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Manufacturer Liability for Asbestos Cleanup in Public Schools Under the Comprehensive Environmental Response, Compensation, and Liability Act

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NOTES

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I. INTRODUCTION

Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter CERCLA) creates a right of action for recovery of "all costs of removal or remedial action" incurred in response to the release or threatened release of hazardous substances into the environment.[1] In creating this right of action, Congress' intent was clear in two respects: first, cleanup of abandoned hazardous waste sites should proceed as quickly as practicable; and, second, to the extent possible, responsible parties, not taxpayers, should bear cleanup costs.[2] To these ends, CERCLA created the Superfund to finance prompt hazardous waste cleanup, and a right of action to recover cleanup costs by the federal government, state governments, or "any other person."[3]

In other respects, Congress' intentions were less clear. CERCLA is a hasty Congressional compromise concluded in the last days of the 96th Congress. Significant issues regarding section 107(a) liability were left to EPA administrators and to judicial processes for resolution.[4] Little helpful legislative history exists to guide those interpreting the statute.[5] In general, courts have resolved CERCLA's ambiguities in a manner consistent with

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1. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982) (hereinafter CERCLA).

2. Comment, *CERCLA Litigation Update: The Emerging Law of Generator Liability*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10224, 10235 (1984) [hereinafter *CERCLA Litigation*]; Ohio ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983).

3. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

4. *See Georgeoff*, 562 F. Supp. at 1312-14.

5. Rogers, *Three Years of Superfund*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10361, 10361 (1983); 1A F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.04[2] (1985).

Congressional intent to expedite cleanup and to recover costs from "responsible" parties. Aided by imprecise, sweeping statutory language, the courts have produced expansive decisions broadly defining liability.[6]

Ambiguity, however, continues to exist regarding liability under CERCLA for hazardous substances sold in the marketplace. Some courts hold that liability survives a sale of a hazardous substance, while others suggest that a sale cuts off liability.[7] Of those cases suggesting continuing generator liability, a recent decision threatens to extend generator liability significantly beyond its prior limits. In *Dayton Independent School District v. W.R. Grace & Co.*,[8] the District Court for the Eastern District of Texas denied the defendant's motion to dismiss a section 107 claim in a consolidated school asbestos suit. Considering the magnitude of the asbestos problem in the United States, the *Dayton* decision could be the harbinger for development of a new and potentially staggering category of CERCLA liability.

This note examines the liability issues in *Dayton* in light of the statutory language of section 107 and prior case law. It concludes that the trial court in *Dayton* improperly failed to distinguish releases of hazardous substances from manufactured products in use from releases of hazardous wastes at disposal sites. It then examines the potential liability repercussions should this decision stand, noting that the consequences of this decision go far beyond liability for asbestos manufacturers. If buildings containing asbestos construction products are proper targets for CERCLA's liability provisions, liability may also be extended to building owners, past and present, retailers of asbestos products, parties who transported the product to the construction site, construction companies, and parties in other industries which incorporate hazardous substances in their products. To extend

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6. *See generally CERCLA Litigation*, *supra* note 2.

7. In two key cases, courts held that a sale does not cut off § 107(a) liability: New York v. General Elec. Co., 592 F. Supp. 291, 302 (N.D.N.Y. 1984) and United States v. A & F Materials Co., 582 F. Supp. 842, 845 (S.D. Ill. 1984). In contrast, the court in United States v. Westinghouse Elec. Corp., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20483 (S.D. Ind. June 29, 1983) held that a manufacturer of polychlorinated biphenyls (PCBs) was not liable as a third party defendant when a purchaser improperly disposed of transformers containing the PCBs. This issue also has arisen in the context of asbestos litigation. In Corporation of Mercer Univ. v. Nat'l Gypsum Co., 24 E.R.C. 1953 (M.D. Ga. Mar. 8, 1986), the court granted summary judgment to the defendants in a claim for asbestos property damages under CERCLA.

8. No. B-81-277-CA (E.D. Tex. June 30, 1986) (denying motion for summary judgment).

liability to these new categories of defendants is inconsistent with CERCLA's primary goal of cleaning up abandoned hazardous waste sites.[9]

II. THE *Dayton* CASE

Dayton Independent School District v. W.R. Grace & Co.[10] is a consolidated school asbestos suit brought by 114 school districts in eastern Texas against a group of asbestos manufacturers. The school districts sought to recover response costs for removal of asbestos construction materials from their school buildings. Plaintiffs based their claim on section 107(a) of CERCLA providing a private right of action for recovery of response costs from responsible parties for the release or threatened release of hazardous substances into the environment.[11] Defendants, National Gypsum Co. and United States Gypsum Co., moved to dismiss for failure to state a claim for which relief can be granted under CERCLA section 107(a). They argued that the history of the Superfund legislation demonstrates that CERCLA liability is limited to cleanup costs for abandoned hazardous waste disposal sites. The release of asbestos fibers from "products" which are part of a building, as distinguished from a release of wastes from disposal sites, does not qualify under this interpretation of CERCLA. [12]

In opposition, plaintiffs argued that CERCLA has two distinct, though interdependent, prongs. The first is the Superfund, which is aimed at cleanup of abandoned hazardous waste sites; second, in the plaintiffs' view, is section 107(a) which imposes liability on responsible parties when:

> (a) a hazardous substance has been or is threatened to be released, (b) the release threatens human health, in this case including children, (c) costs have been incurred by an innocent party to protect others from the threat to human health, and

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9. For a discussion of CERCLA's legislative history and legislative goals, see generally 1A F. GRAD, *supra* note 5.

10. No. B-81-277-CA (E.D. Tex. June 30, 1986).

11. Plaintiffs' Opposition to Motions of Defendants National Gypsum Company and United States Gypsum Company to Dismiss Plaintiff's Claim Under CERCLA at 1, *Dayton*, (No. B-81-277-CA) [hereinafter *Plaintiffs' Opposition*], *reprinted in* Hazardous Waste Litig. Rep. (Andrews) 9,460 (July 21, 1986).

12. *Private Superfund Action: Dayton Independent School District v. Grace*, Hazardous Waste Litig. Rep. (Andrews) 9,419 (July 21, 1986) (hereinafter *Private Superfund*).

> (d) the party responsible for the dangerous conditions in the first place has been identified.[13]

On June 30, 1986, U.S. Senior Judge Joseph J. Fisher denied the defendants' motion to dismiss.[14]

III. Distinguishing the Sale of Manufactured Products Containing Hazardous Substances from the Disposal of Hazardous Waste

Significant support exists in section 107(a) and in case precedent for Judge Fisher's decision to deny defendants' motion to dismiss. Nevertheless, there are substantial reasons in the statutory language and case precedent for distinguishing schools containing asbestos building products from disposal sites covered under CERCLA.

The *Dayton* plaintiffs' claim is premised on section 107(a)(3), which imposes response cost liability on "any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity" if there is a release or threatened release from the facility.[15] For purposes of this claim, the operative terms are: (1) "by contract, agreement, or otherwise arranged for," (2) "facility," and (3) "disposal or treatment."

A. *"[B]y contract, agreement, or otherwise arranged for"*

Section 107 does not explicitly preclude a sale transaction involving hazardous substances from coverage under "by contract, agreement or otherwise arrange for." Section 107(a)(3) clearly expresses Congress' intent to prevent a responsible party from contracting away liability to third parties. The all-inclusive "or otherwise" suggests that Congress intended this section to sweep very broadly to encompass any transaction, including a sale, in which a responsible party attempts to transfer liability to another.

The courts have opted for a broad, inclusive interpretation of this language. In *New York v. General Electric Co.*, the court

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13. *Plaintiffs' Opposition, supra* note 11, at 3, *reprinted in* Hazardous Waste Litig. Rep. (Andrews) at 9,461.

14. *Private Superfund, supra* note 12, at 9,419.

15. (CERCLA § 107(a)(3)), 42 U.S.C. § 9607(a)(3).

held that a sales transaction does not cut off seller liability for releases or threatened releases of hazardous substances into the environment.[16] In *General Electric,* the defendant sold transformer oil to a drag strip which used it for dust control. The court held that the supplier could still be liable under section 107(a)(3) for having "arranged for" the oil's "disposal or treatment." Under *General Electric,* characterization of a transaction as a sale will not prevent liability.[17] To hold otherwise would allow responsible parties to circumvent CERCLA liability provisions by the simple expedient of "selling" their hazardous waste.

B. "Facility"

The term "facility" is also very broadly defined in CERCLA. "Facility" includes:

> (A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.[18]

This broad language evidences Congressional intent to cover more than just traditional dump sites and appears to encompass any site at which hazardous substances come to be located—including school buildings.

Legislative history supports this broad reading. Some of the possible facilities which legislators expected to fall under CERCLA's coverage included dirt roads in Texas which oiling left contaminated with nitrobenzene and cyanide,[19] radium waste sites,[20] abandoned tanks filled with toxic chemicals,[21] and PCBs dumped into the Hudson River.[22]

Courts have refused to narrow the broad definition of facility. In *New York v. General Electric,* the defendant supported a motion to dismiss with the argument that the drag strip upon which its PCB contaminated oil was deposited was not a hazard-

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16. 592 F. Supp. 291, 297 (N.D.N.Y. 1984).
17. *Id.*
18. CERCLA § 101(9), 42 U.S.C. § 9601(9).
19. 126 CONG. REC. 26,767 (1980) (statement of Rep. Eckhardt).
20. 126 CONG. REC. 30,943 (1980) (statement of Sen. Hart).
21. 126 CONG. REC. 26,345 (1980) (statement of Rep. Bauman).
22. 126 CONG. REC. 30,931 (1980) (statement of Sen. Randolph).

ous waste facility.[23] In rejecting this argument, the *General Electric* court relied on the extremely broad definition of "facility" which includes "any area" where hazardous substances come to be located.[24] Under the position taken by the *General Electric* and the *Dayton* defendants, a facility is limited to sites where there has been a prior placement of a hazardous substance—hence making it a hazardous waste disposal site. In rejecting this limitation, the *General Electric* court concluded, "[t]o accord CERCLA's liability provisions any meaning at all, the language 'containing such hazardous substances' found in section 107(a)(3) must be construed as referring to facilities that have been, by a depositor's actions, contaminated . . . ."[25] Under this rule, school buildings contaminated with asbestos may qualify as CERCLA facilities.

Furthermore, Congress apparently fears that "facility" can be interpreted to include buildings containing asbestos construction products. It recently amended CERCLA to limit the President's section 104 response authority, though it left untouched the scope of section 107 private recovery actions such as *Dayton*. The amendment states:

> (3) The President shall not provide for a removal or remedial action under this section in a response to a release or threat of release . . . .
>
> (B) from products which are part of the structure of, and result in exposure within, residential buildings or businesses or community structures . . . .[26]

This suggests that Congress felt that, unless otherwise limited, CERCLA liability extends to releases of asbestos for buildings. Since, unlike section 104, section 107 has not been so limited, generator liability is, arguably, available in private response actions for cleanup of asbestos containing buildings.[27]

C. "Disposal or Treatment"

The *Dayton* plaintiffs' argument begins to falter on the issue of whether defendants arranged for "disposal or treatment" of a hazardous substance when they included asbestos in build-

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23. 592 F. Supp. 291, 295 (N.D.N.Y. 1984).
24. CERCLA § 101(9), 42 U.S.C. § 9601(9).
25. 592 F. Supp. at 296 n.9.
26. Pub. L. No. 99-499, § 112(b), 100 Stat. 1613 (1986).
27. CERCLA § 107(a), 42 U.S.C. § 9607(a).

ing products subsequently used in school construction. Although a sale may be a covered transaction and a school building a covered facility, the transaction must still be for "disposal or treatment" to incur liability under section 107. Because the *Dayton* plaintiffs did not claim that defendants arranged for treatment of their asbestos by including it in building products,[28] only the issue of whether defendants disposed of a hazardous substance need be considered here.

On its face, it is counter-intuitive to equate disposal with sale of a manufactured building product; nevertheless, statutory language provides support for plaintiffs' position. Plaintiffs argue that "it is not just the act of disposal itself—*i.e.*, the actual deposit or placement—that subjects persons to liability under section 107(a)."[29] Rather, they place emphasis on *arranging for* disposal as the central focus of liability under this subsection. Under this interpretation, arranging for disposal "by any means whatsoever" is sufficient to create liability.[30] This interpretation receives some support in CERCLA's definition of "disposal." CERCLA defines "disposal" by reference to the Solid Waste Disposal Act:[31]

> [T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters . . . .[32]

Thus, disposal seems to encompass any placing of a hazardous

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28. To define "treatment" CERCLA § 101(29), 42 U.S.C. § 9601(29) refers to the Solid Waste Disposal Act, which reads:

> The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

RCRA § 1004 (34), 42 U.S.C. § 6903(34). Since the asbestos construction products in *Dayton* were not sold to the schools to render them nonhazardous or for any other "treatment" within this definition, "arranging for treatment" is never likely to arise in the construction materials context.

29. *Plaintiffs' Opposition, supra* note 11, at 13, *reprinted in* Hazardous Waste Litig. Rep. (Andrews) at 9,463 (July 21, 1986).

30. *Id.*

31. 42 U.S.C. § 9601(29), CERCLA § 101(29).

32. RCRA § 1004(3), 42 U.S.C. § 6903(3).

substance so that it enters or threatens to enter the environment. Under this view, disposing of the hazardous substance by including it in a marketable product, including asbestos building products, does not cut off liability for subsequent releases. This interpretation finds some support in *General Electric*. In *General Electric*, the defendant based part of its defense on the proposition that a sale is not a disposal. In rejecting this argument, the court examined CERCLA's definition of disposal as adopted from the Solid Waste Disposal Act.[33]

A definition this broad appears to provide no basis for distinguishing between disposal at a dump site and the sale of construction materials containing a hazardous substance. The test appears to be whether, after passing it on to a third party, the substance is released or threatens release into the environment. The characterization of the transaction as a sale or some other arrangement is irrelevant. It is enough that hazardous substances were deposited on the land or water in such a manner that they might enter the air or water.

The problem with this interpretation is that it proves too much. Under plaintiffs' theory, whenever a hazardous substance passes through a party's hands, that party is potentially liable for having arranged for disposal under CERCLA if there is a subsequent release or threatened release.[34] That is, it makes disposal depend on whether there is a subsequent release or threatened release. If there is a subsequent release, then there was an act of disposal. It seems unlikely, however, that Congress would have used the term "disposal" if it had not intended to distinguish arrangements creating liability, that is arrangements for disposal, from other kinds of arrangements which were not intend for disposal, such as the sale of manufactured products. In this respect, it is significant that CERCLA links only some categories of potential defendants to a disposal requirement. For example, when assessing liability of a present owner of a facility from which there is a release or threatened release, no disposal requirement exists.[35] However, past owners must have owned the facility at the time of *disposal* to incur liability.[36] Similarly, transporters must have accepted the hazardous substance "for

33. 592. F. Supp. 291, 297 (N.D.N.Y. 1984).

34. The only exception to this generalization is consumer products which are specifically exempted from CERCLA coverage. CERCLA § 101(9), 42 U.S.C. § 9601(9).

35. CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1).

36. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2).

transport to *disposal or treatment* facilities or sites."[37] And under "arranged for" liability, the party must have "arranged for *disposal or treatment,* or arranged with a transporter for transport for *disposal or treatment.*"[38] The fact that the disposal requirement applies to some categories of potential defendant but not to others suggests that Congress intended that the disposal requirement have real content as a liability limiting device. Plaintiffs' interpretation empties this requirement of any substantive content by equating disposal with the occurrence of a release or threatened release.

Support for the view that "disposal" and "release" may not be equated is found in CERCLA's definition limiting disposal to transactions involving "solid waste" or "hazardous waste."[39] CERCLA adopts the definition of "hazardous waste" used in the Solid Waste Disposal Act:[40]

> The term "hazardous waste" means a *solid waste,* or combination of *solid wastes,* which . . . may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.[41]

A substance must therefore qualify as a solid waste to meet the definition of hazardous waste. Solid waste is "any garbage, refuse, sludge . . . and other *discarded* material."[42] Hence, disposal requires a transaction involving a discarded material. The discard requirement distinguishes the sale of a manufactured product from disposal even if that product later releases a hazardous substance, as opposed to hazardous waste, into the environment.

Case precedent supports this distinction. In *United States v. Westinghouse Electric Corp.,*[43] the United States sought to recover costs from Westinghouse for cleanup of PCB wastes.

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37. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (emphasis added).
38. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (emphasis added).
39. 42 U.S.C. § 6903(3).
40. CERCLA § 101(29), 42 U.S.C. § 9601(29).
41. RCRA § 1004(5), 42 U.S.C. § 6903(5) (emphasis added).
42. RCRA § 1004(27), 42 U.S.C. § 6903(27) (emphasis added).
43. 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,483 (S.D. Ind. June 29, 1983).

Westinghouse sought indemnification from Monsanto Corp., which manufactured the PCBs and sold them to Westinghouse. The trial court held that "a manufacturer of polychlorinated biphenyls (PCBs) has no liability for indemnity or contribution" under CERCLA to a PCB user facing response cost liability.[44] The court rejected Westinghouse's claim and held that, in selling a "manufactured product" to Westinghouse, "Monsanto did not generate or dispose of any hazardous waste and did not contract for disposal of waste."[45]

Another case, *United States v. A & F Materials Co.*,[46] helps distinguish sales which cut off liability from those which constitute disposal. In *A & F Materials*, a generator sold spent caustic materials to a recycler for use in neutralizing acidic recycled oil. The court held that the generator could be liable for arranging for disposal when the caustic materials were released into the environment. The *A & F Materials* court distinguished *Westinghouse* because Monsanto had not generated waste but had manufactured PCBs.[47] The PCBs were then used by Westinghouse to manufacture capacitors. In contrast, the caustic materials were still waste products even if they were purchased. The court thereby distinguished sales of hazardous waste from sales of other hazardous substances which are manufactured products or constituents of manufactured products.

In distinguishing sales which create liability from those which do not, the *A & F Materials* court relied on EPA regulations that tie the definition of waste to a discard requirement as per the Solid Waste Disposal Act:[48]

> An "other waste material" is any solid, liquid, semi-solid or contained gaseous material resulting from industrial, commercial, mining, or agricultural operation, or from community activities which:
>
> (1) Is discarded or being accumulated, stored or physically, chemically or biologically treated prior to being discarded; or
>
> (2) Has served its original intended purpose and sometimes is discarded; or

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44. *Id.*
45. *Id.* at 20,484.
46. 582 F. Supp. 842 (S.D. Ill, 1984).
47. *Id.* at 845.
48. RCRA § 1004(27), 42 U.S.C. § 6903(27).

(3) Is a manufacturing or mining by-product and sometimes is discarded.[49]

Under these regulations, asbestos manufacturers are not liable for arranging for disposal unless their asbestos products, at very least, are "sometimes discarded."

The *Dayton* plaintiffs relied first on the argument that CERCLA imposes liability generally for release of hazardous *substances* and not just release of hazardous *waste;* alternatively, they argued that the particular asbestos fibers in question were in fact waste since they were *sometimes discarded* as waste.[50] This argument ignores the fact that the "waste" fibers were incorporated into a new product which was not itself "sometimes discarded." The fact that, outside their use in the product in question, the asbestos fibers were sometimes discarded is irrelevant. Since materials which might otherwise be discarded as waste are frequently included in manufacturing a new product, to hold otherwise would obliterate any distinction between manufacture and disposal. Courts prior to *Dayton* have hesitated to take this step.

The PCB-contaminated oil in *General Electric*[51] is also distinguishable from asbestos building products. The PCBs in General Electric's oil did nothing to contribute to the purpose for which they were purchased—dust control. The fact that PCBs were sold in the oil demonstrated a clear intent to discard or dispose. Had the oil not been sold, General Electric would simply have discarded it. In contrast, no indication exists that the asbestos fibers at issue in *Dayton* did not serve their purported purpose of providing insulation. Moreover, the oil in *General Electric* was in no sense manufactured for sale but was clearly a mere waste by-product of the manufacturing process.

In summary, section 107 does not automatically cut off liability for "arranging for disposal or treatment" when a party "disposes" of a hazardous substance be selling it. Nevertheless, the "disposal," waste," and "discard" requirements in CERCLA and in the Solid Waste Disposal Act provide limiting principles by which CERCLA liability may be legitimately narrowed to exclude the sale of manufactured products containing hazardous

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49. 40 C.F.R. § 261.2(b) (1985).

50. *Plaintiffs' Opposition, supra* note 11, at 26-28, *reprinted in* Hazardous Waste Litig. Rep. (Andrews) at 9,467 (July 21, 1986).

51. New York v. General Elec. Co., 592 F. Supp. 291 (N.D.N.Y. 1984).

substances from liability under section 107(a)(3)—"arranging for disposal or treatment."

IV. *Dayton* Liability Consequences

If *Dayton* is allowed to stand, its liability consequences will likely extend far beyond asbestos manufacturers. Given CERCLA's expansive liability provisions, *Dayton* has substantial consequences for other categories of potential defendants. In evaluating these consequences, two factors are critical. First, CERCLA imposes strict liability for release or threatened release of hazardous substances; and, second, CERCLA is very broad in identifying potentially liable parties.

A. Strict Liability

Although CERCLA does not mention culpability standards,[52] courts have consistently held that responsible parties are strictly liable for release or threatened release of hazardous substances.[53] Strict liability is mitigated somewhat by three enumerated defenses in section 107(b): 1) acts of God; 2) acts of war;[54] 3) acts of third parties with no employment, agency, or

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52. During the period when CERCLA was debated in Congress, substantial disagreement existed regarding culpability standards. For example, Senators Domenici, Bentsen and Baker of the Committee on Environment and Public Works argued that the Senate's provision for strict liability, in light of scientific uncertainty related to proving casualty, was unwarranted. They feared, for example, that strict liability would contribute to the reduction in availability of liability insurance and impact negatively on business decisions. S. Rep. No. 848, 96th Cong., 2d Sess. 119 (1980). In the House, at least one version of CERCLA created a negligence escape hatch by allowing a due care defense in selection of a contractor to dispose of hazardous waste. Congressman Stockman argued that strict liability applied retroactively is "a terrible distortion of . . . notions of justice or equity . . . ." 126 Cong. Rec. 26,786 (1980).

53. CERCLA's silence regarding the standard of culpability initially gave rise to differing views regarding the extent to which it imposes strict liability. Early writers disagreed over whether strict liability applied in all cases. For example, one observer noted, "Imposing strict liability upon parties who have not engaged in substantial and purposeful hazardous waste activity is not compelled by express statutory terms. Moreover, such imposition is not consistent with the congressional goals evidenced by the compromise nature of Superfund." Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund,* 57 Notre Dame Law. 260, 276 n.124 (1982). In commenting on the compromise bill, Senator Randolph noted that "[w]e have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act . . . . " 126 Cong. Rec. 30,932 (1980). Courts have consistently interpreted CERCLA to impose strict liability on each of the various categories of defendants. See, e.g., United States v. South Carolina Recycling and Disposal, Inc., 14 ELR 20272, 20274 (D.S.C. 1984).

54. CERCLA § 107(b), 42 U.S.C. § 9607(b).

contractual relationships with defendant, (except only under narrowly drawn circumstances).[55]

B. Potential CERCLA Defendants under Dayton

CERCLA section 107 identifies four categories of defendants upon which strict liability is imposed for release or threatened release of a hazardous substance into the environment: (1) owners and operators of facilities from which a release or threatened release occurs, (2) owners or operators of any facility at the time of disposal, (3) any person who arranged for disposal of hazardous substances at the facility, and (4) transporters of hazardous substances to the facility for disposal.[56] Owners or operators of facilities, including buildings, may be liable

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55. CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3). However, contractual arrangements with common carriers may be exempt. CERCLA § 107 (b)(3), 42 U.S.C. § 9607 (b)(3).

56. CERCLA § 107(a), 42 U.S.C. § 9607(a). The relevant provisions read:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
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> (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Id.

under either of two section 107(a) categories. Section 107(a)(1) creates liability for "the owner or operators of a vessel . . . or a facility" at the time the release or threatened release occurred.[57] The courts apply 107(a)(1) liability to any present owner of a facility even though he was neither the owner at the time of disposal nor caused the presence or release of the hazardous substance.[58] Hence, under *Dayton* present owners of buildings containing asbestos construction materials are potentially liable for CERCLA response costs.

Section 107(a)(2) establishes liability for "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."[59] If the *Dayton* view—that disposal includes selling asbestos containing materials for building construction—prevails, then the owner of such a building at the time the asbestos materials were installed is potentially liable even if he subsequently sold the building.

An owner or operator at the time of the release can include "an owning stockholder who manages the corporation." Hence, a managing shareholder may be personally liable as an "owner or operator".[60] Thus, although the act itself excludes from the definition of "owner or operator" one who merely owns stock without actually participating in management, building shareholders who participate in management are "owners or operators." However, employees who do not participate in management would probably not be liable as section 107(b)(2) owners or operators. Hence, liability under *Dayton* extends to the managing shareholders of the owner of the building at the time of installation of the asbestos construction materials.

Liability issues do not end with building owners. If the sale of asbestos products for purposes of building construction is a

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57. CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1).

58. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d. Cir. 1985).

59. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2); *Shore Realty*, 759 F.2d at 1044. However, past owners at times other than disposal are apparently not liable. In Cadillac Fairview/ Cal., Inc. v. Dow Chem. Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20376 (C.D. Cal. March 5, 1984), plaintiff, current owner of a hazardous waste disposal site, attempted to recover cleanup costs from a previous owner. However, the previous owner asserted that it owned the site only after and not "at the time" of disposal. The court held "that past owners of land upon which hazardous wastes have been disposed who neither received or disposed of the wastes are not liable for damages under CERCLA section 107." *Id.* at 20377.

60. 759 F.2d at 1052.

disposal under section 107(a), other parties are implicated in the chain of potential liability. For example, the construction company, indeed the individual construction worker, may be liable as a party who transported the asbestos building materials to the facility under section 107(a)(4). Construction companies might also be liable under section 107(a)(3) for having arranged for "disposal" by having its workers install the asbestos products. Intermediaries such as retailers also may be liable under section 107(a)(3) for arranging for disposal or treatment or under section 107(a)(4) as transporters. Moreover, nothing exists to limit *Dayton*'s reach to the asbestos industry. Under this decision, and excepting consumer products, any industries producing manufactured products, constituents of which include hazardous substances, are potentially liable.

V. Conclusion

In holding that plaintiffs could, under CERCLA, recover from asbestos manufacturers the costs of removing asbestos building materials from school buildings, the *Dayton* court threatens to expand liability far beyond Congress's original intentions. Not only asbestos manufacturers, but also transporters, construction companies, retailers and building owners may be subjected to CERCLA liability under this decision. These absurd liability consequences can be avoided by careful attention to the interplay between CERCLA and the Solid Waste Disposal Act which, taken together, premise liability for "arranging for" liability on a disposal transaction. The existence of an act of disposal, in turn, depends on whether the material disposed of is normally discarded. In making that distinction, it is also essential that courts focus on the manufactured product itself and not on its material constituents in applying the "sometimes discarded" criteria. The discard requirement has been used previously to distinguish a sale intended for disposal, for which liability attaches, and a sale of manufactured products, for which no liability attaches. Application of that same distinction to *Dayton* yields the conclusion that the trial court in *Dayton* interpreted CERCLA liability provisions more broadly than the statute allows.

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