintiffs brought an action under CERCLA against asbestos manufacturers and suppliers to recover the cost of removing asbestos products from the buildings.[34] The court held that since "[t]he provision exempting consumer products obviously was meant to protect from liability those who engage in production activities with a useful purpose, as opposed to those engaged in the disposal of hazardous substances,"[35] the manufacturers and suppliers were not liable under CERCLA. Thus, this interpretation of the "consumer product in consumer use" exception to facility protects those facilities which are engaged in productive uses.

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[32] *National R.R. Passenger Corp.*, 819 F. Supp. at 1276.

[33] 906 F.2d 1059 (5th Cir. 1990).

[34] *Id.*

[35] *Id.* at 1065; *see also* Vernon Village, Inc. v. Gottier, 755 F. Supp. 1142, 1149 (D.C. Conn. 1990) (explaining that drinking water fell within the consumer product exception to facility).

The third line of cases will be referred to as the "individual consumer" line. In these cases the critical component in interpreting the consumer product exception to facility is who uses the product. For example, in *Reading Co. v. City of Philadelphia*,[36] the defendant's argument that railcars, being a part of a commuter train service, are consumer products in consumer use and thus excepted from CERCLA liability was rejected by the court.[37] "CERCLA's legislative history indicates that the consumer products exception was meant to cover individual consumers."[38] In support of their contention, the court cites numerous statements made by Senator Cannon.[39] Senator Cannon's amendment to Section 9601(9) became the "consumer products exception" that is at issue in *Amcast Industrial Corp.*[40] Therefore, the individual consumer line interpretation of the consumer product exception to facility shields facilities designed for individual use.[41]

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[36] 823 F. Supp. 1218 (E.D. Pa. 1993).

[37] *Id.* at 1232.

[38] *Id.* at 1233.

[39] *Id.* Senator Cannon stated:

> S. 1480 contains no exclusion for consumer products. Therefore, it has been suggested that this would mean that an individual consumer is subject to strict, joint, and several liability for a 'release' from any product that contains one of the numerous hazardous substances listed on pages 24 to 28 of the Senate Environment and Public Works Committee report. While staff has been informed that such a result was not intended, the term 'facility' as it is presently defined would include consumer products, and the report does not in any way clarify that this term does not include consumer products. An amendment will be offered to clarify this matter.

126 CONG. REC. S12,916-23 (daily ed. Sept. 18, 1980).

[40] *Reading Co.*, 823 F. Supp. at 1233.

> Senator Cannon did in fact offer an amendment that became part of section 9601(9) and coined the 'consumer products exception.' Senator Cannon made the following remarks when explaining this amendment:
>
> > [O]ne of my amendments would exclude consumer products from the definition of 'facility,' thus precluding any unintended application of notification requirements and liability provisions to consumers.
>
> *Id.* (citation omitted).

[41] *See Reading Co.*, 823 F. Supp. at 1232-33 (discussing various definitions of "consumer product").

> BLACK'S LAW DICTIONARY 317 (6th ed. 1990) defines consumer product as:
>
> > "Any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes . . . ." A look at the definition provided in the Consumer Product Safety Act, a statute in place at the time of CERCLA's passage in 1980, is also instructive. The act defines the term consumer product as:

B. Section 9607(a)(3): "Arranged For" Liability and Applicable Background Cases

CERCLA, so far as it bears on this case, imposes liability for response costs on "any person who by contract . . . 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."[42] This concept of "arranged for" liability is the second issue discussed by the court in *Amcast Industrial Corp.*

The act that generally falls within the purview of this specific statutory language is the hauling of hazardous waste to a hazardous waste facility. The CERCLA action that subsequently will arise will involve a hazardous waste facility that is the subject of a cleanup. The facility owners will then try to bring all previous haulers and companies that arranged for disposal at their facility into CERCLA's net of liability.[43] For example, in *U.S. v. Bliss*, the court found that four defendants were jointly and severally liable under CERCLA for response costs incurred by the federal government and Missouri at two hazardous waste sites.[44] These four defendants were "the person arranging to transport and dispose of hazardous waste, his corporate successor, the corporation owning a site where waste was deposited, and a corporate officer of the corporation that owned the site."[45]

Perhaps a better case on point is *Transportation Leasing Co. v. California*,[46] in which the court found that "a municipality that contracted for the disposal of residential waste at the Operating Industries site in Monterey Park, California may have incurred arranger liability"[47] under CERCLA. The facts involved in this

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> any article, or component thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.

Id.

[42] CERCLA § 107, 42 U.S.C. § 9607 (a)(3) (1988).

[43] *See, e.g.*, Transportation Leasing Co. v. California, 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,773 (C.D. Cal 1991); U.S. v. Bliss, 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,879 (E.D. Mo. 1988).

[44] United States v. Bliss, 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,879 (E.D. Mo. 1988).

[45] *Id.*

[46] *Transportation Leasing Co.*, 22 Envtl. L. Rep. (Envtl. L. Inst.) at 20,773.

[47] *Id.*

case are representative of the general fact pattern discussed above. The EPA, the State of California, and the California Hazardous Substance Account sued sixty-four industrial companies for response costs expended in cleaning up the Operating Industries site.[48] These companies agreed to pay $61,000,000 to the EPA and the State of California.[49] Subsequently, these companies asserted a reimbursement action under CERCLA[50] based on arranger liability against twenty-nine municipal defendants, the County of Los Angeles, and the State of California.[51]

The interpretation of the phrase "arranged for disposal" is also a matter of concern as it is not defined in CERCLA.[52] "Moreover, [w]hether an 'arrangement for disposal' exists depends on the facts of each case."[53] However, three principles have become apparent from the case law in determining whether a particular set of facts constitutes "an arrangement for" disposal:[54]

> First, the courts will look beyond a defendant's characterizations in deciding whether a particular transaction constitutes an 'arrangement for disposal' of a hazardous substance;[55] persons having a legal responsibility for the disposal of hazardous substances cannot evade liability by simply closing their eyes and doing nothing as to the method of disposal of their hazardous wastes;[56] and (3) courts have concluded that "a liberal judicial interpretation of the term is required in order (to) achieve CERCLA's 'overwhelmingly remedial' statutory scheme."[57]

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[48] *Id.*

[49] *Id.*

[50] *See* CERCLA §107, 42 U.S.C. § 9607 (a)(4)(B) (1988) (allowing recovery from another responsible person).

[51] *Transportation Leasing Co.*, 22 Envtl. L. Rep. (Envtl. L. Inst.) at 20,773.

[52] *Id.* at 20,777.

[53] *Id.* (quoting Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990)).

[54] *Transportation Leasing Co.*, 22 Envtl. L. Rep. (Envtl. L. Inst.) at 20,777.

[55] *Id.* (citing United States v. New Castle County, 727 F. Supp. 854, 873 (D. Del. 1989)).

[56] *Id.* (citing United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985)).

[57] *Id.* (citing *Florida Power & Light*, 893 F.2d at 1317).

II. *AMCAST INDUSTRIAL CORP. v. DETREX CORP.*

A. Background and Facts

"The principal plaintiff, Elkhart (Amcast is its parent, and can be ignored), manufacture[d] copper fittings at a plant in Indiana."[58] One of the chemicals used in the manufacturing process was the solvent trichloroethylene (TCE).[59] The plaintiff purchased TCE from several chemical manufacturers, including the defendant, Detrex Corp. ("Detrex").[60] Detrex delivered TCE to Elkhart in its own trucks and sometimes used a common carrier, Transport Services, to deliver the solvent.[61] In 1984, the ground water beneath a pharmaceutical plant adjacent to Elkhart's plant was found to be contaminated with TCE.[62] "There [was] evidence that both Detrex's and Transport Services' drivers sometimes spilled TCE accidentally on Elkhart's premises while trying to fill Elkart's storage tanks and that some of this spillage found its way into the ground water beneath the pharmaceutical plant . . . ."[63]

Elkhart spent more than $1 million in cleaning up the ground water contamination caused by the spillage of TCE on its own grounds.[64] Elkhart brought this suit under section 9607(a) of CERCLA[65] in order to establish that Detrex was a responsible party as well and "to shift Elkhart's response costs (that is, the $1 million it had incurred in cleaning up the contamination) from itself to Detrex."[66]

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[58] Amcast Indus. Corp. & Elkhart Products Corp. v. Detrex Corp., 2 F.3d 746, 747 (7th Cir. 1993).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 747-48.

[62] *Id.* at 748. The cleanup at the pharmaceutical plant is not relevant to this comment.

[63] *Amcase Indus. Corp.*, 2 F3d at 748. However, the court alluded to the fact that Detrex's expert purportedly attempted to demonstrate the insignificance of the spills:

> [A]n expert hired by Detrex has estimated that out of almost 800 gallons of TCE that have been found in the soil and ground water beneath the pharmaceutical plant, no more than 49 came from these delivery spills, the rest having leaked from the storage tanks or a waste-disposal pit or the plant itself or been spilled by other suppliers' drivers.

Id.

[64] *Id.*

[65] CERCLA § 107, 42 U.S.C. § 9607 (a)(4) (1988).

[66] *Amcast Indus Corp.*, 2 F.3d at 748.

Amcast Industrial Corp. involved two issues that parallel the arguments used by the parties in the case. The first issue, as mentioned previously,[67] involves the consumer product exception to facility. Detrex argued that as to the spillage from its own trucks,[68] it was not liable under CERCLA because its trucks were "consumer products in consumer use" and therefore were excepted from the definition of facility.[69] The second issue, as mentioned above,[70] concerned the applicability of the "arranged for" liability under section 9607(a)(3) of CERCLA. Elkhart used this section in an attempt to make Detrex liable for the spillage of TCE from Transport Services' trucks. The parties and issues can best be explained in the following manner: Elkhart, the principal plaintiff and copper fittings manufacturer, sued Detrex, the defendant and shipper, based upon sections 9607(a)(3) and (a)(4) of CERCLA in an attempt to recover for the spillage from Detrex's own trucks and from Transport Service's common carrier trucks.

B. Holding of the Court Concerning the "Consumer Product" Exception

As to the "consumer product in consumer use" exception, the Seventh Circuit, per Judge Posner, ruled that Detrex was a responsible person under CERCLA for the TCE spilled from its own trucks and that the consumer product exception did not apply in this situation.[71] In explaining its reasoning, the court stated:

> The difficult question is whether the reference to consumer product in section 9601(9), the definition of "facility," is to be read literally. If it is read literally, the only consumer product exempted by the statute is the consumer product that is a facility.

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[67] *See supra* part I.A.

[68] *Amcast Indus. Corp.*, 2 F.3d at 750 (characterizing facts in terms of satisfaction of prima facie case).

> Each of the tanker trucks owned by Detrex in which it delivered TCE to Elkhart constituted prima facie a "facility" within the meaning of the Superfund law, section 9601(9)(A), contained a hazardous substance, namely TCE, and "disposed of" it when the truck spilled it, because the statute defines disposal to include spilling.

Id; *see* CERCLA § 101, 42 U.S.C. § 9601(9), (29) (1988).

[69] *Amcast Indus. Corp.*, 2 F.3d at 748.

[70] *See supra* part I.B.

[71] *Amcast Indus. Corp.*, 2 F.3d at 750.

> The alternative is to read the exemption as referring to facilities that contain consumer products.[72]

The court then proceeded to employ the alternative reading to the facts of the case and determined that under this "extraordinarily strained reading of 'consumer product,' "[73] Detrex would not be liable for the TCE it spilled from its own trucks onto Elkhart's property.[74] However, "[t]his approach does excessive violence to the statutory language. The exception is for facilities that *are* consumer products in consumer use, not for consumer products contained in facilities."[75] The court continued:

> Although read as it is written the exception is narrow, it is not meaningless, for the statute defines "facility" so broadly that it could be thought to include a can of lye. Since Detrex, not Elkhart, was responsible for the environmental damage resulting from the spillage of TCE from Detrex's trucks, there is no anomaly, so far as the purpose of the Superfund statute is concerned, in deeming Detrex a responsible person along with Elkhart. A literal interpretation that furthers the statute's purpose is hard to beat.[76]

Thus, as far as Judge Posner is concerned, the critical element in interpreting the consumer product exception to facility is a literal interpretation of the statutory language itself.

C. *Holding of the Court Concerning "Arranged For" Liability*

As to the second issue concerning "arranger liability," the Seventh Circuit ruled that Detrex was not a responsible person under CERCLA for the TCE spilled from trucks owned by Transport Services.[77] Judge Posner, in explaining the court's reasoning, stated: "Detrex hired a transporter, all right, but it did not hire it

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[72] *Id.*

[73] *Id.*

[74] *Id.*

> [W]e would conclude that until the TCE transported in Detrex's trucks spilled, it was a consumer product in consumer use. It ceased to be in consumer use when it spilled; but the spilled TCE was no longer in the trucks or any other property owned by Detrex, and when it hit the ground it was in premises owned by Elkhart, and Elkhart thus became the facility owner and a responsible person.

Id.

[75] *Id.*

[76] *Id.* at 749.

[77] *Amcast Indus. Corp.*, 2 F3d at 750.

to spill TCE on Elkhart's premises."[78] The court granted the fact that the statute does define disposal to include spilling but made clear that "the critical words for present purposes are 'arranged for' . . . [which] imply intentional action. The only thing that Detrex arranged for Transport Services to do was to deliver TCE to Elkhart's storage tanks. It did not arrange for spilling the stuff on the ground."[79]

Elkhart argued that disposal includes accidental spilling because it is so defined in the statute. Judge Posner escaped from this argument by illustrating that a statute may have several meanings for the same word. For example,

> [i]n the context of the operator of a hazardous-waste dump, "disposal" includes accidental spillage; in the context of the shipper who is arranging for the transportation of a product, "disposal" excludes accidental spillage because you do not arrange for an accident except in the Aesopian sense illustrated by the staged accident.[80]

Continuing the reasoning above, Judge Posner clearly explained that "arranger liability" should apply to an individual or corporation (the shipper) who desires "to get rid of its hazardous wastes [and] hires a transportation company to carry them to a disposal site."[81] Here, if a spill occurs enroute, the shipper would be found a responsible person under CERCLA.[82] But, if the shipper is "arranging for the delivery of a useful product, he is not a responsible person within the meaning of the statute, and if a mishap occurs en route, his liability is governed by other legal doctrines."[83]

Judge Posner concluded the court's consideration of this issue with two statements. First, "[i]t would be an extraordinary thing to make shippers strictly liable under the Superfund statute for the consequences of accidents to common carriers or other reputable transportation companies that the shippers had hired in good

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[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Amcast Indus. Corp.*, 2 F.3d at 750.

faith to ship their products."[84] Second, "[t]his conclusion does not create a regulatory void. Apart from common law liability of transportation companies for chemical spills, noted in our *Indiana Harbor Belt R.R.* decision, there are a variety of direct regulatory controls over the transportation of hazardous substances, illustrated by the Hazardous Materials Transportation Act . . . ."[85]

III. ANALYSIS

A. The Impact of the "Consumer Product" Exception Decision

As noted earlier, the case law on this exception appears to have produced three distinct approaches[86] to the interpretation of this particular statutory language. Does Judge Posner's opinion in the Seventh Circuit create a fourth?

Judge Posner reads this exception literally stating, "[t]he exception is for facilities that are consumer products in consumer use, not for consumer products contained in facilities."[87] This literal interpretation can best be characterized as a two-part test: (1) whether the object from which the leak/spill emanates is a facility as defined in the statute;[88] and (2) whether the object from which the leak/spill emanates is a "consumer product in consumer use."[89]

To better understand the impact of this decision, it is helpful to go through the complete analysis that must be applied in order for a facility to be exempted from liability under CERCLA. The statute imposes liability for response costs on the owner and operator of a facility from which a hazardous substance has been released.[90] The statutory definition of facility excludes, however, a "consumer product in consumer use."[91] Thus, presumably, if the

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[84] *Id.* (citing Indiana Harbor Belt R.R. v. American Cyanamid Co., 916 F.2d 1174, 1180-81 (7th Cir. 1990) (discussing the six critical factors necessary to holding an institution or person strictly liable for a particular activity).

[85] *Id.* (citation omitted).

[86] *See* National R.R. Passenger Corp. v. New York Hous. Auth., 819 F. Supp. 1271 (S.D.N.Y. 1993) (location line); Dayton Indep. Sch. Dist. v. U.S. Mineral Products Co., 906 F.2d 1059 (productive use line); Reading Co. v. City of Philadelphia, 823 F. Supp. 1218 (E.D. Pa. 1993) (individual consumer line).

[87] *Amcast Indus. Corp.*, 2 F.3d at 750.

[88] *See* CERCLA § 101, 42 U.S.C. § 9601 (9) (1988).

[89] *Id.*

[90] *Amcast Indus. Corp.*, 2 F.3d at 750.

[91] *Id.*

object from which the spill emanates passes the two-part test above, (i.e., is defined in the statute as a facility and is a consumer product in consumer use[92]) then the owner and operator of the exempted facility will not be liable under CERCLA for response costs for a spill from the exempted facility. The alternative, "to read the exemption as referring to facilities that contain consumer products,"[93] would be an "extraordinarily strained reading."[94] Therefore, the Seventh Circuit has produced a fourth line of cases interpreting the consumer product exception to facility.

An analysis of the previous cases that delineated the three other lines will facilitate a better understanding of how this fourth construction will work. The location line, illustrated by *National Railroad Passenger Corp.*, interpreted the "consumer product" exception from the perspective that it is where the "consumer product in consumer use" is located.[95] The issue in that case was whether the owners of the building could escape liability from CERCLA by characterizing the asbestos as a "consumer product in consumer use" when it was applied to the building structures.[96] If the two-part test above is applied to the situation in *National Railroad*, the asbestos fails because it is not a facility as defined by the statute.[97] Thus, the outcome under the Seventh Circuit's test and the outcome under the location line analysis are consistent because in both cases the owner and operator of the building could not escape CERCLA liability by characterizing the asbestos as a "consumer product in consumer use."[98]

The productive use line, elucidated in *Dayton Independent School District*,[99] interpreted the consumer product exception by focusing on what utility is derived from the activity at hand. In *Dayton*, a case very similar to *National Railroad*, the issue was whether the manufacturers and suppliers could be held liable for the removal costs of the asbestos.[100] Again, running asbestos

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[92] *Id.* at 748.

[93] *Id.*

[94] *Id.*

[95] National R.R. Passenger Corp. v. New York Hous. Auth., 819 F. Supp 1271, 1275 (S.D.N.Y. 1993).

[96] *Id.*

[97] *See* CERCLA § 101, 42 U.S.C. § 9601 (9) (1988) (defining "facility").

[98] *See National R.R. Passenger Corp.*, 819 F. Supp. at 1276.

[99] Dayton Indep. Sch. Dist. v. U.S. Mineral Products Co., 906 F.2d 1059 (5th Cir. 1990).

[100] *Id.* at 1064.

through the Seventh Circuit's two-part test, it is not a facility as defined by the statute, and therefore the owner and operator of the building could not evade CERCLA liability utilizing this exception.[101] The resolution of the case is the same regardless of the test that is applied.[102]

The individual consumer line, manifested in *Reading Co.*,[103] interpreted the exception in light of who uses the product. In that case, the defendants argued that railcars, as a part of a commuter train service, are consumer products in consumer use and thus excepted from CERCLA liability.[104] Taking the railcars through the Seventh Circuit's two-part test, they satisfy element one as they are statutorily defined facilities,[105] but the question under element two is whether they are consumer products in consumer use. The courts have taken a fairly common-sensical view of the meaning of "consumer products in consumer use." For example, the *Reading Co.* court[106] addressed this issue:

> Under this rationale, things defined as facilities by CERCLA, such as buildings, motor vehicles, and aircraft would be transformed into consumer products in consumer use, simply by virtue of the fact that people use them. "If the court were to accept [defendant's] definition of a facility, any commercial building or property that could be bought or sold would have to be classified as a consumer product if the property is used by the general public. This would effectively exclude all private actions against previous landowners, despite the fact that section 9607 clearly provides for such actions."[107]

Presumably, a railcar interpreted in light of the aforementioned statement would not pass the muster required by element two. Again, whether the test employed is that of the Seventh Circuit or the individual consumer line, the results are consistent as the de-

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[101] *Id.* at 1065.

[102] *Id.* at 1064. "CERCLA does not provide a private right of action to recover costs of removal of asbestos-containing materials from structure of buildings." *Id.*

[103] Reading Co. v. City of Philadelphia, 823 F. Supp. 1218, 1232 (E.D. Pa. 1993).

[104] *Id.*

[105] *See* CERCLA § 101, 42 U.S.C. 9601 (9)(a) (Supp. 1993).

[106] *Reading Co.*, 823 F. Supp. at 1235 (applying the rationale "that because consumers used the Reading Terminal complex, the entire area should be considered a consumer product. Taken to its logical conclusion, this argument becomes absurd.").

[107] *Id.* (quoting C.P. Holdings, Inc. v. Goldberg-Zoino & Assoc., Inc., 769 F. Supp. 432, 439 (D.N.H. 1991)).

fendants could not escape CERCLA liability under either approach.

Logically, element one of the two-part test should be fairly straightforward in its application as the definition of facility is statutorily defined.[108] It seems the issue now will become whether the statutory facility is a "consumer product in consumer use" so as to satisfy element two. Defendants will naturally argue for an expansive view, but in light of the characterization given by *C.P. Holdings, Inc.*,[109] it appears doubtful that courts will agree.[110]

There now appear to be four distinct lines of cases, but only one of these lines has been pronounced at the court of appeals level. As the previous analysis showed, the Seventh Circuit test announced by Judge Posner provided consistent results with the other three interpretations of the "consumer product exception" when applied to the same fact patterns. Therefore, the most conservative route to take in applying this exception to a facility is to utilize the Seventh Circuit approach.

B. The Impact of the "Arranged For" Decision

The facts of this case are uncharacteristic of the typical situations that are resolved under this section of CERCLA.[111] In fact, this second issue in *Amcast Industrial Corp.* is not unraveled by reference to section 9607(a)(3).[112] As Judge Posner states, "[t]he words 'arranged with a transporter for transport for disposal or treatment' appear to contemplate a case in which a person or institution that wants to get rid of its hazardous wastes hires a transportation company to carry them to a disposal site."[113] Here, there is the transportation of a useful product (TCE), not hazardous waste, and it is not to a disposal site but to a manufacturing plant.

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[108] *But see* Amcast Indus. Corp. & Elkhart Products Corp. v. Detrex Corp., 2 F.3d 746, 750 (7th Cir. 1993). "Although read as it is written the exception is narrow, it is not meaningless, for the statute defines 'facility' so broadly that it could be thought to include a can of lye." *Id.*

[109] *See also Reading Co.*, 823 F. Supp. at 1218.

[110] *Id.*

[111] *See infra* part I.B.

[112] *See Amcast Indus. Corp.*, 2 F.3d at 751. Judge Posner quickly removed this case from applicability of this section and embarked upon the question of whether CERCLA will provide a private cause of action in these circumstances at all, *id.*

[113] *Id.*

Thus, the question becomes whether CERCLA provides a private cause of action that addresses this factual scenario.[114] Judge Posner, in concluding that it does not,[115] refers to the prior Seventh Circuit decision of *Indiana Harbor Belt Railroad v. American Cyanamid Co.*[116] In this case, the court announced the six factors that must be satisfied before a particular activity will be subjected to strict liability:[117] (1) the risk of harm was high; (2) the harm that would ensue if the risk materialized could be great; (3) the accident could not be prevented by the exercise of due care; (4) the activity was not a matter of common usage, so there was no presumption that it was a highly valuable activity despite its unavoidable risk; (5) the activity was inappropriate to the place in which it took place; and (6) the value to the community of the activity did not appear to be great enough to offset its unavoidable risks.

The Seventh Circuit's decision not to apply CERCLA to the second issue in *Amcast Industrial Corp.* can be better understood once it has been processed through these six factors. The particular activity here was that of a shipper hiring a common carrier to deliver a hazardous substance to a manufacturer.[118] The risk of harm was not high. In fact, society's risk of harm here was either a late delivery or no delivery at all of a useful product to a manufacturing plant. The harm that would ensue if the risk materialized was at worst a rise in the cost of the finished product or perhaps a temporary shortage. The accident, a late or no delivery of TCE, could be controlled by the exercise of due care. The activity was a matter of common usage, was appropriate to the place in which it took place, and had value to the community great enough to offset its unavoidable risks.

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[114] *Id.*

[115] *Id.*

[116] 916 F.2d 1174 (7th Cir. 1990).

[117] *Id.* at 1176-77.

[118] *Id.* It may be argued that the particular activity here was the hauling and delivery of hazardous substances (TCE). This activity was not run through the analysis for two reasons, *id.* First, the Seventh Circuit, in the *Amcast Industrial Corp.* opinion, did not focus on this activity but on that of the shipper and the common carrier. Amcast Indus. Corp. & Elkhart Products Corp. v. Detrex Corp., 2 F.3d 746 (7th Cir. 1993). Second, *Indiana Harbor Belt R.R.* dealt with an almost identical fact pattern and held a chemical manufacturer was not strictly liable for the consequences of a spill even though it shipped a flammable, toxic chemical in a railroad tank car through a heavily populated area. *Indiana Harbor Belt R.R.*, 916 F.2d at 1176-77.

As this painful exercise shows, not a single element required to place a particular activity under the strict liability regime is present in this factual scenario. This scenario was what the Seventh Circuit meant when Judge Posner stated that, "[i]t would be an extraordinary thing to make shippers strictly liable under the Superfund statute for the consequences of accidents to common carriers or other reputable transportation companies that the shippers had hired in good faith to ship their products."[119] This activity is not a type of activity type that the rationale behind strict liability[120] would support. It therefore appears that the Seventh Circuit's test for whether a private cause of action exists under CERCLA, when it has not yet been recognized, is the strict liability test announced in *Indiana Harbor Belt Railroad*.[121]

The conclusion that shipper's like Detrex are not responsible for the TCE spilled from common carrier's like Transport Services' trucks "does not create a regulatory void."[122] "Apart from common law liability of transportation companies for chemical spills,[123] noted in our *Indiana Harbor Belt Railroad* decision, there are a variety of direct regulatory controls over the transportation of hazardous substances, illustrated by the Federal Hazardous Materials Transportation Act . . . ."[124] Thus, CERCLA does

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[119] *Amcast Indus. Corp.*, 2 F.3d at 751.

[120] *Indiana Harbor Belt R.R.*, 916 F.2d at 1177.

[121] To test whether the strict liability criteria would work as well on other causes of action that also have not been recognized under CERCLA, it was applied to asbestos removal. However, it was concluded that, "CERCLA does not provide a private right of action to recover the costs of removal of asbestos-containing materials from the structures of buildings." Dayton Indep. Sch. Dist. v. U.S. Mineral Products Co., 906 F.2d 1059 (5th Cir. 1990). The manufacturers or suppliers did not know the risk of harm was great at the time the asbestos was installed, *id.* Also, no one knew that there was a risk of harm when the asbestos was installed, *id.* The accident (release of asbestos fibers) could have been prevented by the exercise of due care if the fact that they were hazardous was known, *id.* The activity of using asbestos for insulation was of common usage and was appropriate to the place, and the value to the community was offset by its known unavoidable risks, *id.* Thus, the test, insofar as it is applied to asbestos-removal and the shipper who contracts with a common carrier, seems to be consistent.

[122] *Amcast Indus. Corp.*, 2 F.3d at 751.

[123] The applicability of a pure negligence action to this type of hazardous material activity is discussed at length in *Ind. Harbor Belt R.R.*, 916 F.2d at 1179.

[124] *Amcast Indus. Corp.*, 2 F.3d at 751 (citation omitted); COOKE, *supra* note 13, § 15.05, 15-215 to 15-216. The Hazardous Materials Transportation Act (HMTA) was enacted in 1975 and amended in 1990. It applies to interstate, and in certain instances intrastate, transportation of hazardous materials. The HMTA sets forth specific requirements intended to ensure safety in the transportation of hazardous materials. These regulations include provisions governing transport (by air, highway, rail and water) and reporting

not apply to "*any* chemical spill that creates an environmental hazard."[125] The ramifications of this decision appear to be that if the spill or accident is not one where the strict liability factors of *American Cyanamid* are sensibly applicable, then CERCLA liability does not apply, at least in the Seventh Circuit.

As stated earlier, this decision leaves no void in the statutory realm as to recovery possibilities for Detrex. In fact, *Amcast Industrial Corp.* forces an efficient use of legislative and judicial resources by restraining CERCLA from engulfing both the common law and previous statutes that relate to hazardous materials. The remedial goals of CERCLA[126] are maintained, and the spill site is cleaned. Also, there remains a private cause of action against Transport Services by Elkhart under a pure negligence action.

CONCLUSION

The decisions reached in *Amcast Industrial Corp.* concerning the consumer product exception to facility and arranger liability may at first blush appear overly constraining. However, as the analysis has shown, they are well-reasoned approaches to ambiguous legislation and provide very clear tests to the future CERCLA litigant where CERCLA previously provided none. The Seventh Circuit's approach, per Judge Posner, keeps CERCLA from consuming already existing legislation; while not all spills are covered by CERCLA, all spills are covered.

As Judge Posner has said:

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of spills, discharges, and other incidents of hazardous materials. HMTA §§ 101-115, 49 U.S.C. §§ 1801-12 (1975)(amended 1990).

[125] *Id.* at 747 (emphasis added).

[126] C.P.C. Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 791 (W.D. Mich. 1989) (quoting Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1071, 1081 (1st Cir. 1986); United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

> The purpose of CERCLA is certainly to encourage remedial and removal actions. However, by imposing strict liability on broad categories of defendants, Congress also evidenced its intent to make the responsible parties pay for the costs of the cleanup. The cases have repeatedly interpreted CERCLA in view of its dual purposes. First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poison bear the costs and responsibility for remedying the harmful conditions they created.

C.P.C. Int'l, 731 F. Supp. at 790.

> To the point that courts could achieve "more" of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits. Born of compromise, laws such as CERCLA . . . do not pursue their ends to their logical limits. A court's job is to find and enforce stopping points no less than to implement other legislative choices.[127]

As CERCLA is up for reauthorization in 1994,[128] Judge Posner's interpretations of both the consumer product exception and arranged for liability are sensible directions for Congress to take. They mesh well with the remedial underpinnings of CERCLA but keep the Superfund statute from running amuck.

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[127] Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988) (citations omitted).

[128]

> Congress reauthorized and strengthened CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (SARA), and again reauthorized CERCLA in 1991. Congress will have to act again in 1994 to reauthorize CERCLA; this next reauthorization process could result in significant changes to the law, and battle lines are already being drawn about how CERCLA should be changed.

Bruce P. Howard & Kevin E. Solliday, *CERCLA and Similar State Laws: Overview and Current Developments*, 797 PLI/Corp 39 (1992).