METHODS AND MOTIVES FOR IMPOSING STRICT LIABILITY ON PARTIES HIRING INDEPENDENT CONTRACTORS TO TRANSPORT HAZARDOUS MATERIALS IN THE STATE OF FLORIDA

INTRODUCTION

On July 18, 1998, a tanker truck spilled a load of toxic chemicals forcing 150 families to flee their Hialeah, Florida homes.[1] Floridians have grown increasingly accustomed to such mass toxic accidents[2] as their state's railroads and highways handle more and more of the estimated 800,000 loads of hazardous materials shipped everyday nationally.[3] In 1997, for instance, there were 356 reported transportation accidents in Florida that resulted in the release of hazardous substances.[4] The situation reflects a nationwide trend that saw over 112,000 incidents over the past nine years that have killed hundreds, sickened thousands, and resulted in hundreds of millions of dollars in property damage.[5] Accidents in transport, however, are only one way hazardous materials enter the environment. Poorly chosen or otherwise illegal disposal sites are a major source of toxic contamination in both Florida and the rest of the nation. In 1997, Florida was home to fifty-six final or proposed Superfund sites,[6] which will undoubtedly cost taxpayers enormous sums in clean-up costs.

Human error is the probable cause of most transportation accidents that involve the release of hazardous substances.[7] Although companies are usually held responsible for the actions of their employees, a somewhat different picture emerges when independent contractors cause the release of hazardous substances. Because vicarious liability does not generally flow from transportation contractors to those who employ them, many companies producing hazardous materials may escape liability.

Environmentalists and toxic tort plaintiffs, however, articulate several reasons why companies producing hazardous materials should be held liable

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1. *See Tanker Truck Spills Toxic Chemicals*, MIAMI HERALD, July 17, 1998, at B2.

2. *See Residents of Panhandle Familiar with Wrecks, Caustic Spills on Tracks*, MIAMI HERALD, June 12, 1996, at A13.

3. Telephone Interview with the Office of Motor Carrier Compliance, Fla. Dep't of Transp. (Oct. 12, 1998).

4. *See* U.S. Dep't of Transp., *Hazmat Summary by State for Calendar Year 1997* (visited Sept. 23, 1998) <http://hazmat.dot.gov/1997frm.htm>.

5. *See* Research and Special Programs Admin., *Hazardous Materials Incidents by Mode and Year* (visited Oct. 15, 1998) <http://hazmat.dot.gov/10yrtotal.htm>.

6. *See* ENVIRONMENTAL PROTECTION AGENCY, NATIONAL PRIORITIES LIST (1997).

7. *See* U.S. Dep't of Transp., Office of Hazardous Materials Safety, *Spills* (visited Feb. 25, 1999) <http://hazmat.dot.gov/spills.htm>. *See, e.g.*, Jan Hollingsworth, *Chlorine Leak Points to Problems at Company*, TAMPA TRIB., Aug. 15, 1998, at A1 (describing how human error was responsible for toxic mishap that sickened 62 workers at the Trident Shipworks plant in Tampa).

for the misdeeds of independent contractors. First, holding those who manufacture hazardous materials accountable is a method of discouraging the creation or release of toxins and other products that pose a substantial risk to the environment and to public health. Second, manufacturers of hazardous materials often have "deeper pockets" than the independent contractors that they hire as haulers. By insulating the shipper from liability, many victims of toxic accidents may be left without a defendant capable of providing proper compensation. Third, the lack of manufacturer liability serves to externalize the real costs of hazardous material production. The practice of shifting the real costs of hazardous materials production away from producers creates a virtual pollution subsidy that not only unfairly burdens the general public but also results in overproduction and market inefficiency.

This Note discusses how plaintiffs can use case law from Florida and the Eleventh Circuit to hold those who hire independent transporters strictly liable for the death, injury, and monetary losses caused by accidents or the improper disposal of hazardous materials. Part II examines both the strengths and limitations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Part III looks at the "abnormally dangerous activity" doctrine and compares how Florida state courts have treated the handling and transportation of hazardous materials with the case law from other jurisdictions. Part IV.A examines how the *Restatement (Second) of Torts* section 521 might provide companies with a viable defense against strict liability in transportation accidents. Finally, Part IV.B describes the economic arguments why manufacturers of toxic materials should not escape liability simply by virtue of hiring independent contractors to transport their hazardous products.

I. BACKGROUND

The concept of strict liability arose in nineteenth century England with *Fletcher v. Rylands*.[8] In this landmark case, the Court of Exchequer held that those who engage in a "nonnatural" use of the land should be responsible for all the consequences arising out of such use "whether the things so brought be beasts, or water, or filth, or stenches."[9] During the late 1800's, American courts began to reluctantly apply strict liability to a few situations including the percolation of filthy water and underground tunneling.[10] While drafting

8. *See* Fletcher v. Rylands, 1 L.R.-Ex. 265 (1866), *aff'g* 3 L.R.-H.L. 330 (1868).

9. *Id.*

10. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 559-60 (5th ed. 1984) (discussing the development of strict liability in American jurisprudence). Strict liability "is often referred to as liability without fault." *Id.* at 534. As early as the 1880's, the Florida Supreme

the *Restatement (Second) of Torts*, the American Law Institute included a provision calling for the imposition of liability without fault to "one who carries on an abnormally dangerous activity."[11] The *Restatement* describes six factors used to determine what constitutes "abnormally dangerous activities," including (1) the degree of risk, (2) the gravity of harm, (3) whether the risk can be eliminated by the exercise of reasonable care, (4) whether the act is a matter of common usage, (5) whether the act is inappropriate to the place where it is carried on, and (6) the value of the activity to the community.[12]

Throughout the 1970s, courts struggled to define when the transportation and disposal of hazardous materials rises to the level of an "abnormally dangerous activity."[13] In the waning days of the Carter Administration, however, Congress passed CERCLA which, in effect, imposed strict liability against not only those who own and operate polluting facilities, but also against generators and transporters of hazardous waste.[14] The legislative history surrounding CERCLA's passage indicates that many legislators viewed both the manufacture and handling of hazardous waste as an "ultra-hazardous" activity that should give rise to strict liability.[15] Although this law changed the face of hazardous waste management, the hasty passage of CERCLA left open many questions including when exactly someone should be considered a "generator" of hazardous wastes.

In addition to CERCLA, generators of hazardous materials face a wide variety of federal laws that regulate the transportation and disposal of these substances. For instance, the Hazardous Materials Transportation Act (HMTA) requires the Secretary of Transportation to promulgate regulations to insure the safe transportation of hazardous materials.[16] Many of the duties arising under HMTA fall on the those who cause "hazardous material to be transported in commerce."[17] These duties, however, mostly involve

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Court recognized strict liability. *See* Pensacola Gas Co. v. Pebley, 5 So. 593 (Fla. 1889).

11. RESTATEMENT (SECOND) OF TORTS §§ 519-520 (Tentative Draft No. 17, 1964).

12. *See id.* § 520.

13. *See, e.g.*, East Troy v. Soo Line R.R. Co., 409 F. Supp. 326 (E.D. Wis. 1976) (holding that a common carrier is not subject to strict liability for the transportation of carbolic acid); Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309 (Tex. Civ. App. 1974) (holding that strict liability applies whenever pollutants are intentionally discharged), *reh'g denied*, 18 Tex. Sup. Ct. J. 72 (1974).

14. *See* 42 U.S.C. § 9607(a) (1994). Congress passed CERCLA in response to the political climate created by the 1978 Love Canal disaster that drove 1,000 families from a subdivision built atop a toxic waste dump. *See generally* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION LAW, SCIENCE, AND POLICY 280-81 (2d ed. 1996) (discussing CERCLA's passage).

15. *See, e.g.*, 126 CONG. REC. 26,782 (1980) (statement of Rep. Gore) (arguing that transportation and disposal of hazardous waste should be considered abnormally dangerous activities). CERCLA has been called "a direct extension of common law principles of strict liability for abnormally dangerous activities." PERCIVAL, *supra* note 14, at 280.

16. *See* 49 U.S.C. § 5101 (1994).

17. *Id.* § 5103(b)(A)(ii).

preparation of materials for transport by insuring that proper packaging is used and emergency response information is supplied.[18] Therefore, HMTA will be of little use in seeking compensation for victims of toxic accidents.[19]

The Resource Conservation and Recovery Act (RCRA) is another federal statute that imposes certain duties on the generators of hazardous materials.[20] Under this complicated statute, generators of hazardous wastes are subject to notification, record keeping, labeling, and other procedural requirements.[21] In addition to providing civil and criminal penalties for violation of the Act,[22] RCRA also allows anyone to commence a civil suit on his own behalf against any "past or present generator . . . who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."[23] Nevertheless, the "imminent" requirement renders RCRA ineffective in providing a remedy for one-time spills that no longer pose a substantial threat to human health and prevents the recovery of prior response costs.[24]

II. FEDERAL STATUTORY APPROACH TO STRICT LIABILITY: CERCLA'S LIMITED REACH

Unlike RCRA and HMTA, CERCLA can be used as an important device to hold those who hire independent contractors liable for mishaps and the improper disposal of hazardous materials. This section will discuss the tests that the Eleventh Circuit has developed to determine when a party can be held liable as an "arranger" of hazardous waste disposal under CERCLA section 107(c)(3). Later in this section, subpart II.B will expose CERCLA's limitations in pursuing claims against those who contract for hazardous materials hauling. While this federal statute imposes strict liability on those who generate hazardous waste, CERCLA is much less effective in addressing

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18. *See* 49 C.F.R. § 172.600 (1999) (outlining labeling and emergency response information requirements); *See* 49 C.F.R. § 178 (1999) (describing packaging requirements).

19. HMTA does allow the DOT to enjoin shipments of hazardous materials that pose an "imminent hazard," but this is of little use to private parties after a spill has taken place. *See* 49 U.S.C. § 5122(b)(1).

20. *See* 42 U.S.C. §§ 6901-6992 (1994).

21. *See id.* § 6922.

22. The Federal government may impose criminal penalties for those who knowingly violate conditions of the act. *See id.* § 6928(d)(2)(B). In addition, the Federal government may order a generator to take whatever action necessary to remedy contamination that presents "an imminent and substantial endangerment to health or the environment." *Id.* § 6973(a).

23. *Id.* § 6972(a)(1)(B).

24. *See* Meghrig v. KFC W., Inc., 116 S. Ct. 1251, 1255 (1996). In *Meghrig*, the Court compared the statutory language of CERCLA with that of RCRA and concluded that Congress did not intend for RCRA to provide remedy for past clean up costs. *See id.*

the problems associated with toxic substances that can be classified as "new and useful" products. The Act's conspicuous "petroleum exception" also limits CERCLA's reach. Finally, this section will demonstrate that CERCLA's greatest shortcoming is that it principally authorizes compensation for site clean-up, while leaving many other forms of damages fall outside the law's reach.

A. Arranger Liability Under CERCLA

When Congress pushed CERCLA through during the twilight hours of the Carter Administration, it ushered in an era of unprecedented strict liability.[25] CERCLA's sweeping language and citizen suit provisions[26] provide toxic accident victims a reliable means to recover some costs associated with the spill or improper dumping. The Act holds current and past facility owners or operators liable for response costs from releases of hazardous substances into the environment.[27] Because the term "facility" includes motor vehicles, CERCLA covers the release of hazardous substances during transportation accidents.[28] The Act's definition of facility also includes "storage containers" which is particularly useful in cases where the accidents involve hazardous materials packaged and owned by the manufacturer.[29] In addition, the Act holds transporters of hazardous substances liable for releases from disposal sites to which they delivered the waste.[30]

Transporters, however, often lack the deep pockets of the parties who hired them. When attempting to attach liability to an independent contractor's employer, CERCLA's arranger liability provision is especially useful. Under section 107(a)(3), "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such

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25. Shortly after President Carter's defeat in the 1980 election, the Senate reconvened in a lame duck session and managed to pass a Superfund bill that had been circulated through committees for more than a year. In an eleventh hour compromise, the House agreed to accept the Senate's version without holding a conference committee. President Carter signed the bill into law on December 11, 1980. *See* PERCIVAL, *supra* note 14, at 281. It is highly likely that President-elect Ronald Reagan would have vetoed the bill if Congress had waited much longer. Because of its hurried passage, CERCLA is plagued by numerous statutory ambiguities, and it is not a "model of legislative draftsmanship." United States v. Bestfoods, 118 S. Ct. 1876, 1882 (1998) (quotations omitted).

26. *See* 42 U.S.C. § 9659 (1994).

27. *See id.* § 9607(a)(1-2).

28. *See id.* § 9601(9).

29. *See id.* The Eleventh Circuit left open the possibility that even the casings on electrical transformers can be considered facilities under CERCLA. *See* Florida Power & Light Co. v. Allis Chalmers Corp., 85 F.3d 1514, 1520 (11th Cir. 1996).

30. *See* 42 U.S.C. § 9607(a)(4) (1994).

person, [or] any other party or entity" will be liable for releases of the substances.[31] This language allows a plaintiff to attach liability to the parties that hired independent contractors to haul their hazardous substances. Injured parties can take advantage of the fact that CERCLA imposes joint and several liability which allows plaintiffs to recover all the costs from the deep pockets of those who hired the offending contractor.[32] A plaintiff may also recover attorney's fees incurred while identifying other parties potentially responsible for contributing to the pollution.[33] In addition, CERCLA's strict liability often provides no defense for a contractor's employer.[34]

CERCLA's statutory language does not define the term "arranged for."[35] The Eleventh Circuit has explicitly rejected any *per se* rule in determining when a manufacturer of a product may be liable under the Act.[36] Nevertheless, the Eleventh Circuit has "liberally construed" the phrase in assessing liability under the Act.[37] In *South Florida Water Management District v. Montalvo*, the court listed some of the relevant factors used to determine whether a party had arranged for the disposal.[38] These included "a party's knowledge (or lack thereof) of the disposal,[39] ownership of the

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31. *Id.* § 9607(a)(3).

32. *See* Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496 n.7 (11th Cir. 1996). Under the concept of joint and several liability, a plaintiff can hold any individual defendant who contributed to an indivisible harm liable for the entire amount of the claim. *See, e.g.*, Summers v. Tice, 199 P.2d 1 (Cal. 1948). Joint and several liability is well suited for complex hazardous wastes spills involving toxins from numerous sources. *See* PERCIVAL, *supra* note 14, at 337. With CERCLA, joint and several liability applies as long as the plaintiff is not a responsible party. In cases where the plaintiff is responsible for some of the contamination, however, section 113(f)(1) allows courts to allocate response costs among all responsible parties, including the plaintiff. *See Redwing Carriers*, 94 F.3d at 1496 n.7.

33. *See* Key Tronic Corp. v. United States, 511 U.S. 809 (1994). The Court, however, explicitly refused to extend this "enforcement cost" to cover litigation fees for private enforcement actions. *See id.* at 819.

34. Aside from war and an "act of God," the only defense available under CERCLA is the "innocent land owner exception." 42 U.S.C. § 9607(b). This provision waives liability for "an act or omission of a third party" who is not an employee or agent, and for releases related to a direct or indirect contractual agreement, unless the "sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail." *Id.* § 9607(b)(3). The party seeking the exemption must show that he exercised due care in handling the hazardous substance and took precautions against foreseeable risks. *See id.* Since, however, contractors are always involved in contractual agreements, the exception is unavailable to those who hired them, unless, in some circumstances, it involved shipment by rail. *See id.* § 9607(a)(3).

35. *See* South Fla. Water Management. Dist. v. Montalvo, 84 F.3d 402, 406 (11th Cir. 1996). Because of the Act's hasty legislative process, CERCLA is not a "model of legislative draftsmanship." *Bestfoods*, 118 S. Ct. at 1882.

36. *See* Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313 (11th Cir. 1990).

37. *Mantalvo*, 84 F.3d at 409.

38. *See id.* at 407.

39. "Knowledge" can be either actual or constructive. *See* Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1144 (N.D. Fla. 1994).

hazardous substances, and intent."[40] The listed factors, however, are not dispositive in every case. In fact, the question of when a party "'arranged' for the disposal of a hazardous substance . . . must focus on all of the facts in a particular case."[41]

In *Montalvo*, an aerial pesticide spraying company brought an action under CERCLA against the sugarcane growers who had contracted with the sprayers for pesticide application.[42] The Florida Department of Environmental Regulation had successfully sued the sprayers under CERCLA for contaminating an airfield with a pesticide spill during loading.[43] The sprayers, in turn, sought contribution from the landowners under section 113 on grounds that they "arranged for the disposal" by virtue of the contractual relationship.[44] The Eleventh Circuit, however, affirmed the lower court's grant of summary judgment for the landowners and said that the fact that an agency/independent contractor relationship existed was irrelevant to the liability question in that particular case.[45] Rather, the court said that the sprayers had to show that the landowners "took some affirmative act to dispose of the wastes."[46] In terms of contracting for the transport of hazardous materials, the court said that one who hires an independent contractor might be liable if the facts show they "had sufficient knowledge of or control over the . . . disposal practices."[47] This control did not have to include any "critical decisions as to how, when, and by whom a hazardous substance is to be disposed."[48]

B. CERCLA's Limitations

Despite CERCLA's apparent ability to hold arrangers accountable for spills and improper disposal, the courts have said that liability under the Act is "not boundless" and have set limits on CERCLA liability for manufacturers contracting for transport of their goods.[49] For instance, in *State Department of Environmental Protection v. Eastman Chemical Co.*, the Florida District Court of Appeals held that a manufacturer was not liable under the state's

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40. *Montalvo*, 84 F.3d at 407.

41. *Id.*

42. *See id.* at 405.

43. *See id.* at 404-05.

44. *See id.* at 405.

45. *See id.* at 407 n.8 & 409. The court, however, explicitly stated that it did not intend to "broadly exclude from CERCLA's reach cases where a plaintiff seeks to hold a defendant liable . . . for a service involving the use and disposal of hazardous substances." *Id.* at 409.

46. *Id.* at 407.

47. *Id.* at 409.

48. *See* Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d. 1313, 1318 (11th Cir. 1990).

49. Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1144 (N.D. Fla. 1994).

mini-CERCLA acts for groundwater contamination caused by independent contractors hired to transport the company's hazardous materials.[50] In reaching its conclusion, the court noted that the spill occurred during unloading after ownership of the materials had passed to the purchaser under the purchase agreement.[51]

Eastman Chemical Co. represents one major limitation to the application of strict liability on manufacturers who hire independent contractors to haul hazardous materials. CERCLA specifically targets contamination caused by the *disposal of hazardous waste* and is not a remedy for problems associated with the transport for sale of new and useful consumer items absent evidence indicating that manufacturers "arranged" for the disposal of hazardous waste.[52] Consequently, the "mere sale of a useful product without more could not subject manufacturers to arranger liability under CERCLA."[53] This holding protects manufacturers from liability arising out of transportation accidents and improper disposal caused by the independent contractors hired to haul "new and useful" hazardous materials as long as title to the materials has changed hands.[54]

CERCLA is also limited by its inherent inability to attach liability for petroleum products contamination. The Act explicitly excludes all forms of petroleum from its definition of "hazardous substance."[55] The "petroleum exclusion" also exempts "other substances that are hazardous substances under CERCLA but are indigenous to petroleum or are added to the petroleum during the refining process."[56] Although the exclusion does not include

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50. *See* State Dept. of Envtl. Protection v. Eastman Chem. Co., 699 So. 2d 1051, 1051 (Fla. Dist. Ct. App. 1997). Florida's "mini-CERCLA" acts essentially duplicate section 107 of the federal statute. *See* FLA. STAT. chs. 376.308, 403.727 (1996).

51. *See Eastman Chem. Co.*, 699 So. 2d at 1051.

52. *See Chatham Steel Corp.*, 858 F. Supp. at 1140.

53. Florida Power & Light Co. v. Allis Chamlers Corp., 85 F.3d 1514, 1520 (11th Cir. 1996). In some instances, the sale of useful products does not expose manufacturers to liability under common law tort claims either. For example, the Alabama Supreme Court has held that the sale of lead batteries for recycling does not constitute an "abnormally dangerous activity" giving rise to strict liability under state tort law. *See* S.B. Thompson v. Mindis Metals, Inc., 692 So. 2d 805, 807 (Ala. 1997). In addition, substantial alterations of toxic products, like PCB laden transformers, may shield manufacturers from strict products liability when individuals are injured dismantling the item for scrap. *See* High v. Westinghouse Elec. Corp., 610 So. 2d 1259, 1261-62 (Fla. 1993).

54. The "new and useful" doctrine might give manufacturers of hazardous materials an incentive to require purchasers to take title to the goods before transportation from the factory.

55. *See* 42 U.S.C. § 9601(14) (1994). Hazardous waste "does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance" under the Act. *Id.* Petroleum is also not considered a "hazardous substance" under RCRA. *See* Painewebber Income Properties Three L.P. v. Mobil Oil Corp., 902 F. Supp. 1514, 1514 (M.D. Fla. 1995).

56. Diversified Servs., Inc. v. Simkins Indus., Inc., 974 F. Supp. 1448, 1453 n.3 (S.D. Fla. 1997) (citations omitted).

In Florida, petroleum pollution from underground storage tanks (USTs) is generally covered under

hazardous wastes added during or after use,[57] it still would hamper CERCLA claims brought against manufacturers of the kinds of petroleum products that accounted for 1,095 hazardous materials releases during transport in 1997.[58]

Perhaps the greatest limitation of CERCLA liability is that it primarily authorizes recovery of cleanup costs and does not cover personal injuries.[59] Under CERCLA a responsible party is liable for "necessary costs of response incurred by any other person."[60] Although the Act does not define "costs of response," it does define "response" as "remove, removal, remedy, and remedial action."[61] "Remove" or "removal" is "the cleanup or removal of released hazardous substances from the environment . . . as may be necessary to monitor, assess, and evaluate the release . . . [and] to prevent, minimize, or mitigate damage to the public health or welfare or to the environment."[62] A principle example of a removal action would be the erection of security fencing around the contaminated site or "other measures to limit access."[63] Under this section, parties must also provide temporary housing and alternative water supplies for threatened individuals.[64]

"Remedy" or "remedial action," on the other hand, refers to actions "taken instead of or in addition to removal actions . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment."[65] Examples of remedial actions include repair of leaking containers, neutralization of hazardous materials, collection of leachate, and the use of dikes, trenches, and clay cover.[66] In addition to remedial and removal costs, responsible parties are also liable for certain medical screening for exposed individuals.[67] Other than these specific expenses, other costs are

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the Inland Pollution Trust Fund. *See* FLA. STAT. Ch. 376.3701. The Fund was established in 1986 to encourage the rehabilitation of sites contaminated by USTs. *See* Environmental Trust v. State Dept. of Envt'l Protection, 714 So. 2d 493, 495 (Fla. Dist. Ct. App. 1998). Under the program, the Department of Environmental Protection must seek recovery and reimbursement for clean up costs from parties who caused the discharge. *See* FLA. STAT. Ch. 376.3701(7). The state, however, will pay some of the response costs for certain eligible facilities under the Florida Petroleum Liability and restoration Insurance Program. *See id.* ch. 376.3072.

57. *See id.* at 1453.

58. *See* Research and Special Programs Admin., *supra* note 5.

59. *See* Woodman v. United States, 764 F. Supp. 1467, 1470 (M.D. Fla. 1991).

60. 42 U.S.C. § 9607(a)(4)(B) (1994).

61. *Id.* § 9601(25).

62. *Id.* § 9601(23).

63. *Id.*

64. *See id.*

65. *Id.* § 9601(24). This can include permanent relocation or residents and businesses where the President determines that such measures would be more cost-effective and environmentally preferable to more conventional cleanup. *See id.*

66. *See id.*

67. *See id.* § 9607(a)(4)(D). This section provides for recovery of costs for health effects studies

not recoverable, as CERCLA was not designed to "compensate private parties for economic harms that result from hazardous substance releases."[68] In *Woodman v. United States*, for example, the district court limited the costs that private parties could recover from a defendant who hired the independent contractors responsible for illegally dumping hazardous substances into a Jacksonville landfill.[69] The court said "CERCLA's legislative history clearly indicates that medical expenses incurred in the treatment of personal injuries or disease caused by an unlawful release or discharge of hazardous substances are not recoverable."[70] In addition, the court denied the plaintiff's compensation request for individual future medical screening and for expenses relating to attending specialized and technical conferences on groundwater contamination.[71] The court held that these expenses "did not advance the purpose of the act–'the prompt, thorough, and cost-effective cleanup of a hazardous waste site.'"[72]

Because CERCLA's strict liability covers only "response costs," the Act is of limited use in toxic tort litigation. It has also been noted that private parties must pay for "response costs" *before* bringing any CERCLA claim, which can place an onerous burden on all but the wealthiest victims of toxic accidents and illegal dumping.[73] Used properly, however, it still provides plaintiffs a convenient route to recover the often sizable costs of physically cleaning up a contaminated piece of property. In addition, a CERCLA claim can help open the doors to the federal courts for toxic tort claims through supplemental jurisdiction.[74] Victims of toxic contamination, however, must

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carried out under section 9604(i), which includes "tissue sampling, chromosomal testing where appropriate, epidemiological studies, or any other assistance appropriate under the circumstances." 42 U.S.C. § 9604(i)(1)(D) (1994).

68. Exxon Corp. v. Hunt, 475 U.S. 355, 359 (1986).

69. *See Woodman*, 764 F. Supp. at 1470.

70. *Id.* at 1470. Under Florida's "mini-CERCLA" law, damages must also be connected with the clean up of the discharge. *See* Italiano v. Jones Chems., Inc., 908 F. Supp. 904, 906 (M.D. Fla. 1995) (citing Mostoufi v. Presto Food Stores, Inc., 618 So. 2d 1372, 1377 (Fla. Dist. Ct. App. 1993).

71. *See id.*

72. *Id.* In addition, CERCLA response costs do not include excess expenses arising out of the clean up of spills containing chemicals mistakenly believed to be highly toxic. *See* Associated Transp. Line, Inc. v. Productos Fitosanitarios Proficol el Carmen, S.A., 197 F.3d 1070, 1073 (11th Cir. 1999). Damages in such cases, however, can still be recovered by demonstrating that the manufacturer breached its duty to communicate accurately the chemical composition of cargo given to contractors for transport. *See id.*

73. *See* Stephen A. Evans, *Using the Abnormally Dangerous Activity Doctrine to Hold Principals Vicariously Liable for the Acts of Toll Manufacturers*, 21 B.C. ENVTL. AFF. L. REV. 587, 594 (1994).

74. *See* 28 U.S.C. § 1367(a) (1994) (granting federal courts supplemental jurisdiction over state law claims that form the "same case and controversy" as federal claim). "[S]tate law claims are appropriate for federal court determination if they form a separate but parallel ground for relief also sought in a substantial claim based on federal law." United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

resort to other causes of action if they wish to recover for death, injury, or economic loss unrelated to the physical cleanup.

III. STRICT LIABILITY UNDER FLORIDA COMMON LAW

Fortunately for toxic tort victims, CERCLA's language explicitly states that it does not preempt most state law claims.[75] This allows plaintiffs to bring state law claims against those responsible for hazardous materials releases under various theories including nuisance, trespass, and negligence. It is well established, however, that liability for these types of common law actions typically does not flow from an independent contractor to the principals who hired them.[76] Nevertheless, Florida courts have recognized two exceptions to the general rule insulating parties from the misdeeds of their independent contractors.[77] The first situation is where the employer knows that the contractor has created a dangerous condition.[78] The second exception arises when the independent contractor carries out "inherently or intrinsically dangerous work."[79]

This section will examine the "inherently dangerous activities" exception and will also compare how the Florida courts have handled the question of when the transportation of hazardous wastes can be considered inherently dangerous with several decisions from other jurisdictions. In particular, this section will highlight how in Florida, as opposed to many other states, a party is not responsible for injuries to the employees of the independent contractors they hire, even when they are engaged in inherently dangerous activities.

A. Inherently Dangerous Activities

The first question in assessing liability to a principal is whether the agent is considered a servant or an independent contractor.[80] In considering whether

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75. *See* 42 U.S.C. § 9614(a) (1994). CERCLA, however, does prevent recovery of "the same removal costs or damages or claims" compensated under the Act. *Id.* § 9614(b). *See generally* New York v. Shore Reality Corp., 759 F.2d 1032, 1041 (2nd Cir. 1985) (discussing CERCLA's limited preemptive effects).

76. *See* Madison v. Midyette, 541 So. 2d 1315, 1317 (Fla. Dist. Ct. App. 1989). *See also* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1998) (distinguishing independent contractors from servants).

77. *See* Emelwon, Inc. v. United States, 391 F.2d 9, 11 (5th Cir. 1968) (Note: prior to 1982, the Fifth Circuit included Florida).

78. *See id.*

79. *Id. See also* RESTATEMENT (SECOND) OF AGENCY § 250 (detailing that the principal can be liable for acts of non-servant agents when employer is under the duty to have the act performed with due care).

80. *See Midyette*, 541 So. 2d at 1317.

an agent is an independent contractor, "the primary factor to be decided is the degree of control exercised over the details of the work."[81] If the facts show that the employer exercised a considerable degree of control over the work, then the principal will be liable for the negligence of the agent.[82] If, however, the facts indicate that the agent maintained control over the details of the work, then the worker is considered an independent contractor, and thus the principal would be shielded against liability unless it is shown that the work involved an inherently dangerous activity.[83]

The question then revolves around whether the work contracted for rises to the level of "inherently dangerous." Florida courts have long recognized that certain activities will give rise to liability regardless of negligence.[84] In one early case, *Pensacola Gas Co. v. Pebley*, the Florida Supreme Court found a gas works operator strictly liable for the release of refuse that made his neighbor's well water "unpalatable, nauseous, and unhealthy."[85] The standard to be used in imposing strict liability for abnormally dangerous activities, however, was not clarified until almost ninety years later in *Cities Service Co. v. Florida*.[86] In *Cities Service Co.*, the State of Florida filed suit against an operator of a phosphate rock-mine that stored phosphatic slime in settling ponds.[87] It was from one of these ponds that a billion gallons of slime escaped into a nearby creek causing a massive fish kill and other environmental

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81. *Id.* In measuring the degree of control, the Florida Supreme Court said:

> in determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others are considered:
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> (d) the skill required in the particular occupation;
> (e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is a part of the regular business of the employer; and
> (i) whether or not the parties believe they are creating the relationship of master and servant.

Margarian v. So. Fruit Distribs., 1 So. 2d 858, 860 (Fla. 1941) (quoting RESTATEMENT (SECOND) OF AGENCY § 220).

82. *See Midyette*, 541 So. 2d at 1317.

83. *See id.*

84. *See* Pensacola Gas Co. v. Pebley, 5 So. 593, 595 (Fla. 1889).

85. *Id.* at 595.

86. *See* Cities Serv. Co. v. Florida, 312 So. 2d 799, 803 (Fla. Dist. Ct. App. 1975).

87. *See id.* at 800.

damage.[88] Relying on the *Restatement (Second) of Torts'* definition of ultra hazardous activity,[89] the *Cities Service* court affirmed the imposition of strict liability against the mine by way of summary judgment.[90] The court considered the factors listed by the *Restatement* to determine whether an activity is abnormally dangerous and found that four of the six weighed against the mine.[91] The court said that "admitting the desirability of phosphate and the necessity of mining in this manner, the rights of adjoining landowners and the interests of the public in our environment require the imposition of a doctrine which places the burden upon the parties whose activity made it possible for the damages to occur."[92]

Since *Cities Service*, Florida courts have on several occasions addressed the question of whether the handling of hazardous materials in other contexts can be considered inherently dangerous. One such instance was in *Bona v. Peoples Gas System, Inc.*, where a landowner brought suit against the generator of hazardous materials for contamination caused by the independent contractors hired to haul the waste.[93] The *Bona* court reversed the trial court's grant of summary judgment against the landowner as it found a genuine question of fact as to "whether the improper disposal of 'hazardous' waste creates a strict liability exception to the insulation from liability that one or more of the parties might otherwise enjoy pursuant to the independent contractor doctrine."[94]

Three years after *Bona*, the same Florida court addressed the question of whether the fumigation of buildings was an "ultra hazardous activity."[95] In *Old Island Fumigation, Inc. v. Barbee*, several residents of a condominium complex became ill after Old Island fumigated an adjacent building.[96] Despite evidence that architects were negligent when they designed the wall separating

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88. *See id.*

89. *See supra* note 12 and accompanying text. The terms "ultra hazardous" and "abnormally dangerous" are essentially interchangeable terms in the context of strict liability. *See* KEETON, *supra* note 10, at 554-55.

90. *See Cities Services*, 312 So. 2d at 803.

91. *See id.* Specifically, the court found that the impoundment of "billions of gallons of phosphatic slimes behind earthen walls" (a) involved a high degree of risk of (b) great harm that (c) could not be eliminated by the exercise of reasonable care and (d) was not a matter of common usage. *Id.* at 802-03. Florida courts have subsequently used these same factors to determine whether other activities are "ultrahazardous." *See, e.g.*, Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp., 460 So. 2d 510, 513 (Fla. Dist. Ct. App. 1984) (using the *Restatement* factors to determine that rock crushing was not abnormally dangerous); Hutchinson v. Capelletti Bros., Inc., 397 So. 2d 952, 953 (Fla. Dist. Ct. App. 1981) (adopting *Cities Servs.* approach for imposing strict liability for pile-driving activities).

92. *Cities Services*, 312 So. 2d at 804.

93. *See* Bona v. Peoples Gas Sys., Inc., 557 So. 2d 581 (Fla. Dist. Ct. App. 1989).

94. *Id.* at 582.

95. *See* Old Island Fumigation, Inc. v. Barbee, 604 So. 2d 1246, 1247 (Fla. Dist. Ct. App. 1992).

96. *See id.*

the buildings,[97] the court held the fumigator strictly liable and granted summary judgment in favor of the plaintiffs.[98] "Fumigation is an ultra hazardous activity as it necessarily involves a risk of serious harm to the person, land, or chattels of others which cannot be eliminated by the exercise of the utmost care, and is not a matter of common usage."[99]

The question of hazardous materials handling was also addressed by the Fifth Circuit, which had to determine whether aerial spraying of pesticides was inherently dangerous under Florida law.[100] In *Emelwon, Inc. v. United States*, farmers brought suit against the defendant who hired independent contractors to spray herbicides in an attempt to eradicate the noxious water hyacinth plant.[101] The plaintiffs claimed that the independent contractors had damaged their crops by negligent spraying.[102] Although the federal court could find no Florida cases holding that aerial spraying was inherently dangerous, it nevertheless remanded to the lower court to decide whether such activity was sufficiently hazardous to hold the contractor's employer vicariously liable for the crop damage.[103]

More recently, the Eleventh Circuit had to decide whether Florida law would consider the transportation and disposal of PCBs an ultra hazardous activity.[104] In *Dickerson, Inc. v. United States*, an asphalt company brought suit against a generator of hazardous materials for the negligent sale of PCB laden waste oil by independent contractors hired to dispose of the waste.[105] Noting the "potential hazard of PCB exposure posed by the transportation of PCBs," the Eleventh Circuit held that "the Florida courts, if confronted with this question, would hold that there is a recognizable and substantial danger inherent in the transportation and disposal of this highly toxic material."[106]

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97. "One carrying on an abnormally dangerous activity is subject to strict liability for the resulting harm although it is caused by the unexpectable innocent, negligent or reckless conduct of a third person." *Id.* at 1248 (quoting RESTATEMENT (SECOND) OF TORTS § 522 (Tentative Draft, 1968)).

98. *See id.* at 1248.

99. *Id.* at 1247 (quoting *Cities Serv. Co.*, 312 So. 2d at 799). General arbitration clauses in fumigation contracts do not apply to strict liability and other tort claims. *See* Terminix Int'l Co., L.P. v. Michaels, 668 So. 2d 1013, 1015 (Fla. Dist. Ct. App. 1996).

100. *See* Emelwon, Inc. v. United States, 391 F.2d 9, 11 (5th Cir. 1968).

101. *See id.* at 10.

102. *See id.*

103. *See id.* at 12-13. The court relied on numerous cases from other states that held that aerial pesticide spraying was inherently dangerous. *See id.* at 11 n.3. Although the courts in *Emelwon* and *Old Island* found that the dangerous nature of pesticide handling was sufficient to impose liability, some pesticide cases will not give rise to state law tort actions. In *Papas v. Upjohn*, the court held that the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y, preempted state law tort claims based on inadequate labeling and packaging of pesticides. *See* Papas v. Upjohn, 985 F.2d 516, 518 (11th Cir. 1993), *on remand from* Papas v. Zoecon Corp., 112 S. Ct. 3020 (1992).

104. *See* Dickerson, Inc. v. United States, 875 F.2d 1577, 1580 (11th Cir. 1989).

105. *See id.* at 1579-80.

106. *Id.* at 1583. The Eleventh Circuit latter explained that, under the Federal Torts Claims Act,

Although the federal court's proclamation is not binding precedent on the state level, *Dickerson* does give a good indication of how Florida courts would come down in similar cases.[107] Combined with the other aforementioned state law cases, it is reasonable to expect that plaintiffs in toxic tort cases will be able to attach strict liability on parties that hire independent contractors to transport hazardous materials.

B. Other Jurisdictions' Rejection of Strict Liability for Hazardous Materials Transportation

By imposing strict liability on parties who hire independent contractors for hazardous materials accidents and improper disposal, Florida courts have been relatively responsive to the needs of injured parties as compared to rulings in some other jurisdictions. For instance, a Connecticut court refused to impose strict liability on a transporter when a truckload of hazardous chemicals exploded and killed four people.[108] In refusing to extend the doctrine of strict liability to the transportation of hazardous chemicals, the court said "the distributor (carrier) of an inherently dangerous substance owes to the public a duty to exercise care commensurate with the danger of its distribution. He is not, however, an insurer of the safety of third persons."[109]

Virginia courts have also been reluctant to extend the concept of strict liability to the disposal of hazardous wastes.[110] In *Philip Morris, Inc. v. Emerson*, the Virginia Supreme Court rejected a claim of strict liability against independent contractors hired to clean up a site contaminated by the deadly toxin Pentaborane.[111] The court reached this conclusion after finding that the defendants "had the ability to eliminate the risk of injury by exercising reasonable care" which runs contrary to one criterion for determining whether an activity is ultra hazardous.[112]

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28 U.S.C. §§ 2671-2680, the federal government may delegate its safety responsibilities to independent contractors, absent any existing federal laws or policies that restrict it from doing so. *See* Andrews v. United States, 121 F.3d 1430, 1440 (11th Cir. 1997). CERCLA, however, restricts delegation by the federal government in many circumstances involving hazardous waste, so this exception should only apply for pre-1980 releases, when the Act was not on the books. *See id.* at 1439. The terms of the contract to dispose of the waste can also produce nondelegable duties for the government. *See id.* at 1441.

107. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Under the *Erie* doctrine, the federal court looks to how the state's highest court would rule on the given question of law. *See id.* at 79.

108. *See* Christ Church Parish v. Cadet Chem. Co., 199 A.2d 707, 708 (Conn. Super. Ct. 1964).

109. *Id.* at 708-09.

110. *See* Philip Morris, Inc. v. Emerson, 368 S.E.2d 268, 282 (Va. 1988).

111. *See id.* at 271.

112. *Id.* at 272.

A final example that illustrates how some courts have rejected the idea of imposing strict liability for the transportation of hazardous wastes comes out of the Seventh Circuit.[113] In *Indiana Harbor Belt. R.R. Co. v. American Cyanamid Co.*, a switching line company brought suit against a major chemical manufacturer for almost $1 million in decontamination costs after a transportation contractor spilled approximately 6,000 gallons of the company's flammable, highly toxic, and possibly carcinogenic product Acrylonitrile.[114] Despite the substance's hazardous nature and the fact that the spill prompted an evacuation in a metropolitan Chicago neighborhood near the rail yard, the Seventh Circuit reversed the lower court's imposition of strict liability on the manufacturer.[115] In doing so, the court established a hierarchy among the six factors enumerated in the *Restatement*.[116] The Seventh Circuit suggested that in determining whether a particular activity gives rise to strict liability, a court should first examine whether there is an "inability to eliminate the risk of accident by the exercise of due care."[117] Because the court found that the accident was caused by "carelessness," it decided that the imposition of strict liability was unnecessary as "such accidents are adequately deterred by the threat of liability for negligence."[118]

This reasoning illustrates a common theme of not only the aforementioned decisions, but of many other cases that have declined to invoke strict liability in the transportation of hazardous substances.[119] Many of these cases seem to focus on the fact that the risk could be reduced if the transporter or generator of the hazardous products had exercised more care, and these courts rarely go further with their analysis. This issue, however, is only one factor out of the six enumerated by the *Restatement*.[120] Florida courts, on the other hand, should continue to follow the example of *Cities Services* and come to a conclusion of whether to impose strict liability only after weighing *all* the relevant factors.

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113. *See* Indiana Harbor Belt R.R. Co. v. American Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990).

114. *See id.* at 1175.

115. *See id.* at 1183.

116. *See id.* at 1177.

117. *Id.* "The baseline of common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful . . . there is no need to switch to strict liability." *Id.*

118. *Id.* at 1179.

119. *See* Evans, *supra* note 73, at 613.

120. *See* RESTATEMENT (SECOND) OF TORTS § 520 (Tentative Draft No. 10, 1964).

C. The Exception for Injuries to an Independent Contractor's Employees

While Florida courts have tended to accept the imposition of strict liability on those who hire independent contractors to handle their hazardous materials, their decisions have left open at least one loophole to avoid liability even when the work is inherently dangerous. In *Florida Power & Light Co. v. Price*, the Florida Supreme Court confronted the question of whether a court can impose vicarious liability on a party for injuries to an independent contractor's worker caused by a co-worker's negligence.[121] In that case, Florida Power & Light (FPL) hired an electrical contracting company to construct an electrical distribution system for a new subdivision.[122] During the work, an employee of the independent contractor negligently allowed a "jumper" wire to come too close to an electrical arc which resulted in the electrocution of a co-worker.[123] The injured worker brought an action against FPL under the inherently dangerous exception to the general rule that an employer cannot be held liable for the deeds of an independent contractor.[124] The court agreed that the work on the electrical distribution system was inherently dangerous,[125] but it still refused to extend liability to FPL.[126]

> We hold that liability flowing from operation of the doctrines of dangerous instrumentalities and inherently dangerous work is subject to the exception that where the defendant owner contracts with an independent contractor for the performance of inherently dangerous work and the latter's employee is injured by a dangerous instrumentality owned by the defendant which is negligently applied or operated by another employee of the independent contractor but wholly without any negligence on the part of the defendant owner, the latter will not be held liable.[127]

The court was careful, however, to distinguish injuries to an independent contractor's employee from those to a member of the general public, which would still trigger liability for the party contracting out the

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121. *See* Florida Power & Light v. Price, 170 So. 2d 293, 294 (Fla. 1964).

122. *See id.* at 294.

123. *See id.*

124. *See id.* at 295.

125. "This work was of such a nature that in the ordinary course of events its performance would probably, and not merely possibly, cause injury if proper precautions were not taken." *Id.*

126. *See id.* at 298.

127. *Id.* This holding has been adopted by numerous subsequent Florida court cases. *See, e.g.*, Atlantic Coast Dev. Corp. v. Napoleon Steel Contractors, Inc., 385 So. 2d 676 (Fla. Dist. Ct. App. 1980) (recognizing rule).

inherently dangerous work.[128] Nevertheless, this exception could have serious consequences by leaving injured workers of insolvent contracting companies without adequate remedies. Consequently, Florida courts should follow the examples of other states that hold the employer of independent contractors vicariously liable, even in these situations.[129] This would be a modest step in insuring that those who ultimately profit from such risk taking shoulder the costs of dangerous activities.

IV. ECONOMIC AND ETHICAL REASONS FOR THE IMPOSITION OF STRICT LIABILITY FOR THE TRANSPORTATION OF HAZARDOUS MATERIALS AND THE REJECTION OF THE RESTATEMENT'S COMMON CARRIER EXCEPTION FOR ABNORMALLY DANGEROUS ACTIVITIES

From *Pensacola Gas Co.* to *Cities Service*, Florida courts have developed a solid foundation for the imposition of strict liability on those who contract out for the transportation of hazardous materials. One potential defense to this expansion of liability, however, is found in the *Restatement (Second) of Torts* section 521.[130] According to the *Restatement*, courts should exclude common carriers from strict liability for the transportation of goods which they are required by law to accept.[131] This section first examines the development of this doctrine in American jurisprudence and how it has been applied in various jurisdictions. This section then discusses the economic and ethical arguments why Florida courts might reject the *Restatement's* position and allow for the imposition of strict liability for the transportation of hazardous materials by common carriers.

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128. *See Price*, 170 So. 2d at 298-99. Since this exception to the doctrines of vicarious liability grows out of the assumption of the risks on the part of the independent contractor's workers, it is inapplicable to the members of the general public since they are "not embraced in the relationship created by the independent contract." *Id.*

129. *See, e.g.*, Rooney v. United States, 634 F.2d 1238 (9th Cir. 1980) (holding that employer of an independent contractor was liable for injuries to contractor's employee for failing to provide adequate safety measures during the intrinsically dangerous work of painting radar domes); Besner v. Central Trust Co., 130 N.E. 577 (N.Y. 1920) (holding employer of independent contractor liable for death of contractor's employee killed installing elevator doors).

130. *See* RESTATEMENT (SECOND) OF TORTS § 521 (1977).

131. *See id.* As for the transportation of hazardous materials by sea, a state strict liability claim is generally not an appropriate cause of action under the rules of admiralty established by Congress. *See* EAC Timberlane v. Pisces, Ltd., 745 F.2d 715, 721-22 (1st Cir. 1984).

A. The Origins and Development of Restatement (Second) of Torts Section 521

This doctrine dates back to 1914 and *Actiesselskabet Ingrid v. Central R.R. Co. of New Jersey*.[132] In that case, the owner of a Norwegian sailing vessel brought suit against a rail company that owned a boxcar packed with dynamite that exploded near a pier, wrecking the plaintiff's moored vessel.[133] Despite the plaintiff's attempt to invoke the relatively new concept of strict liability from *Rylands v. Fletcher*, the New Jersey court rejected the idea that common carriers should be held liable without a showing of negligence.[134] The court said:

> It certainly would be an extraordinary doctrine for courts of justice to promulgate to say that a common carrier is under legal obligation to transport dynamite and is an insurer against any damage which may result in the course of transportation, even though it has been guilty of no negligence which occasioned the explosion which caused the injury. It is impossible to find any adequate reason for such a principle.[135]

After the *Restatement* adopted this rule in 1938, other courts have accepted the *Ingrid* reasoning and have exempted common carriers from the "ultra hazardous activity doctrine." For example, in *Town of East Troy v. Soo Line R.R. Co.*, a United States district court rejected a town's claim of strict liability brought against a railroad and a manufacturer for a derailment and carbolic acid spill that contaminated area wells.[136] Citing section 521 of the *Restatement (Second) of Torts*, the court held that, under Wisconsin law, "a common carrier is not subject to strict liability for the transportation of goods which it is required by law to undertake."[137]

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132. *See* Actiesselskabet Ingrid v. Central R.R. Co. of N.J., 216 F. 72 (N.J. Ct. App. 1914), *cert. denied*, 238 U.S. 615 (1915).

133. *See id.* at 74.

134. *See id.* at 78.

135. *Id.*

136. *See* East Troy v. Soo Line R.R. Co., 409 F. Supp. 326 (E.D. Wis. 1976).

137. *Id.* at 330. *See also* Albig v. Municipal Authority of Westmoreland County, 502 A.2d 658, 664 (Pa. Super. Ct. 1985) (refusing to find public reservoir strictly liable for release "is consistent with the Restatement rule that absolute liability is not to be imposed where an otherwise hazardous activity is carried on in pursuance of a public duty.").

Despite *Town of East Troy* and other similar holdings,[138] courts have not universally accepted the *Restatement* position.[139] One case which does not follow the *Restatement* is *National Steel Serv. Ctr. v. Gibbons* from Iowa.[140] This case involved a civil action brought against the trustee of a bankrupt railroad for damages caused by a derailment and subsequent propane explosion.[141] In applying Iowa law, the Eighth Circuit explicitly rejected section 521 of the *Restatement* and imposed strict liability on the railroad.[142]

Moreover, Congress seemed to ignore the *Restatement's* approach when it mandated strict liability for transporters under CERCLA.[143] Although CERCLA's language takes the *Restatement* position in its definition of "owner and operator" of facilities,[144] it still, in many situations, attaches liability without fault for "any person who accepts or accepted any hazardous substances for transport."[145] This is a glaring example of how section 521 of the *Restatement (Second) of Torts* is far from dispositive and should not be allowed to dominate the discussion of strict liability for the transport of hazardous materials. Therefore, Florida courts can feel free to deviate from the common carrier exception if and when the actual question arises of whether the *transport* of hazardous substances can be considered ultrahazardous.

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138. *See, e.g.*, Pecan Shoppe v. Tri-State Motor Transit Co., 573 S.W.2d 431, 434 (Mo. Ct. App. 1978). In *Pecan Shoppe*, a owner of property damaged by an dynamite truck explosion caused by a sniper during a labor dispute brought a claim of strict liability against the carrier. *See id.* Missouri Court of Appeals refused to deviate from § 521 of the Restatement's bar on strict liability for common carriers of hazardous goods. *See id.*

139. *See, e.g.*, Siegler v. Kuhlman, 502 P.2d 1181, 1187 (Wash. 1973). The Washington Supreme Court said that "hauling gasoline in great quantities as freight, we think, is an activity that calls for the application of principles of strict liability." *Id.*

140. *See* National Steel Serv. Ctr. v. Gibbons, 693 F.2d 817 (8th Cir. 1982).

141. *See id.* at 818.

142. *See id.* at 818-19. The Eighth Circuit certified to the Iowa Supreme Court the question of whether strict liability can be applied to the railroad for transporting hazardous materials. *See id.* at 819. Iowa's highest court declined to adopt the common carrier exception and said that it was "committed to a broader application of . . . *Rylands v. Fletcher* than is reflected in the Restatement." *Id.* at 818.

143. *See* 42 U.S.C. § 9607(a)(3) (1994).

144. *See id.* § 9601(20)(B). "The shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control." *Id.*

145. *See id.* § 9607(a)(4). CERCLA might provide a defense, however, for arrangers where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier *by rail*," and where the arranger exercised "due care" took and took "reasonable precautions." *Id.* § 9607(b)(3) (emphasis added). Florida's "mini-CERCLA" also provides that generators may escape liability under the state law if they comply with the terms of the act and its regulations, have contracted with a licensed hazardous waste, and have received a certificate of disposal from the facility. *See* FLA. STAT. ch. 403.727.

B. Economic Arguments Against the Application of Restatement (Second) of Torts Section 521

Plaintiffs can articulate a number of reasons why the Florida courts should take the initiative to reject the *Restatement* position and impose strict liability on those who contract for the transportation of hazardous substances. Some of these reasons were discussed in *Chavez v. Southern Pac. Transp. Co.*[146] In *Chavez*, plaintiffs sought recovery for damages and injuries sustained when eighteen boxcars loaded with bombs exploded in a California railyard.[147] The court explicitly rejected section 521 and proceeded to apply strict liability to the transporter of the hazardous munitions.[148] The court explained that "there is no logical reason for creating a 'public duty' exception when the rationale for subjecting the carrier to absolute liability is the carrier's ability to distribute the loss to the public."[149] By forcing the parties handling the hazardous wastes to bear the consequences of their actions, strict liability minimizes the "harsh impact of inevitable disasters" on innocent parties who happen to be in the wrong place at the wrong time. Instead, it spreads the loss over time and to a greater population.[150] While the *Chavez* court based its holding on this rationale, there are other reasons why Florida courts should impose strict liability on those who generate hazardous substances.

From an economist's point of view, it makes sense to make those who benefit from hazardous activities bear the true costs of the risks they create. A negative externality is "an uncompensated, human-caused harm to society."[151] In market terms, a technological externality is a byproduct of the production process which allows a manufacturer to shift some of the costs to society that are not reflected in market prices in the goods.[152] For example, a company that pollutes pushes some of the costs of production (i.e. the loss of clean air and water) onto the public. The true costs of production, including deaths from pollution related illnesses, are therefore not reflected in the market price, and the public is, in effect, subsidizing the manufacturer. Because the true costs of production are not reflected in the price of the goods, overproduction and market inefficiency result.[153]

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146. *See* Chavez v. Southern Pac. Transp. Co., 413 F. Supp. 1203 (E.D. Cal. 1976).
147. *See id.* at 1205.
148. *See id.* at 1214.
149. *Id.*
150. *See id.*
151. STEVEN C. HACKETT, ENVIRONMENTAL AND NATURAL RESOURCES ECONOMICS, 43 (1998).
152. *See id.* at 44.
153. *See id.* at 54.

Economists have noted that the overproduction caused by companies externalizing the true costs of manufacturing is a major source of market failure.[154] One remedy, however, to the problem of negative technological externalities is the imposition of a Pigouvian Tax on polluters.[155] As Princeton economist William Baumol notes, the most effective Pigouvian tax equals the social cost of the externality.[156] Attaching strict liability on those who generate hazardous materials would achieve this result.

Without strict liability, the true costs of the production of hazardous materials are not realized. The use of the traditional negligence standard, in many instances, will not force the manufacturers of hazardous materials to bear the true costs of the production. First, many releases of hazardous substances are true accidents, not caused by human error and the resulting damages are, therefore, not recoverable. CERCLA's limited strict liability does not provide a remedy for some of the most costly aspects of hazardous waste releases, such as death and injury. Unless strict liability is applied, the true costs of the accidental releases will not be reflected in the price of goods, and market inefficiency and failure will result.

In addition, without strict liability, responsibility for damages will not flow from independent contractors to the parties that employed them. The problem with this is that often the transporter is found to be insolvent and, without the ability to attach liability on the parties hiring the contractor, the costs of the release will fall on the public. This amounts to a public subsidy for the production of the hazardous substances that will ultimately lead to overproduction and market inefficiency.

Finally, it would be simply unfair to leave victims of toxic accidents without a remedy. If the costs of a hazardous materials accident must fall on either an innocent party or the producer benefitting from the production, common sense and good judgment dictate that the latter should be responsible. For these reasons, Florida courts should continue to flexibly apply the doctrine of strict liability, renounce section 521 of the *Restatement (Second) of Torts*, and eliminate the exception on liability for injuries to an independent contractor's employees.

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154. *See* WILLIAM J. BAUMOL ET AL., THE THEORY OF ENVIRONMENTAL POLICY 15-16 (2d ed. 1988).

155. *See id.* at 23. A Pigouvian Tax (named after economist A.C. Pigou) is placed on firms and "is based on the external costs resulting from their pollution emissions." *See* HACKETT, *supra* note 151, at 316. An effective "Pigovian tax" would equal the externalized costs so that the true social costs of production will equal the cost of the production on the manufacturer. *See* BAUMOL, *supra* note 154, at 51.

156. *See* BAUMOL, *supra* note 154, at 23.

CONCLUSION

The problems associated with transportation of hazardous wastes, including both accidents and improper disposal, pose a serious threat to the health and safety of Florida's residents and environment. The problem is enhanced by the fact that traditional agency law often shields those profiting from the production of hazardous materials from the liability arising out of the misdeeds of independent contractors hired to transport these dangerous substances. While CERCLA purports to impose strict liability on those who generate hazardous wastes, its practical reach is limited. Specifically, the cost of injuries and deaths from hazardous waste accidents and illegal dumping are unrecoverable under the Act. In addition, CERCLA regulates wastes and provides no remedy for damages caused by "new and useful" products.

State tort law, on the other hand, can be an effective alternative route to impose liability on the generators of hazardous materials. This is especially true in Florida, where the courts have been more willing than in other jurisdictions to impose strict liability for the handling of hazardous wastes. Although Florida courts have laid the groundwork for imposing strict liability on those who hire independent contractors to haul hazardous materials, these same generators can escape responsibility for injuries to the contractor's employees. Reversal of this exception will help make those who generate hazardous materials realize the true costs of their dangerous activities and in turn promote more efficient markets and a healthier environment.

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