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I. INTRODUCTION

Government regulation of hazardous substances increased dramatically with the passage of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). CERCLA imposes strict liability on all responsible parties for the costs incurred from the emergency cleanup of hazardous substances released into the air, water, or ground. Section 107 of CERCLA deems the following parties potentially liable for those cleanup costs: current or past owners and operators of the affected property, generators who arrange for the disposal or treatment of hazardous waste, and transporters of the waste.


2. Although the statute does not expressly state the standard of liability, courts have interpreted it to impose strict liability. See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (noting that CERCLA defines "liability" with reference to the same standard that is used in § 311 of the Clean Water Act, 33 U.S.C. § 1321 (1988), which is strict liability).


4. Id. § 9601(8).

5. Id. § 9607(a). Section 107 provides:

   Liability

   (a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

   (1) the owner and 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
This Comment, however, does not focus on the parties expressly listed in section 107 of CERCLA. Instead, it focuses on a fourth class of persons that some courts have found to be potentially liable under section 107—vendors of hazardous waste.

This Comment first examines the development and legislative history of CERCLA to determine whether Congress intended the sale of hazardous substances to trigger liability. It then discusses two lines of cases that distinguish between manufacturer and vendor liability. Finally, this Comment suggests that a clarification of section 107 of CERCLA is needed and proposes that vendors of hazardous waste should be liable only under the theory of product liability.

II. BACKGROUND

To provide the United States Environmental Protection Agency ("U.S. EPA") with a mechanism to respond quickly to releases of hazardous substances, Congress enacted CERCLA, which authorizes the U.S. EPA to use federal funds to clean up a hazardous substance release and then locate the parties designated under the statute as "responsible." Under CERCLA, generators and transporters of hazardous waste, as well as all past and present owners and operators of the affected facility, are potentially liable for the cleanup costs. However, the legal theories under which Congress intended to hold these parties liable are unclear because the legislative history of CERCLA is both muddled and gap-filled. Nevertheless, the legislative history does point to the common law doctrine of strict liability to fill those gaps.

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6. See infra notes 13-55 and accompanying text.
7. See infra notes 56-170 and accompanying text.
8. See infra notes 171-214 and accompanying text.
10. Id. § 9607(a).
11. Id. § 9607; see supra note 5.
12. See infra notes 42-46 and accompanying text.
A. The Development of CERCLA

Before CERCLA was enacted, the issue of hazardous wastes was addressed when Congress passed the Resource Conservation and Recovery Act ("RCRA") in 1976.13 RCRA requires the identification and listing of hazardous wastes and regulates the disposal process.14 Through RCRA, the U.S. EPA requires generators15 and transporters of hazardous waste,16 and owners and operators of disposal facilities,17 to register and list the wastes they handle and to keep records of all transactions.18

In addition, RCRA subjects persons who knowingly violate its requirements to prison terms and fines of up to $50,000 per day of violation.19 When the U.S. EPA Administrator determines that there has been a release of hazardous waste from an authorized facility, the Act gives the U.S. EPA authority to issue orders for corrective action, including abatement orders.20 RCRA expressly allows general common law defenses, including assumption of the risk, to criminal charges.21

Despite the seemingly broad enforcement provisions of RCRA,
Congress began to recognize the need for supplemental legislation to address the growing problem of abandoned hazardous waste dumps. In particular, the “Love Canal” site in Niagara Falls, New York, 22 sparked debate over the need for a statute that would provide an immediate response to such disasters. Thereafter, many other abandoned waste dumps were discovered, with the discovery often occurring long after the operator went out of business. RCRA failed to provide an answer to the problems that these waste dumps posed because RCRA provided no mechanism to deal with the particular dilemma of abandoned facilities.

Designed to address abandoned waste dumps, CERCLA has unique provisions to finance emergency responses to releases from such facilities. Thus, while RCRA addresses the proper procedures and standards for transport, storage, and disposal of wastes, CERCLA addresses improper handling or disposal of toxic products. 23

CERCLA liability is triggered by a release or threatened release 24 of a hazardous substance 25 from a facility 26 which results in...

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22. See United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546, 549 (W.D.N.Y. 1988). Hooker Chemical Company (now Occidental Chemical) owned or operated a hazardous waste disposal operation at the site from 1942 to 1953. Id. at 548-49. Hooker then deeded the property to the local Board of Education. Id. at 549. During the period of Hooker's operation, at least 42 million pounds of chemical waste were deposited on the site. Id. After CERCLA was enacted, the United States and the State of New York sought to recover the response costs associated with, Love Canal, including those costs incurred prior to passage of the Act. Id. at 550.


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cleanup costs or injury to natural resources.\textsuperscript{27} Once triggered, CERCLA authorizes the U.S. EPA to compel a cleanup of the site,\textsuperscript{28} or to begin cleanup on its own.\textsuperscript{29} The U.S. EPA may remove the hazardous product or negotiate with the responsible parties for its removal.\textsuperscript{30}

Section 107 of CERCLA defines potentially responsible parties as generators, transporters, and both past and present owners and operators of facilities releasing or threatening the release of hazardous substances.\textsuperscript{31} CERCLA's express liability provisions focus on the potentially responsible party's ("PRP") degree of control over the disposal decision, as well as the degree of control involved in the selection of the site for the purpose of disposal. In this fashion, CERCLA serves the stated goal of RCRA—"requiring that the hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date."\textsuperscript{32}

Although CERCLA does not expressly name vendors as poten-
tially liable parties under section 107, it did name vendors in its provisions regarding the Hazardous Substance Response Trust Fund ("Trust Fund"). Congress set up the Trust Fund to pay for immediate cleanup of hazardous substance releases. Taxes on the sale of certain hazardous materials provide most of the financing for the Trust Fund. The Trust Fund responds to releases or threatened releases of hazardous substances by providing access to trust monies under sections 104 and 106 of CERCLA.

Despite the fact that the imposition of taxes on the sale of specified chemicals is the only express coverage under CERCLA for vendors, courts nevertheless have held vendors liable under section 107. Before this Comment outlines the opinions handed down by those courts, it will discuss the legislative history of CERCLA with respect to Congress's intent regarding CERCLA liability.

B. Legislative History of CERCLA

Determining congressional intent in CERCLA cases is a chronic problem, especially when attempting to determine the Act's applicability to vendors. Courts have described CERCLA as having a "well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history," and as being "unusually riddled by self-serving and contradictory statements."

34. Id. The fund originally was designed to reach $1.6 billion, with industry supplying 87.5% of the revenues. Id. § 9631, repealed by Pub. L. No. 99-499, 100 Stat. 1774 (1986). SARA increased the fund to $8.5 billion. 26 U.S.C. § 9507 (1988).
35. 26 U.S.C. § 4661 (1988). The specific hazardous chemicals and corresponding taxes are enumerated in § 4661(b) of the Trust Fund. Id. § 4661(b). Authorization for the appropriation of these taxes to the Trust Fund is granted under § 9507(b). Id. § 9507(b). This fund is supplemented by government funds. Id. § 9507.
36. A party compelled by the U.S. EPA to take remedial action may seek reimbursement from the Trust Fund, provided it is not a party otherwise liable. 42 U.S.C. § 9606(b)(2)(A), (b)(2)(C) (1988). However, the Trust Fund does not act as a government waste disposal insurance policy and liable parties are held responsible for their own cleanup and response costs. See United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989) (holding that ultimate financial responsibility rests "on those responsible for problems caused by the disposal of chemical poisons" (quoting Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1981))); see also 1 ENVIRONMENTAL PROTECTION AGENCY, RCRA/CERCLA CASE MANAGEMENT HANDBOOK 7 (1985) ("Cost recovery for response activities seeking reimbursement and Superfund expenditures will be initiated in every appropriate case where there are liable potentially responsible parties.").
37. See supra note 35.
The Committee Report to the original Senate bill offers assistance in determining the scope of liability. In particular, the report notes that liability is imposed on generators of hazardous waste because “they have more knowledge about the risk inherent in their wastes... and they determine whether and how to dispose of these wastes—on their own sites or at locations controlled by others.”

C. CERCLA and Common Law Strict Liability

Various statements in the legislative history of CERCLA indicate that common law rules of strict liability were meant to apply when the statute remained silent. The Senate Committee stated that “the most analogous areas of the law are product liability and liability for abnormally dangerous activities.” Although specific references to strict liability were deleted before Congress passed CERCLA, courts, in keeping with their view of Congress’s intent, generally apply a standard of strict liability in deciding bills dealing with hazardous waste were considered in the 96th Congress: H.R. 7020, introduced Apr. 2, 1980; H.R. 85, introduced Jan. 15, 1979; and S. 1480, introduced July 11, 1979. Additionally, S. 1341, introduced June 14, 1979, was discussed during Senate hearings but died before reaching the full committee. In the end, none of these bills passed. See ENVIRONMENTAL L. INST., SUPERFUND: A LEGISLATIVE HISTORY at xv-xvii (Helen Cohn Needham et al., eds., 2d ed. 1985) [hereinafter SUPERFUND: A LEGISLATIVE HISTORY].

CERCLA as finally enacted was a quickly drawn compromise to S. 1480, containing reductions in the size of Superfund, limits on compensation for each occurrence of natural resource damage, and the elimination of medical expenses to victims of releases. Id. at xx. As one legislator commented, “[F]rankly, it eliminates 75 percent of what we were seeking in S. 1480. But knowing of the urgent need for legislation, we were willing to do that.” 126 CONG. REC. 30,935 (1980) (statement of Sen. Stafford of Vermont).


40. S. 1480 Committee Report, supra note 40, at 15.

41. S. 1480 Committee Report, supra note 40, at 14.

42. 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph of West Virginia) (explaining that although specific references to joint and several liability were deleted from both S. 1480 and H.R. 7020 before passage, such liability was assumed to carry through via common law interpretation); 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio of New Jersey) (affirming the preservation of liability through traditional common law principles).

43. S. 1480 Committee Report, supra note 40, at 14.

CERCLA cases. Courts may apply strict liability under CERCLA by characterizing the storage, transport, and disposal of hazardous substances as “abnormally dangerous [activities].”

Common law strict liability for abnormally dangerous activities derives from two sources. The first is the line of cases stemming from the English case Rylands v. Fletcher. The second source of strict liability for abnormally dangerous activities is found in section 519 of the Restatement (Second) of Torts.

Under CERCLA, courts impose strict liability on owners and operators who acted without fault, on foreclosing mortgage holders, and on parent and successor corporations. Strict liability,

45. See supra note 2.
46. S. 1480 Committee Report, supra note 40, at 33 (“S. 1480 declares the manufacture, use, transportation and disposal of hazardous substances to be abnormally dangerous activities . . . and, therefore, subject to a rule of strict liability.”).
47. L.R. 3 H.L. 330 (1868). In Rylands, the court developed the general principle that “the person who for his own purposes brings on his lands and collects and keeps there . . . anything likely to do mischief if it escapes, must keep it at his peril . . . and is prima facie answerable for all the damage which is the natural consequence of its escape.” Id.; see Jon G. Anderson, Comment, The Rylands v. Fletcher Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?, 1978 Ariz. St. L.J. 99, 103-04 (listing U.S. jurisdictions that have applied the Rylands principle of strict liability); see also S. 1480 Committee Report, supra note 40, at 33 (citing the Rylands strict liability rule).
48. Section 519 states the general principles as follows:
(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.
Restatement (Second) of Torts § 519 (1977). The Restatement also lists six factors a court should consider in determining whether an activity is abnormally dangerous:
§ 520. Abnormally Dangerous Activities
In determining whether an activity is abnormally dangerous, the following factors are to be considered:
(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is out-weighed by its dangerous attributes.
Id. § 520.
49. New York v. Shore Realty, 759 F.2d 1032, 1044-45 (2d Cir. 1985) (finding that § 107 holds the current owner strictly liable without causation requirement).
50. United States v. Fleet Factors, 901 F.2d 1550, 1558 (11th Cir. 1990) (finding that a secured creditor may be liable “if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions”); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa.
however, is not absolute liability, and therefore it permits certain
defenses. Under the Rylands doctrine, courts recognize several de-
fenses, including contributory fault and acts of God. The Re-
statement also lists several defenses, including a plaintiff's abnor-
ma!y sensitive activity, performance of a public duty, and assumption of the risk.

Thus, the intent of Congress to have common law principles and
defenses fill the gaps left by CERCLA seems clear. However,
courts interpreting the congressional intent have not been able to
concur as to what parts of CERCLA are unclear, and therefore
need of congressional clarification.

III. DISCUSSION

Courts across the country have taken varying approaches to the
issue of the liability of vendors of hazardous substances under
CERCLA. Courts that have held vendors liable under CERCLA
have found vendors to fall within the definition of generators or
owners under section 107. In contrast, courts that have refused
to hold vendors liable have reasoned that vendors do not play an
active part in the generation and disposal of hazardous wastes be-
cause their transactions are not made for the purpose of disposal or
treatment.

A. Cases Finding Vendors Potentially Liable

In 1984, the court in United States v. A & F Materials Co. denied
summary judgment to a defendant who generated caustic ma-
terial, holding that generators of waste are responsible for the
ultimate disposal of their waste. The defendant, McDonnell Doug-
las Corporation, solicited bids on approximately 500,000 gallons of

Oct. 1, 1985) (holding that secured creditors may be liable under CERCLA when they
exercise control over the property).
51. Smith Land & Improvement Corp. v. Celotex, 851 F.2d 86, 92 (3d Cir. 1988
finding that Congress intended to hold liable those successor corporations that have
"merged with or have consolidated" under CERCLA).
52. See, e.g., Wheatland Irrigation Dist. v. McGuire, 537 P.2d 1128, 1133 (Wyo.
1975) (listing the defenses available under Rylands: "'The defendant can excuse himself
by showing that the [damage] was owing to the plaintiff's default or perhaps that the
[damage] was the consequence of vis major or the act of God.'" (citations omitted)).
53. Restatement (Second) of Torts § 524A (1977).
54. Id. § 521.
55. Id. § 523.
56. See infra notes 58-112 and accompanying text.
57. See infra notes 113-70 and accompanying text.
a spent caustic solution generated as a result of manufacturing processes. A & F Materials Company, a processor of industrial waste, was the highest bidder and ultimately received seventeen shipments of the solution at its waste oil reclamation plant. After a release at the A & F Materials site, the United States sued McDonnell Douglas for "arranging for disposal" of hazardous wastes under section 107.

The District Court for the Southern District of Illinois confronted the issue of whether McDonnell Douglas's sale of the spent caustic material could be construed as "arranging for disposal." The court first noted what it characterized as CERCLA's "broad language" and found that McDonnell Douglas "otherwise arranged for disposal" of the caustic solution at the A & F Materials facility, thereby exposing McDonnell Douglas to CERCLA liability. The court stated that the most important factor for determining liability was McDonnell Douglas's role in the choice of the disposition site. Thus, the court found it irrelevant that the disposition was made by sale and that the decision to place the material at this site was incidental to selecting the highest bidder.

Another CERCLA case, New York v. General Electric Co., involved the sale and disposal of a "hazardous product contained within another product." In the early 1960s, General Electric Company ("GE") sold used electric transformer oil to a dragstrip operator for use as a dust suppressant. After soil and air sample analyses revealed contamination, the State of New York sued and alleged that GE sold the oil knowing it contained PCBs.

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59. Id. at 844-45.
60. Id. at 844.
61. Id. at 844-45.
62. Id. at 845.
63. Id. "The Court is impressed with the broad language in § 9607(a)(3) which imposes liability on 'any person who by contract, agreement, or otherwise arranged for disposal or treatment, of hazardous substances ... at any facility ... containing such hazardous substances.'" Id.
64. Id.
65. Id. McDonnell Douglas "decided to place its hazardous waste into the hands of A & F Materials to be used and disposed of at [the site]." Id. Without citing any specific CERCLA provision, the court stated that "it is precisely this decision that CERCLA was intended to regulate." Id.
66. Id.
68. Id. at 293. Between 400 and 500 55-gallon drums of used transformer oil were found to have contained polychlorinated biphenyls ("PCBs") and dibenzofurans after use on the purchaser's dragstrip. Id.
69. Id.
70. Id. at 294 n.6. This opinion was a ruling on defendant's motion to dismiss under the CERCLA provision.
moved to dismiss, arguing that the dragstrip did not qualify as a facility under CERCLA and denying that its act constituted disposal. GE stated that it only sold oil to the dragstrip for use as the dragstrip owner saw fit.

The court denied GE's motion to dismiss. It held that the dragstrip qualified as a "facility" even though the express language of the statute was not satisfied. Addressing the disposal issue, the court structured its holding around two views of legal intent: congressional intent in passing CERCLA and the intent issue addressed by the court in A & F Materials. The General Electric court first looked to the Act's legislative history and found that Congress meant to prevent PRPs from "contracting away" their responsibility by alleging that the incident was caused by the act or omission of a third party. The court then cited A & F Materials, stating that a waste generator's liability is not to be "facilely circumvented by its characterization of its arrangements as 'sales.'" Consequently, the court held that the sale in question was a disposal arrangement subjecting GE to CERCLA liability.

The court in United States v. Conservation Chemical Co. took FED. R. Civ. P. 12(b)(6) and all factual allegations in the complaint were therefore assumed to be true. Id. at 293 n.3.

71. Id. at 294-97.
72. Id. at 297.
73. Id. at 304.
74. Id. at 296-97. Section 107 provides for liability of any person who "arranged for disposal or treatment, ... at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substance." 42 U.S.C. § 9607(a)(4) (Supp. 1990) (emphasis added). GE, therefore, argued that the dragstrip was not a facility under CERCLA because it contained no hazardous substances prior to the sale. General Elec., 592 F. Supp. at 295. Although the court found GE's argument "not lacking entirely in intuitive appeal," it also found the "hypertechnical construction to be unsupported by the legislative history and contradicted by simple common sense." Id. at 296.

75. See supra notes 63-66 and accompanying text.
78. General Elec., 592 F. Supp. at 297. Unfortunately, the court did not discuss this issue further. As a result, the General Electric and A & F Materials decisions are certainly distinguishable. In A & F Materials, the buyer-disposer purchased the product for the very properties that made it hazardous, i.e., that its caustic nature made it suitable for use in neutralizing acidic oils. A & F Materials, 582 F. Supp. at 844. By contrast, in General Electric, the PCB contamination and its hazardous nature were hidden from the buyer. General Elec., 592 F. Supp. at 297. As discussed below, this distinction is important in establishing the common law defense of assumption of the risk. See infra notes 195-212 and accompanying text.
the *A & F Materials* reasoning a step further. As in *A & F Materials*, this action resulted from the sale of chemical wastes including alkaline products to an oil reclamation company.\(^8\) Kansas City Power & Light Company sold fly ash\(^9\) to the principal defendant, Conservation Chemical Company, and was brought in as a third-party defendant following a release.\(^8\)

Holding that the sale of fly ash was covered under section 107 as an act of disposal, the court stated that the definition of disposal is not limited to transactions in which the site owner is paid to dispose of the hazardous substances.\(^8\) The court read section 107 broadly and followed *A & F Materials* in looking to the "party who both owned the hazardous waste and made the crucial decision how it would be disposed of or treated."\(^8\) The court also took the next logical step in the *A & F Materials* reasoning, stating that intent to dispose is not a requirement for a finding of liability under CERCLA's strict liability standard.\(^8\) The court therefore held Kansas City Power & Light potentially liable and denied its motion for summary judgment.\(^8\)

*United States v. Aceto Agricultural Chemicals Corp.*\(^8\) presented a different type of disposal liability problem. In *Aceto*, the U.S. EPA sued eight pesticide manufacturers under section 107 for reimbursement of over $10 million in response costs incurred as a result of the cleanup of a pesticide formulation facility.\(^9\) The pesticide manufacturers sent raw pesticide to the facility for formulation into finished products.\(^9\) Through fire, mishandling by the formulator, and leaking storage, both raw and formulated pesticide were

\(^{81}\) Id. at 182-83.

\(^{82}\) Id. at 237-38. Fly ash, also known as lime slurry, is a by-product of the combustion of coal. *Id.* at 238. The product was purchased to neutralize other wastes processed at the facility. *Id.* at 239.

\(^{83}\) Id. at 237-39.

\(^{84}\) Id. at 240-41. Citing *A & F Materials* and *General Electric*, the court stated that "[t]he direction of flow of monetary consideration is not the test of liability under CERCLA." *Id.* at 240.

\(^{85}\) Id. at 241 (quoting United States v. *A & F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984)).

\(^{86}\) Id. Attempting to distinguish *General Electric* and *A & F Materials*, the defendants argued that those courts focused on whether the defendant had acted "with the intent to dispose." *Id.* The *Conservation Chemical* court found the argument "mis-guided" and concluded that "CERCLA required neither intent nor even negligence, but provides for strict liability." *Id.*

\(^{87}\) Id.

\(^{88}\) 872 F.2d. 1373 (6th Cir. 1989).

\(^{89}\) Id. at 1375.

\(^{90}\) Id. Aidx Corporation had operated the facility for seven years before going bankrupt in 1981. *Id.*
Sale or Disposal

released onto the site. The U.S. EPA claimed that because waste generation was an inherent part of the pesticide formulation, the defendant pesticide manufacturers "arranged for disposal" of the pesticide waste when they contracted with Aidex Corporation, the facility operator, and therefore were liable. The pesticide manufacturers moved to dismiss.

Citing the language of section 107—"or otherwise arranged for the disposal"—the Eighth Circuit Court of Appeals stated that this language requires a liberal interpretation. Since it found that the U.S. EPA had stated a cause of action, the court denied the motion to dismiss. The court stated that the defendants could be liable under both section 107 and common law theories of agency.

In the case of United States v. Farber, the court reasoned that vendors can be liable for the sale of hazardous substances if those substances are found to be "wastes." In Farber, Rambach Chemical, a vendor of chemical raw materials, was included in a CERCLA action after a release at its customer's manufacturing facility. Rambach moved for summary judgment, arguing that the "sale of a product is insufficient, as a matter of law, to establish liability under CERCLA." Moreover, Rambach argued that because the terms "treatment" and "disposal" relate to action taken with regard to hazardous "waste," its action as a supplier of chemical substances that were clearly not "wastes" precluded attaching liability under section 107.

The trial court agreed with Rambach's assertion that the mere

92. Aceto, 872 F.2d at 1378.
93. Id. at 1376.
94. Id. at 1380.
95. Id. at 1384.
96. Id. at 1382 (citing RESTATEMENT (SECOND) OF TORTS, §§ 413, 416, 427, 427A (1965)). Other cases have held sellers of hazardous products potentially liable under different CERCLA § 9607 subsections. See, e.g., Ametek, Inc. v. Pioneer Salt & Chem. Co., 709 F. Supp. 556, 559 (E.D. Pa. 1988) (holding that a chemical vendor may incur liability as an operator under § 9607(a)(2) for allegedly spilling chemicals during an on-site delivery).
98. Id. at 20,855.
99. Id.
100. Id. at 20,855-56.
sale of a hazardous substance should not and does not expose a party to CERCLA liability. However, the court concluded that CERCLA contemplated attaching liability to one who "arranges for the treatment or disposal" of hazardous substances, whether or not the substances could be characterized as a "waste." Because the court found that the facts alleged could change the character of the transaction from one of a sale to one of a disposal, the court denied Rambach's motion for summary judgment.

Although the court's language appears to shield suppliers from liability, the relevant factual allegation was only that Rambach's chemicals could require processing by the customer prior to use. The court held that the allegations of required treatment of the products were material to a possible finding of disposal liability.

In summary, under the A & F Materials line of cases, which includes Conservation Chemical and Aceto, section 107 is given one of the broadest readings possible, often triggering liability. The courts in these cases read the term "disposal" to include the sale of a useful substance and stated that no intent to dispose is required. In these cases, the major question in imposing liability is in determining which party decided to place the material "into the hands of a facility that contains hazardous wastes." However, as the General Electric court noted, a finding that the facility previously contained hazardous waste is not always necessary for a finding of liability. Courts may hold generators liable although they had no knowledge of the site where their waste was dumped. The decision in Farber demonstrates that some courts continue to apply this broad construction of the term "disposal."

101. Id. at 20,856.
102. Id.
103. Id. at 20,857. Rambach had been characterized by the third party, Farber, as a "scavenger of chemical materials, including off-grade and odd-lot materials [that] required treatment before being utilized as a product or product ingredient." Id. at 20,856.
104. Id. at 20,856-57.
105. Id.
106. See supra notes 58-96 and accompanying text.
108. Id. at 240.
110. Id. at 296-97.
B. Cases Finding Vendors Not Potentially Liable

Before General Electric, A & F Materials, Conservation Chemical, and Aceto were decided, the District Court for the Southern District of Indiana addressed the issue of vendor liability in United States v. Westinghouse Electric Corp. Westinghouse Corporation, the principal defendant, used PCBs supplied by Monsanto Chemical Company and then disposed of them in a landfill. The U.S. EPA sued to recover response costs following a release of the PCBs. Westinghouse brought a third-party complaint for contribution and indemnification against Monsanto, claiming that, under CERCLA, it had a private right of action against Monsanto as supplier of the PCBs.

The Westinghouse court stated that CERCLA liability is limited to those parties directly involved in an affirmative act of waste product disposal. The court found that the government's claims were based on Westinghouse's improper disposal of the product, not on Monsanto's prior sale to Westinghouse. Because Monsanto did not generate or dispose of any hazardous waste and did not contract for disposal of waste, the court dismissed Westinghouse's claim against Monsanto. Thus, the Westinghouse court held that a party must be active in waste generation and disposal to incur third-party liability under CERCLA.

In Edward Hines Lumber Co. v. Vulcan Materials Co., the District Court for the Northern District of Illinois read section 107's liability provision even more narrowly than the Westinghouse court. In Hines Lumber, the plaintiff incurred costs in the cleanup of its wood-treating facility and sought contribution from the suppliers of chemicals used in its wood-treating process. After the court dismissed Hines Lumber Company's state law claims against

114. Id. at 20,484.
115. Id.
116. Id.
117. Id.
118. Id. (stating that the objectives of CERCLA include "the prohibiting of open dumping of hazardous wastes . . . [and] the converting of existing open dumps to nonhazardous dumps").
119. Id.
120. Id. at 20,484-85.
121. Id. at 20,484. The court's treatment of the issue of contribution may prove to be unique because no right to contribution had been codified at the time of this decision. The right to contribution is now codified in § 113 of SARA, 42 U.S.C. § 9613(f)(1) (1988).
122. 685 F. Supp. 651 (N.D. Ill.), aff'd, 861 F.2d 155 (7th Cir. 1988).
123. Id. at 652-53.
most of the suppliers,\textsuperscript{124} the remaining defendants, suppliers of creosote and chromated copper arsenate, moved for summary judgment.\textsuperscript{125}

Relying on cases that interpreted sales transactions as acts of disposal under section 107, Hines Lumber argued that the chemical suppliers were subject to CERCLA liability.\textsuperscript{126} However, the court rejected Hines Lumber's argument that section 107 reaches chemical manufacturers who sell hazardous substances to parties who use and then dispose of the products on the same site.\textsuperscript{127} The court agreed that CERCLA's definition of "hazardous substances" included primary products and by-products as well as waste products, but the court stated that CERCLA liability extended only to those transactions made for the purpose of disposal or treatment of such substances.\textsuperscript{128} The court interpreted Hines Lumber's argument as an attempt to remove an express statutory limitation on liability contrary to legislative intent.\textsuperscript{129}

Hines Lumber appealed, but argued only that Osmose Wood Preserving Company, one of its suppliers, would fall within the section 101 definition of "owner or operator."\textsuperscript{130} On appeal, the Seventh Circuit Court of Appeals found that the statute provided no guidance,\textsuperscript{131} and thus applied common law principles.\textsuperscript{132} The

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\textsuperscript{124} Id. at 653 (citing prior dismissals of counts against Vulcan Materials, Monsanto, and other suppliers).

\textsuperscript{125} Id.

\textsuperscript{126} Id. at 654-55 (noting Hines Lumber's reliance on New York v. General Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984), and United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985)); see supra notes 67-87 and accompanying text (discussing General Electric and Conservation Chemical). The Hines Lumber court disagreed with the reasoning in Conservation Chemical to the extent that the holding in that earlier case allowed liability to attach to any transaction involving a hazardous substance regardless of the motivation behind the transaction. Hines Lumber, 685 F. Supp. at 655-56 (suggesting that Conservation Chemical, at most, stands for the proposition that a court should not grant defendant's summary judgment when there exists evidence of a motivation to dispose of a waste or by-product).

\textsuperscript{127} Id., 685 F. Supp. at 654.

\textsuperscript{128} Id. The Hines Lumber court held that the sale of wood-treating chemicals as a primary product, without intent to dispose, does not qualify as disposal. Id. at 656. The court also stated that the vendors were not liable even if they knew how the process waste would be disposed. Id. Thus, the court refused to impose liability on the vendor. Id.

\textsuperscript{129} Id. at 656 n.5.

\textsuperscript{130} Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir. 1988). Hines Lumber previously argued that Osmose incurred liability under CERCLA essentially as a "disposer" by "arrang[ing] for disposal or treatment" of hazardous substances. Hines Lumber, 685 F. Supp. at 658.

\textsuperscript{131} Id. at 157-58.

\textsuperscript{132} Id. at 157-58.
court reasoned that because Osmose, as a supplier, did not have enough "day-to-day control" to be liable under common law, it could not be considered an operator for purposes of section 107. The Seventh Circuit stated that "[a] court's job is to find and enforce stopping points no less than to implement other legislative choices."134

In Prudential Insurance Co. of America v. United States Gypsum Co., the plaintiffs sought to recover damages under CERCLA from vendors of asbestos-infected materials that were used in buildings in which the vendors had an ownership interest. The plaintiffs alleged that by virtue of transporting and distributing these materials, the defendant, United States Gypsum Company ("USG"), arranged for and was responsible for the disposal of these substances. USG moved to dismiss these counts arguing that its sale did not constitute "disposal" under section 107 of CERCLA.

The court first observed that Congress, by enacting CERCLA, sought to provide a cleanup mechanism for abandoned hazardous waste dumps and hazardous substance releases. The court then reviewed the CERCLA and RCRA definitions of "disposal" and held that liability would arise under section 107 only if USG had taken an affirmative step toward disposing of a hazardous substance. Specifically, the court said that for USG to be liable, it must have "dumped [its] waste on the site at issue." Finding that the question of liability turned on whether "the transfer of a hazardous substance . . . [was a sale] . . . rather than a disposal arrangement," the court held that "the sale of a hazardous substance for a purpose other than its disposal does not expose . . . [a party] to CERCLA liability." Since the sale of asbestos in this

133. Id.
134. Id. at 157.
136. The plaintiffs were Prudential Insurance Company of America, PIC Realty Corporation, and 745 Property Investments. Id. at 1246.
137. Id. at 1248.
138. Id. at 1249.
139. Id. at 1249-50.
140. Id. at 1251.
141. Id. at 1253; see supra note 14 (setting forth the definition of "disposal" under RCRA).
143. Id. at 1253 (citing Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257, 1260 (D.N.J. 1987), aff’d, 866 F.2d 1411 (3d Cir. 1988)).
144. Id.
145. Id. at 1254.
case was for a useful purpose, the court held that the sale did not constitute a "disposal" under CERCLA.\textsuperscript{146}

The \textit{Prudential} and \textit{Hines Lumber} decisions were followed by the District Court for the Western District of Michigan in \textit{Kelley v. Arco Industries Corp.}.\textsuperscript{147} In \textit{Kelley}, the State of Michigan brought a suit under CERCLA against Arco Industries Corporation, a manufacturer of rubber goods, for damage to ground water caused by the company's disposal of rubber-related compounds.\textsuperscript{148} After settling with the State, Arco Industries filed a third-party complaint against E. I. Du Pont de Nemours Corporation ("Du Pont") and several other suppliers of the released chemicals.\textsuperscript{149} Arco Industries alleged that Du Pont knew of the manner in which Arco used and disposed of chemicals.\textsuperscript{150} Arco Industries also alleged that Du Pont knew that its product contained toluene, a hazardous substance of no use to Arco that could have been removed prior to the sale.\textsuperscript{151}

The trial judge rejected Arco Industries's contention that the sale of a product containing an unnecessary hazardous substance subjected Du Pont to CERCLA liability.\textsuperscript{152} Adhering to the rationale of \textit{Hines Lumber}, the court found legislative intent against holding vendors liable and noted that earlier cases had rejected a broad reading of the "otherwise arranged for disposal" language.\textsuperscript{153} The court held that Du Pont was not liable because it lacked an affirmative intent to dispose of the product.\textsuperscript{154}

In \textit{Florida Power & Light Co. v. Allis-Chalmers Corp.},\textsuperscript{155} the court revealed the need for clarification on the issue of vendor liability. \textit{Florida Power & Light} involved the disposal of an electric transformer containing PCBs.\textsuperscript{156} Florida Power & Light Company was held liable for the damage caused by the release of these PCBs and sued Allis-Chalmers Corporation, the manufacturer of the transformers, for contribution.\textsuperscript{157} The utility alleged that Allis-
Chalmers was ultimately responsible for the disposal of the PCBs because it was the entity that originally sold the transformers. After the trial court granted summary judgment for Allis-Chalmers, Florida Power & Light appealed.

The Eleventh Circuit Court of Appeals did not overturn the lower court decision because it found no abuse of discretion by the trial court. The court, however, significantly weakened the language in the lower court opinion regarding supplier liability. First, the court rejected the idea of a per se rule holding vendors liable under the “otherwise arranged for disposal” standard. Second, the court stated that even though a manufacturer does not decide how, when, or by whom a hazardous substance is to be disposed, that manufacturer may still be liable. The court explained that in order for a manufacturer to be liable it must be “the party [that was] responsible for ‘otherwise arranging’ for the disposal.”

Unfortunately, the court did not define the term “otherwise arranging for the disposal.” Thus, this appellate review was a Pyrrhic victory for vendors because the court rejected a per se rule of liability for manufacturers and left the issue of liability to be resolved on a case-by-case basis.

In summary, the decisions in *Hines Lumber*, *Prudential*, and *Kelley* interpret section 107 of CERCLA to require an affirmative act of disposal before holding parties liable under the “otherwise arranging for disposal” language. These courts use a more conventional definition of disposal: it must be shown that the party in some way “dumped [its] waste on the site at issue.”

Thus, courts that have refused to hold suppliers of hazardous wastes liable as generators, transporters, or owners under CERCLA liability provisions stress both the amount of contact the

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158. *Id.*
160. *Florida Power & Light*, 893 F.2d at 1315.
161. *Id.* at 1318-19.
162. *Id.* at 1318.
163. *Id.*
164. *Id.*
165. *Id.*
169. *Id.* at 359; *Prudential*, 711 F. Supp. at 1253; *Hines Lumber*, 685 F. Supp. at 656.
suppliers had with the chemical and the purpose of the sale. The judicial split in the interpretation of section 107 demonstrates that clarification is needed with respect to this provision.

IV. ANALYSIS

The issue of vendor liability continues to loom as an unknown for vendors of hazardous materials. There are several compelling reasons for Congress to clarify the scope of section 107 of CERCLA. First, as the discussion above illustrates, there is a conflict between at least two Circuit Courts of Appeal regarding the interpretation of the “otherwise arranged for disposal” language in section 107.

The split in the courts on this issue has resulted in strikingly different results for similarly situated parties. In Hines Lumber, the chemical supplier escaped liability even though it was actively involved in both the design of the storage plant and the handling of the wood-treatment chemicals.171 Similarly, in Kelley, the suppliers avoided liability despite the allegation that the products they sold contained hazardous substances that were not needed and could be construed as waste inherent in the product.172 In contrast, the courts in Farber173 and Aceto174 considered the disposal of hazardous substances contained within useful products as an inherent part of the sale or transfer, thereby equating sale with disposal.175 The judicial split reinforces the attack launched by one congressman who stated: “[CERCLA as finally written] is unexcusably vague in terms of identifying who should be liable and for what.”176

The second reason for Congress to clarify the issue of vendor liability under CERCLA involves the strong policy considerations against the imposition of disposal liability on the sale of hazardous products. The imposition of disposal liability would place a potentially enormous burden on an important segment of the economy—the suppliers of useful products. Moreover, this risk may not be insurable under standard general comprehensive liability

171. Hines Lumber, 685 F. Supp. at 656. The court emphasized that the supplier never operated the facility or exercised any control over the disposal process. Id.
175. Farber, 18 Envtl. L. Rep. at 20,856; Aceto, 872 F.2d at 1384.
Liability is imposed even though the vendor, aside from accepting an order, has no control over the ultimate disposition of the product.

A third reason for congressional clarification of section 107 liability is that the statute as a whole suggests that vendors should not be subject to liability, or at least that vendors should be able to rely on the common law defenses for strict liability. Nevertheless, courts have found holes in the statute and have held vendors liable.

Although courts have held that there is no causation requirement under section 107, it is apparent that parties are found liable under this provision because they had the ability to control or influence the disposition of hazardous substances. Owners, operators, generators consciously disposing, and transporters choosing the site of disposal possess some degree of control over the methods of waste disposition. Even past owners who owned the facility at the time that hazardous substances were actually released are held liable by virtue of their ability to control procedures during the critical period of disposal. In this fashion, section 107 achieves the objectives of the Congress that enacted it: "to make those who release hazardous substances strictly liable for cleanup costs."

This degree of control over the disposition of hazardous substances is absent in a sales transaction. Once title to the material transfers, the vendor generally has no ability to ensure that the hazardous substances are handled properly. Sole control of the product shifts to the buyer who decides where, how, or whether to dispose of the substance. It is unlikely that without expressly stating so, Congress meant for vendors who are without control over the disposal decision to be liable. Yet, some courts have held that CERCLA damages are not covered by standard insurance policies. See Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co. 842 F.2d 977, 986-87 (8th Cir.) (policy strictly construed to exclude CERCLA damages), cert. denied, 488 U.S. 821 (1988); Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348, 1352-54 (4th Cir. 1987) (policy covers only legal damages, not CERCLA damages which are equitable in nature), cert. denied, 489 U.S. 1008 (1988). But see Avondale Indus. v. Travelers Indem. Co., 887 F.2d 1200, 1207 (2d Cir. 1989) (remedial damages covered since not expressly disclaimed). See generally Debi L. Davis, Comment, Insureds Versus Insurers: Litigating Comprehensive General Liability Policy Coverage in the CERCLA Arena—A Losing Battle for Both Sides, 43 Sw. L.J. 969 (1990).


179. See supra text accompanying note 41.


Congress did intend this result.\textsuperscript{182}

Absent congressional guidance or clarification, a vendor has few options. First, to protect itself against future losses, a vendor may execute an indemnification agreement with its customer.\textsuperscript{183} To have practical effect, however, the customer must be able to withstand a potential CERCLA judgment of up to $50 million.\textsuperscript{184} Second, a vendor may refuse to sell used materials since a sale of products that can be characterized as waste is more likely to be held an act of disposal.\textsuperscript{185} Finally, the vendor may withdraw from the hazardous materials business altogether.

Judge Richard Posner of the Seventh Circuit has described strict liability as a legal discouragement of the activities subject to the liability.\textsuperscript{186} Strict liability for the acts of those not within one's control is even more likely to discourage the activity. Because trade in hazardous substances serves a useful and necessary purpose, continued imposition of vendor liability under CERCLA will curtail a socially valuable function.

After \textit{Conservation Chemical},\textsuperscript{187} a prudent generator may retain, treat, store, and dispose of substances even though they are well-suited for use by the company next door. This second company will then be forced into the virgin product market and additional hazardous material will be produced, transported, stored, and eventually disposed.

Aside from being wasteful, this strong disincentive to reuse runs contrary to stated environmental policy. As noted previously, RCRA\textsuperscript{188} set policies and procedures for the disposition of solid waste and stated: "Congress finds . . . that millions of tons of recoverable material which could be used are needlessly buried each


\textsuperscript{183} 42 U.S.C. § 9607(e) (1988).

\textsuperscript{184} Id. § 9607(c)(1)(d).


\textsuperscript{186} RICHARD A. POSNER, TORT LAW—CASES AND ECONOMIC ANALYSIS 477 (1982) ("A rule of strict liability automatically induces potential injurers to consider activity changes as a method, alternative to greater care, of reducing expected accident costs.").


\textsuperscript{188} 42 U.S.C. §§ 6901-6992k (1988).
RCRA sets as a goal the recovery and reuse of materials that otherwise would increase the volume of solid waste. Congress intended CERCLA to supplement the overall federal waste management policy. When, as in the case of vendor liability, CERCLA’s effect is to reduce or eliminate the reuse of materials, it thwarts the efficient use of resources and increases the volume of solid waste.

The motivation behind the U.S. EPA’s pursuit of the broadest possible group of responsible parties is understandable, given the enormity of the abandoned waste dump problem and the limited monies available. As the manager of a fund with limited resources, the U.S. EPA will try whenever possible to compel private party cleanup. Therefore, the U.S. EPA has strong incentive to broaden the scope of liability whenever possible by including any parties tangentially related to the site.

However, by allowing the U.S. EPA to include vendors of hazardous substances in the pool of defendants, courts subject an important segment of the economy to liability for acts over which they possess no control, thus discouraging growth of small business and providing strong disincentives for recycling waste. The only congressional reference to manufacturers and vendors of hazardous substances in the CERCLA occurs in the tax provisions of the Act. This single reference suggests that Congress intended this tax, and not section 107 liability, to be the manufacturers’ and vendors’ proper CERCLA contribution. Due to the split in the courts on the issue of manufacturer and vendor activity and due to the overall effect of this split on waste-management policy, Congress should address this liability issue when discussing CERCLA this year.

189. Id. § 6901(c)(1).
190. Id. § 6902(a).
191. See supra notes 9-23 and accompanying text.
192. Although by 1987, over 26,000 hazardous waste sites had been identified, the General Accounting Office estimated that the figure could rise to 368,000 sites with a more comprehensive inventory. Paul Marcotte, Toxic Blackacre, 73 A.B.A. J. 66 (Nov. 1987).
193. See ENVIRONMENTAL LAW INSTITUTE, SUPERFUND DESKBOOK 369, 375 (1986) (setting forth a U.S. EPA memorandum on interim CERCLA settlement policy, dated Dec. 5, 1985, that states: “The goal of the agency is to bring enforcement action wherever needed to assure private party cleanup or to recover costs.”).
194. Economic analysis suggests that administrative agencies instinctively attempt to shift costs to others to avoid depleting their budgets, thereby strengthening their posture with Congress at budget making time. See PAUL H. RUBIN, BUSINESS FIRMS AND THE COMMON LAW—THE EVOLUTION OF EFFICIENT RULES 118-19 (1983).
V. PROPOSAL

Congressional testimony at the time of CERCLA's passage indicates that gaps in the interpretation of CERCLA were expected to be filled by the application of common law principles.\(^{195}\) Because Congress characterized the storage and handling of hazardous substances as an abnormally dangerous activity, it presumably intended that courts recognize common law defenses to strict liability, especially when dealing with a class of parties not expressly named in the Act itself.\(^{196}\) As explained below, the most appropriate defense by a vendor faced with a CERCLA claim is assumption of the risk.

Assumption of the risk, when applicable, is a complete defense to strict liability for abnormally dangerous activities.\(^{197}\) For the defense to be applicable, the assumption must be voluntary\(^{198}\) and the party assuming the risk must understand both the nature of the risk and the foreseeable consequences.\(^{199}\) Although some transactions are excluded from the defense,\(^{200}\) a normal sale to a knowledgeable buyer seems to be within the Restatement (Second) of Torts definition.\(^{201}\)

For these reasons, assumption of the risk should be available as a defense for vendors of hazardous substances under CERCLA. A facility operator who seeks a product for a useful purpose and seeks the product for the very properties that make it hazardous, voluntarily and knowingly assumes the risk of foreseeable harm.\(^{202}\)

Knowledge of the risks involved in the purchase of hazardous substances may be established in several ways. First, knowledge

\(^{195}\) See supra notes 42-44 and accompanying text.

\(^{196}\) Parties are limited to the statutorily defined defenses. 42 U.S.C. § 9607(b) (1988).

\(^{197}\) RESTATEMENT (SECOND) OF TORTS § 523 (1977) ("The plaintiff's assumption of the risk of harm from an abnormally dangerous activity bars his recovery for the harm.").

\(^{198}\) Id. § 496A.

\(^{199}\) Id. § 496D.

\(^{200}\) An example of this is the use of a common carrier or other public utility. Id. § 523 cmt. g.

\(^{201}\) This is true since the buyer has voluntarily entered into a relationship involving a known risk. Comment c, illustration 2, to § 496(A) provides that a plaintiff who has "entered voluntarily into some relation with the defendant which he knows to involve the risk... is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances." Id. § 496(A), cmt. c, illus. 2; see also United States v. Aceto Agric. Chems. Corp., 699 F. Supp. 1384, 1389-90 (S.D. Iowa 1988) (finding the Restatement provisions useful in defining the responsible parties in a CERCLA action as well as providing "meaningful standards for resolving liability questions from the common law").

\(^{202}\) See supra text accompanying notes 178-82.
may be established through examination of the nature of the transaction itself by inquiring into whether the buyer purchased material commonly known to be hazardous or toxic. Second, statutory requirements regarding the sale of hazardous materials should create a presumption of knowing acceptance by the purchaser. For example, regulations under the Occupational Safety and Health Act require that vendors of hazardous materials provide all customers with a safety data sheet listing physical data, fire and explosion information, and toxicological properties. Under existing law, the supplier also must provide information about any toxic chemicals contained in generically-named products. When the buyer is made aware of the toxic or hazardous nature of the products, voluntary and knowledgeable acceptance of the risk should be presumed.

Applying this defense to the cases holding vendors liable would balance the equities. In A & F Materials and Conservation Chemical, the facility operators who purchased the spent caustic products to neutralize waste assumed the risk of foreseeable releases. In General Electric, however, the defense should not have been available to the vendor of PCB-contaminated oil because it was the seller, not the buyer, who was aware of the hazardous nature of the oil.

Allowing the assumption of risk defense would clarify the issue of vendor liability by incorporating well-understood common law doctrine into a statute intended to include common law principles. However, absent clarification by Congress, an assumption of the risk defense may not apply in CERCLA cases. While it may provide a defense to contribution actions by purchasers, its applica-

206. See supra note 201.
210. Id. at 297; see supra notes 67-79 and accompanying text. The PCB-contaminated oil was purchased by dragstrip owners to keep dust down on the race track. Because it was not alleged that the buyers were aware of the existence of the hazardous substance, voluntary acceptance of the risk of contamination was not shown. General Elec., 592 F. Supp. at 295-96.
tion when the government sues a vendor directly under section 107 is uncertain. Also, contradictory indemnification language in the statute muddles the suggestion of common law defenses to CERCLA liability. 212

There is also confusion regarding application of the strict liability standard. In *A & F Materials*, 213 the court appeared to expand the doctrine of strict liability by using it to spread liability to additional defendants. 214 Under these circumstances, and with an emerging conflict regarding supplier liability within the Circuits, clarification by Congress is needed.

VI. CONCLUSION

A conflict exists regarding whether vendors of hazardous materials may be held liable as “otherwise arranging for disposal” under CERCLA. Although most of the transactions held to trigger liability involved the resale of used materials, some courts have refused to exclude even vendors of virgin raw materials from liability.

The traditional common law doctrine of assumption of the risk may provide a defense to liability, but conflicting language in CERCLA raises questions regarding its application. The application of CERCLA strict liability to vendors provides a strong disincentive for recycling and reuse, discourages trade with smaller companies, and places strong burdens on parties having little or no control over the method of disposal of hazardous substances.

CERCLA is up for reauthorization this year, and the issue of

212. 42 U.S.C. § 9607(e) states:

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator . . . or from any person who may be liable . . . to any other person the liability imposed under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section . . . has or would have, by reason of subrogation or otherwise against any person.

_id. _§ 9607(e).

This section does not readily resolve the question of whether an assumption of the risk defense is statutorily barred nor does it clarify whether vendors are excluded from the “may be liable” limitation.


214. *A & F Materials*, 582 F. Supp. at 844. The reasoning can be outlined as follows: (A) defendant X sold the material to Y, (B) Y disposed of the material, (C) CERCLA calls for strict liability, and (D) therefore, defendant X is liable for disposal.
vendor liability clearly should be addressed with an eye toward its effect on overall waste management policies.

CHRISTOPHER J. GRANT