

Article

**Shipper Liability for Hazardous Materials Incidents
During Transportation and the Need for a
Legislative Solution**

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INTRODUCTION

Early in the morning of January 6, 2005, two freight trains collided in the small town of Graniteville, South Carolina.² A tank car carrying 90 tons of chlorine ruptured and released a cloud of poisonous chlorine gas killing nine people.³ The rupture caused over 5,000 citizens to evacuate for several days and 250 people sought medical treatment for the effects of chlorine inhalation.⁴

All ensuing lawsuits named the railroad—Norfolk Southern Railway Company (NS)—as the lead defendant, of course.⁵ But some suits also named the owner and manufacturer of the involved tank cars (Union Tank Car Company); the lessee of the cars (Olin Corporation); the shipper of the product (also Olin); and the intended receiver of the chlorine (Rhodia, Inc).⁶ The primary litigation was a class action lawsuit against NS, alleging a cause of action for simple negligence.⁷ Some plaintiffs attempted to bring similar causes of action against the non-railroad defend-

2. *Collision of Norfolk Southern Freight Train 192 With Standing Norfolk Southern Local Train P22 With Subsequent Hazardous Materials Release*, NAT’L TRANSP. SAFETY BD. (Nov. 29, 2005) <http://www.nts.gov/investigations/AccidentReports/Pages/RAR0504.aspx> [hereinafter *Collision*].

3. Chlorine is classified by the U.S. Department of Transportation as a “poison-by-inhalation hazard” (PIH). PIH materials, and Toxic-by-Inhalation Hazards (TIHs) are identified in the Hazardous Materials Regulations. See Purpose and Use of Hazardous Materials Table, 49 C.F.R. § 172.101 (2014); see also Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, 73 Fed. Reg. 20752-01, 20757 (Apr. 16, 2008) (to be codified at 49 C.F.R. §§ 172, 174) (using TIH and PIH interchangeably); ASS’N. OF AM. R.R.S., CIRCULAR OT-55-N, RECOMMENDED RAILROAD OPERATING PRACTICES FOR TRANSPORTATION OF HAZARDOUS MATERIALS (2013).

4. *Collision*, *supra* note 2.

5. *Baker v. Norfolk S. Ry. Co.*, No. 1:07-0153-MBS, 2007 WL 2156696 (D.S.C. July 26, 2007); *Self v. Norfolk S. Corp.*, No. 1:06-1730-MBS, 2007 WL 540373 (D.S.C. Feb. 15, 2007); *Lanier v. Norfolk S. Corp.*, No. 1:05-3476-MBS, 2006 WL 1878984, at *1 (D.S.C. July 6, 2006).

6. Complaint at 1, *DeLoach v. Norfolk S. Corp.*, No. 1:05-864-24, 2005 WL 918688 (D.S.C. Mar. 21, 2005) (bringing suit against NS, Olin, Rhodia, and Union Tank Car); Complaint at 1-2, *Wood v. Norfolk S. Corp.*, No. 1:06-CV-01748, 2006 WL 5378196 (D.S.C. June 9, 2006) (bringing suit against NS, Olin, and Union Tank Car, as well as certain individuals including the engineer, conductor, and brake man of the train); Complaint at 1-3, *Myrick v. Norfolk S. Corp.*, No. 1:05-CV-1108-MBS, 2005 WL 3673423 (D.S.C. Apr. 12, 2005) (bringing suit against NS, Olin, Union Tank Car Company, and Rhodia).

7. *Curtis v. Norfolk S. Ry. Co.*, No. 1:05-115-MBS, 2010 WL 2662269, at *1 (D.S.C. June 21, 2010) (class action suit against NS arising from the Norfolk Southern derailment which resulted in a chlorine release in Graniteville, SC).

ants.⁸ As to negligence against Olin, Union Tank Car, and Rhodia, the Complaints asserted that these defendants breached their duty of care by, inter alia, failure to “properly design the pressurized tanks that contained the liquid chlorine, failure to ensure safe transport of the chlorine,” failure to safely maintain or inspect the tank cars, and failure to respond effectively to the emergency.⁹ Plaintiffs also asserted claims of strict liability under the theory that chlorine is an ultrahazardous commodity.¹⁰ As such, plaintiffs argued that there was a heightened standard of care because of the defendants’ involvement in the “manufacture, distribution, storage, ownership, sale and/or transportation” of this ultrahazardous commodity.¹¹ Suits against Olin, Union Tank Car, and Rhodia settled.¹² NS ultimately settled out of court with the remaining plaintiffs.¹³

The risk of another Graniteville-style tragedy is a real one. Toxic-by-inhalation Hazard (TIH) products carry unique characteristics that make them exceedingly dangerous.¹⁴ Chlorine and anhydrous ammonia make up the majority of all carloads of TIH transported by rail every year.¹⁵ These products are shipped as compressed gasses and are under high pressure.¹⁶ When released, they vent rapidly from a car and form a cloud that quickly expands well beyond the accident site.¹⁷ No fire or explosion is necessary to form the cloud.¹⁸ Both products are highly reactive¹⁹ and, when inhaled, chlorine reacts violently with the lining of the lungs, releasing fluid that rapidly accumulates.²⁰ Victims literally drown in the “air.”²¹ These characteristics make TIH materials among the most dan-

8. *Self*, 2007 WL 540373, at *1 (alleging that employees of NS acted negligently in failing to reset a switching device).

9. *Myrick*, 2005 WL 3673423, ¶ 36.

10. *Id.* ¶¶ 41, 50.

11. *Id.* ¶ 59.

12. See Stipulation of Dismissal with Prejudice, *Myrick v. Norfolk S. Corp.*, No. 1:05-CV-1108 (D.S.C. June 28, 2006); see also Stipulation of Dismissal with Prejudice, *Wood v. Norfolk S. Corp.*, No. 1:06-01748-24, 2006 WL 5378196 (D.S.C. Aug. 29, 2007), 2007 WL 4902211; Consent Order, *DeLoach v. Norfolk S. Corp.*, No. 1:05-CV-00864 (D.S.C. Dec. 22, 2005).

13. *Curtis*, 2010 WL 2662269, at *1.

14. See Lewis M. Branscomb et al., *Rail Transportation of Toxic Inhalation Hazards: Policy Responses to the Safety and Security Externality*, BELFER CTR. FOR SCI. & INT’L AFFAIRS 2 (Feb. 2010) (Belfer Center Discussion Paper No. 2010-01, Harvard Kennedy School), <http://belfercenter.ksg.harvard.edu/files/Rail-Transportation-of-Toxic-Inhalation-Hazards-Final.pdf>.

15. See *id.* at 3 n.2 (anhydrous ammonia, which is commonly used in agricultural applications, is classified as a TIH).

16. *Id.* at 9.

17. See *id.* at 16.

18. *Id.*

19. *Id.* at 2.

20. *Id.* at 9 (“If inhaled at very high concentrations, chlorine breaks down in the lungs to form hydrochloric acid that burns lung tissue, causing pulmonary edema and essentially causing drowning as liquid floods the lungs.”).

21. See *id.*

gerous of commodities the law requires railroads to handle.²²

The significant liability risks for railroads inherent in the transportation of hazardous materials (hazmats)²³ and TIH materials are well known.²⁴ However, the liability risks hazmat and TIH *shippers* can face for a release of toxic chemicals during the transportation of those products has been less widely discussed. This may be because, historically, plaintiffs in toxic release cases usually file suit against rail carriers, rather than pursuing shippers for damages.²⁵ Certainly, past suits against shippers have been less publicized.

But this historical pattern may be changing. In July 2013, an unattended Montreal Maine and Atlantic (MMA) train carrying 72 cars of crude oil derailed in Lac-Mégantic, Canada.²⁶ Multiple tank cars ruptured and exploded, killing 47 persons²⁷ and affecting more than 125 businesses.²⁸ In the wake of this tragedy, a number of class action lawsuits were filed, both in Canada and in the United States.²⁹

22. *Id.* at 2.

23. 49 C.F.R. § 171.8 (2014) (hazardous material defined as “a substance or material that the Secretary of Transportation has determined is capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and has designated as hazardous under section 5103 of Federal hazardous materials transportation law (49 U.S.C. § 5103).”); *see also* 49 C.F.R. §§ 172.101, 173.501, 173.503 (2014) (the term “hazardous material” includes hazardous substances, hazardous wastes, marine pollutants, elevated temperature materials, and materials designated as hazardous in the Hazardous Materials Table).

24. *See, e.g.*, Zachary T. Abel, *Getting Hazmat Transportation Back on Track: The Need for Hazmat Liability Reform for Rail Carriers*, 35 WM. & MARY ENV'T L. & POL'Y REV. 973, 981 (2011); Stephen J. Foland, *Common Carriage and Liability in the Rail Transportation of Toxic Inhalation Hazard Materials*, 8 AVE MARIA L. REV. 197, 198-99 (2009). For an exception to this rule that recognizes that shippers also face a significant liability risk from hazmat releases during transportation, *see* Ann H. Whitmore, Thomas E. Schick, & Kenneth M. Kastner, *Liability from Hazardous Materials Transportation: Are You Protected?*, 20 ACCA DOCKET 90, 91-92 (2002).

25. For example, TIH releases after incidents in Macdona, Texas, and Scottsbluff, Nebraska, led to litigation against railroad and rail employee defendants, but it does not appear that other parties were named in these suits. *See In re Union Pac. R.R. Co.*, 294 S.W.3d 589 (Tex. 2009) (suit against UP following the derailment at Macdona, Texas, which resulted in a chlorine gas release); *In re Derailment Cases*, 416 F.3d 787 (8th Cir. 2005) (suit against BNSF and Montana Rail Link arising from the derailment at Scottsbluff, Nebraska, which resulted in the release of benzene and other hazardous chemicals).

26. *See* Robert Johnston, *Rail Safety Advisory Letter – 12/13*, TRANSP. SAFETY BD. OF CAN. (Sept. 11, 2013), <http://www.tsb.gc.ca/eng/medias-media/sur-safe/letter/rail/2013/r13d0054/r13d0054-617-12-13.asp>; *see also* *Railway Investigation R13D0054*, TRANSP. SAFETY BD. OF CAN., <http://www.tsb.gc.ca/eng/enquetes-investigations/rail/2013/R13D0054/R13D0054.asp> (last updated Jan. 20, 2015).

27. *See id.*

28. Transport Canada, *Derailment at Lac-Mégantic, Quebec, Presentation to the Railroad Safety Advisory Committee*, FED. RAILROAD ADMIN., RAILROAD SAFETY ADVISORY COMMITTEE (RSAC) (Aug. 29, 2013), <https://rsac.fra.dot.gov/meetings/20130829.php> (follow “Transport Canada Presentation to RSAC on Derailment at Lac-Mégantic, Quebec” hyperlink).

29. *See* Complaint at 91, *Montreal, Maine & Atlantic Ry., Ltd. v. World Fuel Services Corp.*

Several of those actions seek damages from parties that include crude oil shippers, tank car manufacturers, and lessees.³⁰ Specifically, some Lac-Mégantic complaints allege that oil shippers and distributors owed a duty to the public-at-large to operate their businesses in a safe manner and to take “reasonable measures to avoid exposing the public to the dangers associated with the transport of crude oil to refineries.”³¹ The complaints allege these defendants breached this duty by using allegedly unsafe tank cars and a railroad with an allegedly poor safety record.³²

It may be that the Lac-Mégantic plaintiffs’ counsel sought to bring shippers into the lawsuit because the railroad involved in the accident was a short line with limited funds. Indeed, MMA and its parent filed for bankruptcy in both the United States and Canada on August 7, 2013, only one month after the July 6 tragedy, and just a few weeks after plaintiffs filed the first round of complaints.³³ With insurance limits of \$25 million, MMA’s Chairman acknowledged in an issued statement announcing the bankruptcy, “[i]t has become apparent that the obligations of both companies now exceed the value of their assets, including prospective insurance recoveries, as a direct result of the tragic derailment.”³⁴ The small railroad was not alone as a small-sized defendant.

While some of the non-railroad defendants are substantial commercial enterprises, others are considerably smaller. One defendant, World Fuel Services (whose subsidiary is Western Petroleum Company, the apparent owner/seller of the crude) said if it were held liable, there was “no assurance that our insurance will be adequate to cover any liabilities that may be incurred as a result of this incident.”³⁵

Shippers of freight by rail might profess surprise to learn they may be named as a defendant in the event of a rail accident, but as the examples above show, there is considerable precedent for that outcome. In particular, the Lac-Mégantic litigation should put all shippers on notice that they are at risk of liability from hazmat releases. Most of these terri-

(*In re* Montreal, Maine & Atlantic Ry., Ltd.), No. 13-10670, 2014 WL 667989 (Bankr. D. Me. Jan. 30, 2014).

30. *Id.*

31. Complaint ¶ 107, *Roy v. Montreal, Maine & Atlantic Ry., Inc.*, No. 2013-L-008272, 2013 WL 3784162 (Ill. Cir. Ct. July 22, 2013) [hereinafter *Roy* Complaint]. See generally *Gagne v. Rail World, Inc.*, No: 450-06-00001-135 (Can. Que. Sup. Ct.).

32. *Id.* ¶ 108.

33. Press Release, Montreal, Maine & Atlantic Files for Bankruptcy In Canada & the U.S. (Aug. 7, 2013, 2:00 PM) (on file with author), available at https://archive.org/stream/748835-mma-press-release-8-7-2013-english/748835-mma-press-release-8-7-2013-english_djvu.txt.

34. *Id.*

35. Adam Kovac & Riley Sparks, *Who’s liable for the Lac-Mégantic disaster?*, MONTREAL GAZETTE (Aug. 10, 2013), <http://www.montrealgazette.com/news/liable+M%C3%A9gantic+disaster/8775349/story.html>.

ble accidents have occurred on major railroad companies with “deep pockets” and substantial (although not unlimited) insurance. The MMA litigation now presents an entirely different set of litigation dynamics: the railroad itself is, relatively speaking, judgment proof.

Comparatively, some of the defendants in the MMA litigation have significant resources.³⁶ Under those circumstances, plaintiffs’ counsel can be fully expected to pursue these non-carrier defendants with a vigor not seen in prior incidents.

In prior incidents, the substantial legal damages did not exceed the principal defendant’s ability to pay the damages through insurance and its own assets. Shippers and others did not face the full brunt of the litigation risk.³⁷ That will not always be the case. The defendant railroad may be too small or the damages may exceed even the resources and insurance of a Fortune 500 railroad company.³⁸ Railroads have raised concerns about the inherent risks of transporting hazmat and TIH shipments.³⁹ Shippers, however, should not turn a blind eye. As this article will discuss, they are not immune from the risk of significant liability from a hazmat or TIH release during transportation.

There is a pressing need for railroads and chemical shippers to recognize the transportation of TIH and hazmat creates substantial liability risks for both groups.⁴⁰ This shared recognition should create the basis for both groups to work together to eliminate all unnecessary risks and craft a rational regime for liability.

36. For example, defendant tank car manufacturers and World Fuels have multi-billion dollar market caps. See, e.g., *World Fuel Services Corp*, BLOOMBERG (Feb. 17, 2015, 8:00 PM), <http://www.bloomberg.com/quote/INT:US> (reporting a \$3.9 billion market cap for World Fuels); *Trinity Industries Inc*, BLOOMBERG (Feb. 17, 2015, 8:00 PM), <http://www.bloomberg.com/quote/TRN:US> (reporting a \$4.7 billion market cap for Trinity Industries, a defendant in the Canadian class action).

37. See Abel, *supra* note 24, at 974.

38. See Betsy Morris, *Fiery Oil-Train Accidents Raise Railroad Insurance Worries*, WALL ST. J. (Jan. 8, 2014, 11:00 PM), <http://online.wsj.com/news/articles/SB10001424052702304773104579268871635384130> (discussing recent accidents involving railcars carrying crude oil and raising concerns about the ability of railroads to obtain sufficient insurance coverage to protect against catastrophic accidents).

39. Jeff Stagl, *Railroads, Chemical Shippers Home in on Haz-Mat Safety and Security Concerns, Hash Out Liability Differences*, PROGRESSIVE RAILROADING (Sept. 2008), http://www.progressiverailroading.com/csx_transportation/article/Railroads-Chemical-Shippers-Home-in-on-HazMat-Safety-and-Security-Concerns-Hash-Out-Liability-Differences—17896.

40. Studies of this issue from the shipper perspective have similarly concluded that railroads and shippers need to work together to resolve the hazmat liability risk problem. See Michael F. McBride, *Is the Price-Anderson Act An Appropriate Model for The Railroads?*, 76 J. TRANSP. L., LOGISTICS & POL’Y 93, 100 (2009) (“The risks faced by the railroad industry in transporting hazardous materials are of concern to all involved parties, including shippers, rail labor, and the potentially affected communities. A legislative solution that addresses the problem of liability for accident exposure that cannot be insured is a matter that should be addressed promptly.”).

Section I of this Article discusses some of the major theories under which a shipper could be held liable for hazmat release in transit and defenses to those theories. Little actual law exists in the area of shipper responsibility for these kinds of incidents, due to the simple reason that most cases settle. Nonetheless, some cases have progressed to the point at which Courts have had occasion to decide some of these liability issues, and a survey of those cases and their liability theories is highly instructive. Section II discusses the need for a liability limitation regime that recognizes the shared risks and responsibilities of shippers and railroads.

I. THEORIES OF SHIPPER LIABILITY

Railroads undoubtedly bear the brunt of the risk of liability for accidents during the transport of hazmat and TIH chemicals.⁴¹ However, as will be discussed, shippers clearly are not immune from liability for a hazmat release during transportation. On the contrary, shippers have been found liable for hazmat releases under several negligence theories.⁴² Plaintiffs have been less successful with asserting strict liability theories against railroads and shippers.⁴³ But, it is not inconceivable that some courts could be convinced that the very act of introducing TIH or other highly hazardous commodities into the stream of transportation is an ultrahazardous activity, warranting strict liability. In short, the problem of massive potential liability for a toxic release in a rail transportation accident is not just a railroad problem, but also a problem for the entire transportation community.

A. NEGLIGENCE THEORIES

Shippers face potential liability for any toxic release where a plaintiff could claim the shipper breached some duty of care contributing to the release. Some of the most prominent theories of negligence asserted against shippers are: (1) negligent failure to warn the railroad of the dangerous characteristics of the commodity being shipped;⁴⁴ (2) improper or negligent loading;⁴⁵ and (3) a failure to comply with federal hazmat regu-

41. Abel, *supra* note 24, at 974 (railroads bear this liability due to their inability to refuse to transport hazardous materials under the common carrier doctrine).

42. See *infra* notes 46-48 and accompanying text.

43. *But see* Chavez v. S. Pac. Transp. Co., 413 F. Supp. 1203, 1208-14 (E.D. Cal. 1976) (imposing strict liability on a carrier on the premise that transporting hazardous materials constitutes an ultrahazardous activity and noting that California public policy justifies the imposition of strict liability so as to distribute the losses amongst the public); Nat'l Steel Serv. Ctr., Inc. v. Gibbons, 319 N.W.2d 269, 273 (Ia. 1982) (imposing strict liability on a carrier).

44. See Symington v. Great W. Trucking Co., Inc., 668 F. Supp. 1278, 1284 (S.D. Ia. 1987); *In re M/V DG Harmony*, 533 F.3d 83, 94 (2d Cir. 2008).

45. See Key v. Liquid Energy Corp., 906 F.2d 500, 502 (10th Cir. 1990); *Symington*, 668 F.

lations.⁴⁶ Railroads recently asserted negligence theories against third-party contractors for failure to properly inspect and repair defective rail-car parts.⁴⁷ In addition, the recent Lac-Mégantic litigation involves several novel theories of liability, including allegedly negligent selection of unsuitable tank cars and the selection of an allegedly unsafe rail carrier.⁴⁸

1. *Negligent Failure to Warn*

Some courts have found that shippers can be liable for accidents when the shipper improperly labeled or identified the commodity tendered for transport.⁴⁹ These courts reason that because shippers are more familiar with the properties of the chemicals they manufacture and ship, they are better positioned to provide carriers with the information needed to safely transport the chemicals.⁵⁰

In *Symington v. Great Western Trucking Co., Inc.*, the court found the shipper liable for improper loading of a toxic chemical (Tonox 60/40) and failure to warn the carrier of the harmful nature of the hazardous material.⁵¹ This case stemmed from a trucking accident where hazardous materials leaked from the rear of a truck trailer.⁵² The court determined the truck driver's lack of knowledge about the proper handling of the substance he was carrying caused the release.⁵³ The shipper negligently failed to properly warn the driver of the "harmful propensities" of the chemical and "of any reasonably foreseeable danger from transporting it."⁵⁴ The bill of lading did not include any information regarding possible damage to the environment or the truck.⁵⁵ The shipper also failed to provide the driver with a Material Safety Data Sheet that would inform the driver more fully regarding the dangerous qualities of the chemical.⁵⁶ The totality of the shipper's failures resulted in its liability.⁵⁷ In this case, the carrier was jointly liable because the driver acted negligently follow-

Supp. at 1284; *Union Pacific R.R. Co. v. Forexport, Inc.*, No. CIV-99-917-KI, 1999 WL 1206758, at *1 (D. Or. Dec. 14, 1999).

46. See *Poliskie Line Oceaniczne v. Hooker Chem. Corp.*, 499 F. Supp. 94, 97 (S.D.N.Y. 1980).

47. Amended Complaint and Demand for Jury Trial at 5-6, *Union Pac. R.R. Co. v. Progress Rail Servs. Corp.*, No. 8:10-CV-38, 2010 WL 5758850 (D. Neb. Sept. 24, 2010) [hereinafter *Union Pac. Complaint*].

48. *Roy Complaint*, *supra* note 31, ¶ 108.

49. See *Symington*, 668 F. Supp. at 1282-83.

50. See *In re M/V DG Harmony*, 533 F.3d 83, 95 (2d Cir. 2008).

51. *Symington*, 668 F. Supp. at 1283-84.

52. *Id.* at 1280.

53. *Id.* at 1284-85.

54. *Id.* at 1284.

55. *Id.*

56. *Id.* at 1280.

57. *Id.* at 1285.

ing the discovery of the leaking cargo.⁵⁸

The Second Circuit recently reiterated the principle that shippers are better positioned to be familiar with the characteristics of the goods they ship, and are responsible for consequences of their failure to properly warn carriers about those dangerous characteristics.⁵⁹ In *In re M/V DG Harmony*, the Second Circuit upheld a finding that the shipper, PPG Industries, breached its duty to warn a carrier of the danger of the shipped chemical—an industrial bactericide known as calhypo.⁶⁰ This suit arose out of a shipping accident involving an explosion on the M/V DG Harmony off the northern coast of Brazil.⁶¹ The explosion resulted in a fire that destroyed the vessel and its cargo.⁶² The cause of the fire was determined to be the calhypo.⁶³ Calhypo is unstable at room temperature and prone to generate heat that can result in explosion, particularly if it is improperly packaged and tightly enclosed.⁶⁴ The District Court found PPG loaded the calhypo onto pallets in such a manner that made it difficult for heat to dissipate.⁶⁵

In considering claims that PPG was negligent for failure to warn the carrier about dangerous goods, the *M/V DG Harmony* court noted that shippers are “expected to have a greater access to and familiarity with goods” than carriers.⁶⁶ Courts “generally will not charge [carriers] with encyclopedic knowledge beyond the shipper’s attestations.”⁶⁷ “[W]hen receiving a cargo like calhypo, the dangerousness of which is not open and obvious, a carrier may rely on the shipper’s attestations as to the cargo’s characteristics.”⁶⁸ The Second Circuit affirmed the district court’s findings that PPG had a duty to warn the carrier about the dangerous nature of the chemicals and that it breached that duty by failing to provide adequate warnings about the properties of the calhypo as it was packaged in this particular instance.⁶⁹

58. *Id.*

59. *In re M/V DG Harmony*, 533 F.3d 83, 95 (2d Cir. 2008).

60. *Id.*

61. *Id.* at 87.

62. *Id.*

63. *Id.* at 96.

64. *Id.* at 87. As the court explained, calhypo is an “unstable substance that continually decomposes at room temperature. It is an oxidizer, which means that it releases oxygen in most reactions. Most importantly, however, calhypo is prone to ‘thermal runaway,’ a phenomenon in which the heat naturally produced by the calhypo serves to heat the calhypo further, thus causing it, in turn, to generate even more heat.”

65. *Id.* at 88.

66. *Id.* at 95.

67. *Id.*

68. *Id.*

69. *Id.* at 97. The Second Circuit remanded the case and ordered the district court to determine whether there was a causal link between the duty to warn and the explosion. Also, the

Where shippers have particular knowledge about the goods offered for transportation they have a duty to inform the carriers about the characteristics of the goods tendered. Shippers will be held liable for accidents that arise following a failure to adequately communicate the dangers of the shipments to the carriers.

2. *Negligent Loading*

A duty to warn carriers of the properties of the chemical shipped is not the only theory of liability courts apply to shippers. Shippers have been held liable for improperly loading chemicals for shipping.⁷⁰ In *Key v. Liquid Energy Corporation*, the Tenth Circuit upheld a jury verdict that found a shipper liable for improperly loading flammable gas into an inappropriate tanker.⁷¹ The suit arose from a tanker explosion that injured a truck driver and an employee of the receiving petroleum company.⁷² The driver and employee sought to test the transported product, butane condensate, per directives from Liquid Energy.⁷³ One of the trailers remained pressurized before the testing and, when opened, released condensate in a 15-foot-high column resulting in an explosion.⁷⁴

The court determined liquids loaded by the shipper “were rated at 45 PSI at 100 degrees F, while the tanker was rated only for materials of 16 PSI at 100 degrees F.”⁷⁵ While it is possible the driver’s improper venting of the tanker was to blame for the explosion, the court determined that the jury was “entitled to conclude that the proximate cause of the explosion was in fact the negligent act of Liquid Energy in loading the trailer with a more highly combustible material than it was designed to carry.”⁷⁶ The court also noted, “just as the transporter has a duty to provide the appropriate equipment for the job of transportation, the offeror has a duty to conform to standards of due care in offering or transferring the material in question to the transporter.”⁷⁷

district court was to determine whether a proper warning regarding the properties of the chemical would have altered the carrier’s stowage methodology and prevented the harm.

70. See *Key v. Liquid Energy Corp.*, 906 F.2d 500, 505 (10th Cir. 1990).

71. *Id.* at 502.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 505.

76. *Id.*

77. *Id.* at 506 (noting that the hazardous materials regulations apply to drivers of transport trucks, and not to the general public alone). Historically, railroad shippers furnish tank cars due to their specialized nature. The right, *vel non*, of a railroad to require the use of more robust tank cars than proffered by shippers is currently being litigated. See Complaint at *9-10, *Chlorine Inst., Inc. v. Soo Line R.R.*, No. 0:14-cv-01029 (D. Minn. Apr. 10, 2014) (challenging CP Tariff 8, Item 55, which became effective April 14, 2014, and requires that any shipper tendering Toxic-by-Inhalation materials for shipment must tender them in a tank car that meets heightened

Similarly, in *Symington*, discussed above, the court found the shipper liable for improper loading and for failure to warn the carrier of the harmful nature of the hazardous material.⁷⁸ The court noted, “while responsibility for obviously improper loading rests on the carrier, the shipper is liable for loading defects which are latent and concealed.”⁷⁹ Upon receipt of the bill of lading, it was reasonable for the driver to infer that the truck was properly loaded.⁸⁰ The defective loading was a latent defect that was the shipper’s responsibility.⁸¹

Corporations must, by definition, act through their employees.⁸² Also, corporations are generally held responsible for the acts of their employees.⁸³ A review of some liability theories urged by plaintiffs makes it apparent that errors by front line, blue collar plant employees carry greater potential for imposing liability on shippers of highly hazardous materials than may be widely recognized.

Shippers have a duty to adequately pack and label cargo.⁸⁴ Without evidence of improperly packed or labeled cargo, courts have been reticent to impose liability on shippers, particularly where the shipper had no control over the shipment at the time of the breach.⁸⁵ For example, in *Hawkins v. Evans Cooperage Co., Inc.*,⁸⁶ an insurance company sought contribution from its insured shipper, Olin Chemical Corporation, following the release of toluene diisocyanate (TDI)⁸⁷ off the back of a truck during transport.⁸⁸ Evidently, the trucking company was negligent in using improper trucks and bracing techniques to secure the drums.⁸⁹ However, because Olin exercised no “control over, or impliedly authorized, the method of transportation of the TDI” it had “no duty to ensure, through instructions or supervision, that the independent contractor per-

AAR standards, including a requirement that they be built of normalized steel). The Court recently dismissed this complaint without prejudice in favor of the primary jurisdiction of the STB. See *Chlorine Inst., Inc. v. Soo Line R.R.*, No. 14-CV-1029, 2014 WL 2195180, at *2-4, *7 (May 27, 2014).

78. *Symington v. Great W. Trucking Co., Inc.*, 668 F. Supp. 1278, 1284 (S.D. Ia. 1987).

79. *Id.* at 1282.

80. *Id.* at 1283.

81. *Id.* at 1282.

82. See *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001).

83. *Id.*

84. See, e.g., *Hawkins v. Evans Cooperage Co. Inc.*, 766 F.2d 904, 906, 909 (5th Cir. 1985); *Exquisite Form Indus., Inc. v. Transportes Ragat, S.A. de C.V.*, 585 F. Supp. 473, 476 (S.D. Tex. 1984) (“a shipper of goods in interstate commerce is under a duty to exercise adequate care in packaging and labeling its cargo”).

85. *Id.*

86. *Id.*

87. *Id.* at 906. The court explained that TDI is a hazardous substance used in the manufacture of polyurethane foam, and it is “used primarily to stuff chairs and other furniture.”

88. *Id.*

89. *Id.* at 907.

form[ed] its obligations in a reasonably safe manner.”⁹⁰

Similarly, where a shipper merely provides instructions or suggestions for off-loading of hazardous materials that are not followed by the carrier, the shipper does not assume a duty of care with respect to off-loading procedures.⁹¹ In *E.S. Robbins Corp. v. Eastman Chemical Co.*, the court held the shipper assumed no duty of care with regard to the transportation and off-loading of a chemical product where the chemical spill occurred during off-loading from a truck into storage tanks by the trucking company transporting the product.⁹² The shipper did not have control over the product at the time of unloading and “the mere providing of instructions and suggestions does not result in an assumption by [the shipper] of a duty to off-load the material or to do so in any particular manner.”⁹³

In the rail context, Union Pacific Railroad Company (UP) attempted to convince a court to find a shipper of non-hazardous materials liable for breach of its duty of care following a derailment in Oregon.⁹⁴ The train carried both lumber products and hazardous materials, among other commodities, at the time of derailment.⁹⁵ The derailed cars released a hazardous commodity, toluene.⁹⁶ UP brought suit against the shipper of lumber products under the theory the shipper improperly loaded the lumber on the rail car.⁹⁷ UP alleged the improperly loaded lumber proximately caused the derailment.⁹⁸ The court never ruled on the merits, as the Canadian lumber shipper was dismissed from the suit for lack of personal jurisdiction.⁹⁹ Despite the end result, this suit is a good example of the potential liability shippers can face for toxic releases during rail transportation attributable to negligent loading.

3. *Negligence Per Se for Violating Hazardous Material Regulations*

Finally, plaintiffs could prove negligence under a negligence *per se* theory.¹⁰⁰ Courts have found shippers negligent *per se* for violations of

90. *Id.* at 908. The court noted that the situation might be different if the transportation of TDI were an ultrahazardous activity, but found that it was not an ultrahazardous activity under Louisiana law.

91. *See E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1492-93 (N.D. Ala. 1995).

92. *Id.*

93. *Id.* at 1492.

94. *See Union Pac. R.R. Co. v. Forexport, Inc.*, No. CIV-99-917-K1, 1999 WL 1206758, at *1 (D. Or. Dec. 14, 1999).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at *5.

100. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 14 (2010) (“An actor is

federal hazardous materials regulations.¹⁰¹ Carriers bear the brunt of the responsibilities imposed by DOT's Hazardous Materials Regulations (HMR), but shippers do not escape all regulation.¹⁰² For example, Part 173 of the HMR imposes upon shippers various duties, including proper labeling, packaging, and documenting of hazardous materials tendered for shipping.¹⁰³

In *Poliskie Line Oceaniczne v. Hooker Chemical Corp.*, the court imposed liability under Part 173 on the shipper for improperly loaded drums of sulphur dichloride onto a ship in violation of 49 C.F.R. § 173.1(B).¹⁰⁴ That section imposes a duty on "each person who offers hazardous materials for transportation to instruct each of his officers, agents, and employees having any responsibility for preparing hazardous materials for shipment as to applicable regulations in this subchapter."¹⁰⁵ The shipper was found negligent *per se* for violating the HMR by loading corrosive material improperly into the plaintiff's storage containers.¹⁰⁶

4. *Negligent Inspection by Third-Party Rail Services Providers*

In a twist on theories of negligence in rail accidents, both UP and BNSF recently brought independent suits against third-party rail services providers alleging negligent inspection and repair of rail parts.¹⁰⁷ In UP's case, the railroad claims that Progress Rail Services Corporation, a unit of Caterpillar Inc., negligently inspected a rail axle and failed to take reasonable care in removing corrosion pits from the axle during the repair.¹⁰⁸ According to UP, Progress Rail's negligence was the proximate cause of a derailment in DeWitt, Iowa, in July 2007.¹⁰⁹ Another derailment in January 2010 in Martin Bay, Nebraska, resulted in a similar com-

negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.").

101. See *Poliskie Line Oceaniczne v. Hooker Chem. Corp.*, 499 F. Supp. 94, 97 (S.D.N.Y. 1980).

102. See Hazardous Materials Regulation, 49 C.F.R. §§ 171-80 (2014).

103. See generally Shippers—General Requirements for Shipments and Packaging, 49 C.F.R. § 173 (2014).

104. *Poliskie*, 499 F. Supp. at 97.

105. *Id.* at 97.

106. *Id.* at 102; see *Key v. Liquid Energy Corp.*, 906 F.2d 500, 506 (10th Cir. 1990) (affirming jury verdict finding shipper negligent *per se* for loading pressurized butane condensate into a tanker that was not rated for that pressurized material).

107. See *Union Pac.* Complaint, *supra* note 49, at 3-4; Complaint ¶ 16, *BNSF Ry. Co. v. Progress Rail Servs. Corp.*, No. 3:13-cv-00080-RRE-KKK (D.N.D. Sept 24, 2013) [hereinafter *BNSF Complaint*].

108. *Union Pac.* Complaint, *supra* note 49, at 3-4.

109. *Id.* ¶¶ 12, 19.

plaint.¹¹⁰ These combined suits resulted in a jury verdict in favor of Progress Rail in June 2013.¹¹¹ The case was appealed to the Eighth Circuit, which affirmed the district court's judgment in February 2015.¹¹²

BNSF filed a similar lawsuit, also against Progress Rail, in the District of North Dakota in September 2013.¹¹³ The complaint alleges Progress Rail is liable under similar negligence theories asserted by UP, albeit the complaint lays out the negligence theory in much more detail.¹¹⁴ In this case, the resulting derailment occurred on December 12, 2010, in Jamestown, North Dakota.¹¹⁵

Defense of these cases relies primarily on preemption claims.¹¹⁶ Progress Rail's motion to dismiss the BNSF matter asserts BNSF's complaint is preempted by Federal Railway Safety Act (FRSA) regulations promulgated by the FRA regarding axle inspection.¹¹⁷ This defense has succeeded in a similar case involving UP and Johnstown Axel Corporation, while state claims survived the initial dismissal.¹¹⁸ It remains to be seen whether carriers will be successful in pursuing third-party contractors for maintenance problems that can result in rail accidents.¹¹⁹ This line of cases makes clear that railroads are not going to sit back and absorb liability for derailments without at least attempting to share the liability for such accidents with other responsible parties in the chain of rail operations.

5. *The New Negligence Theories of the Lac-Mégantic Litigation*

The class action litigation in the wake of the Lac-Mégantic tragedy is still in a very early stage. It is worth noting that the plaintiffs alleged two relatively novel theories for asserting liability against the oil companies

110. The two complaints were subsequently combined. See *Union Pac. R.R. Co. v. Progress Rail Servs. Corp.*, No. 8:10-CV-38-LSC-FG, 2010 WL 3724792 (D. Neb. Sept. 17, 2010).

111. *Union Pac. R.R. Co. v. Progress Rail Servs. Corp.*, No. 8:10CV38, 2013 WL 3858003 (D. Neb. June 27, 2013).

112. *Union Pac. R.R. Co. v. Progress Rail Servs. Corp.*, Nos. 13-2658, 13-2797, 2015 WL 570300, at *1 (8th Cir. 2015).

113. *BNSF Complaint*, *supra* note 109, ¶ 16.

114. *Id.* (detailing 16 different failures by Progress Rail that BNSF asserts constitute a breach of Progress Rail's duty to use reasonable care in refurbishing and returning an axle and wheel set into service).

115. *Id.* ¶ 10.

116. See Reply Brief in Support of Defendants Motion to Dismiss at 1, 3-5, *BNSF Ry. Co. v. Progress Rail Servs. Corp.*, No. 3:13-cv-00080 (D.N.D. Jan. 16, 2014).

117. *Id.*

118. See *Union Pac. R.R. Co. v. Johnstown Axel Corp.*, No. 4:07-CV-238 HEA, 2007 WL 1174845, at *4-5 (E.D. Mo. Apr. 20, 2007) (dismissing negligent inspection claims as preempted by the Federal Railroad Safety Act).

119. For a media perspective on this line of cases, see James R. Hagerty & Bob Tita, *Railcar Lawsuits Raise Safety Questions*, WALL ST. J. (Feb. 6, 2014, 12:38 AM), <http://www.wsj.com/articles/SB20001424052702303496804579365160018360066>.

and distributors whose product was involved in the Lac-Mégantic accident.

First, the Lac-Mégantic complaints allege oil shippers negligently chose to use DOT-111 tank cars not retrofitted to meet the NTSB/AAR recommended heightened standards for flammable petroleum products.¹²⁰ The complaint alleges older tanker cars have a “well-known rupture risk.”¹²¹ The Lac-Mégantic complainants suggest a shipper could be negligent for using cars with a “well-known” risk even if applicable regulations permitted the use of such cars.¹²² There is precedent for the proposition that a shipper’s transportation of hazardous materials in a tank car not rated properly for that transportation can constitute negligence *per se* for violating hazmat transportation regulations.¹²³ It still remains to be seen how viable this theory might be, and whether or not it could survive an argument that compliance with federal regulations preempts state common law actions imposing more stringent standards of care.¹²⁴

Second, plaintiffs allege the Lac-Mégantic shippers acted negligently in using MMA to transport their product while allegedly knowing of MMA’s “poor safety record.”¹²⁵ Negligent hiring is a recognized cause of action that can apply when an employer “hires an independent contractor to perform an activity that creates a risk of physical harm.”¹²⁶ There is precedent for finding shippers liable for negligent hiring in the context of selecting motor carriers.¹²⁷

The legal viability of the Lac-Mégantic plaintiffs’ claims against the oil shipper defendants has not yet been tested. Nevertheless, the complaint undoubtedly provides further warning to TIH and hazmat shippers

120. Roy Complaint, *supra* note 31, ¶ 108.

121. *Id.*

122. *Id.* A similar claim against tank car manufacturers was brought in the wake of the January 2002 rail accident in Minot, North Dakota, which resulted in one fatality and hundreds of injuries. Claims were pursued against both the railroad involved in the accident and against the manufacturers of the breached tank cars that released the anhydrous ammonia. Third Amended Complaint and Demand for Jury Trial at 66, *Grabinger v. Canadian Pac. Ry. Co.*, No. WD 03-20849, 2004 WL 5039970, at 20-24 (D. Minn. Dec. 29, 2004) (alleging that tank car manufacturers “knew or should have known that the design and manufacturer of the tank cars that released the anhydrous ammonia were inadequate and/or that the cars were defective and unreasonably vulnerable to catastrophic failure . . .”).

123. See, e.g., *Key v. Liquid Energy Corp.*, 906 F.2d 500, 504-05 (10th Cir. 1990).

124. See, e.g., *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664-65 (1993) (holding that federal regulation covers a subject matter, and hence preempts state law, when it directly addresses, “includes” or “embraces” that subject matter “in an effective scope of treatment or operation”).

125. Roy Complaint, *supra* note 32, ¶¶ 78-79.

126. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 55 (2012).

127. See, e.g., *Jones v. C.H. Robinson Worldwide, Inc.*, 558 F. Supp. 2d 630, 642 (W.D. Va. 2008).

of the significant risk they face of liability for accidents during the rail transportation of their products.

B. STRICT LIABILITY THEORIES

Strict liability “is imposed upon a defendant without proof that he was at fault. In other words, when liability is strict, neither negligence nor intent must be shown.”¹²⁸ Generally, attempts to hold shippers strictly liable for hazmat chemical releases during transportation have not been successful.¹²⁹ Courts have been reluctant to conclude the mere act of introducing a hazmat into the stream of commerce is, in and of itself, an ultrahazardous activity.¹³⁰ Attempts to impose the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) on shippers have also been unsuccessful.¹³¹

However, all hazardous materials are not created equal. Chemicals such as acrylonitrile (used in manufacturing plastics) and toluene diisocyanate (TDI) (used in foam furniture stuffing) require careful handling and can injure humans given sufficient exposure.¹³² However, they are not under pressure nor do they explode or form toxic clouds that can expand beyond the immediate site of a release.¹³³

TIH products, such as chlorine gas and anhydrous ammonia, are shipped in a compressed form.¹³⁴ When even a modest breach occurs to the integrity of a tank car, these products exit the containment vessel

128. Dan B. Dobbs et al., *Law of Torts* § 437 (2d ed. 2011); *see also* William L. Prosser & W. Page Keeton, *Prosser and Keeton on Torts* § 534 (5th ed. 1984) (defining strict liability as “liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e. actionable negligence”).

129. *See* *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1178 (7th Cir. 1990).

130. *See* *Gaines-Tabb v. ICI Explosives USA*, 995 F. Supp. 1304, 1309 (W.D. Okla. 1996).

131. *See* *E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1484-85 (N.D. Ala. 1995).

132. *See* *Acrylonitrile—Hazard Summary*, EPA, <http://www.epa.gov/ttnatw01/hlthef/acryloni.html> (last updated Jan. 2000); *2,4-Toluene diisocyanate—Hazard Summary*, EPA, <http://www.epa.gov/ttnatw01/hlthef/toluene2.html> (last updated Jan. 2000).

133. *See generally* *NIOSH Pocket Guide to Chemical Hazards—Acrylonitrile*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/niosh/npg/npgd0014.html> (last updated Feb. 13, 2015); *NIOSH Pocket Guide to Chemical Hazards—Toluene-2, 4-diisocyanate*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/niosh/npg/npgd0621.html> (last updated Feb. 13, 2015).

134. *Compare* 49 C.F.R. § 173.115 (2015) (defining classes of compressed gas), *with* *Safety Data Sheet—Ammonia*, AIRGAS § 14, <http://www.airgas.com/msds/001003.pdf> (last updated Oct. 14, 2014) (listing Ammonia as a transport hazard class 2.2 product), *and* *Safety Data Sheet—Chlorine*, AIRGAS § 14, <http://www.airgas.com/msds/001003.pdf> (last updated Oct. 15, 2014) (listing Chlorine as a transport hazard class 2.3 product).

under pressure.¹³⁵ Unlike many hazmat chemicals in liquid form that only affect air quality if burned or as they evaporate, chlorine and anhydrous ammonia form a toxic cloud that can be blown away from an accident site.¹³⁶

The question of whether manufacturing and deciding to ship is an ultrahazardous activity may ultimately turn on a product-by-product analysis.

Looking just at the decisional case law, courts have historically been reticent to impose any form of strict liability on shippers for releases of hazardous materials during transportation.¹³⁷ The courts required plaintiffs to plead some form of negligence in order to sustain a claim for relief.¹³⁸ Theories that appear to sustain a claim for relief in the past included allegations of failure to warn the carrier of properties and inherent dangers in the chemicals and failure to properly package or store the chemicals.¹³⁹

However, no court appears to have addressed the question of whether some commodities, by their inherent chemical/physical properties, might be such that a shipper's decision to introduce them into the stream of commerce may present a unique set of circumstances that could lead to a different result.

And, neither does a court appear to have addressed shipper liability in a situation where the human impact has approached that of Lac-Mégantic—where the human tragedy is huge and the economic damages are massive. Many cases where shippers have been named as defendants have settled, possibly because the level of acceptable settlement against shippers has been small given the large carrier's deep pockets. Where the carrier is small, and lacks the resources to satisfy a judgment, one can expect the plaintiffs to pursue the non-carriers more aggressively.

135. See *Safety Data Sheet—Ammonia*, *supra* note 136, § 2; *Safety Data Sheet—Chlorine*, *supra* note 136, § 2.

136. See *Ammonia Solution (UN 3318); Ammonia, Anhydrous (UN 1005): Lung Damaging Agent*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/niosh/ershdb/emergencyresponsecard_29750013.html (last updated Nov. 20, 2014); *Chlorine: Lung Damaging Agent*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/niosh/ershdb/EmergencyResponseCard_29750024.html (last updated Nov. 20, 2014).

137. See *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1181-82 (7th Cir. 1990).

138. *Id.* at 1183.

139. See *Symington v. Great W. Trucking Co., Inc.*, 668 F. Supp. 1278, 1284 (S.D. Ia. 1987); *In re M/V DG Harmony*, 533 F.3d 83, 94 (2d Cir. 2008); *Key v. Liquid Energy Corp.*, 906 F.2d 500, 502 (10th Cir. 1990); *Union Pacific R.R. Co. v. Forexport, Inc.*, No. CIV-99-917-KI, 1999 WL 1206758, at *1 (D. Or. Dec. 14, 1999).

1. *Ultrahazardous Materials*

Plaintiffs have tried to reach carriers and shippers alike under the theory that the tender and transport of toxic chemicals constitutes an ultrahazardous or abnormally dangerous activity.¹⁴⁰ If an activity is found to be “ultrahazardous,” then the actor is generally regarded as liable without regard to whether it acted negligently.¹⁴¹ Courts have been generally unreceptive to such attempts.¹⁴² Section 520 in the Restatement (Second) of Torts lists six factors to be taken into consideration when determining whether an activity is abnormally dangerous:

- (1) the existence of a high degree of risk of some harm to the person, land, or chattel of others;
- (2) the likelihood that the harm that results will be great;
- (3) the inability to eliminate the risk by the exercise of reasonable care;
- (4) the extent to which the activity is not a matter of common usage;
- (5) the inappropriateness of the activity to the place where it is carried on;
- and (6) the extent to which its value to the community is outweighed by its dangerous activities.¹⁴³

The transport of hazardous materials certainly meets some of the criteria listed in the Restatement.¹⁴⁴ Saving carriers and shippers from strict liability claims, however, is the fact that the transport of hazardous materials is a necessary and common activity. Therefore, it does not give rise to an ultrahazardous activity.¹⁴⁵

The leading case rejecting strict liability for a shipper of a hazardous material is *Indiana Harbor Belt Railroad v. American Cyanamid Company*.¹⁴⁶ The Seventh Circuit reversed the lower court’s finding that the

140. See, e.g., *In re Derailment Cases*, 416 F.3d 787, 797 (8th Cir. 2005).

141. See James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVTL. L. & POL’Y 217, 219-22 (2000/2001).

142. *Actiesselskabet Ingrid v. Central R. Co.*, 216 F. 72, 78 (2nd Cir. 1914) (often credited with establishing the common carrier defense to strict liability claims, holding that “so far as a common carrier is concerned, that such danger as necessarily results to others from the performance of its duty, without negligence, must be borne by [the public] as an unavoidable incident in the lawful performance of legitimate business”).

143. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

144. See *Amcast Indus. Corp. v. Detrex Corp.*, 779 F. Supp 1519, 1544 (N.D. Ind. 1990), *aff’d in part, rev’d in part*, 2 F.3d 746 (7th Cir. 1993) (noting that handling of trichloroethylene (TCE) involves a “high degree of risk to persons and land,” and that “it is likely that the harm that results from the release of TCE would be great,” but finding that reasonable care eliminated the risk).

145. See *E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1489-90 (N.D. Ala. 1995) (transportation and delivery of hazardous chemicals did not constitute an abnormally dangerous activity, particularly where evidence indicated that safe handling and transportation were “the norm”); *Amcast*, 779 F.Supp at 1544 (transportation of hazardous material was not abnormally dangerous activity).

146. See *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990).

shipper was strictly liable for the transport of acrylonitrile under an ultrahazardous activity theory.¹⁴⁷ The court held the transport of the hazardous material at issue here, acrylonitrile, was not an abnormally dangerous activity.¹⁴⁸ Therefore, neither the manufacturer nor the shipper was strictly liable.

In rejecting the district court's strict liability holding, the Court noted there is an "inevitable risk of derailment or other calamity in transporting 'large quantities of anything.'"¹⁴⁹ "[T]he manufacturer of a product is not considered to be engaged in an abnormally dangerous activity merely because the product becomes dangerous when it is handled or used in some way after it leaves his premises, even if the danger is foreseeable."¹⁵⁰ "The relevant activity is transportation, not manufacturing and shipping."¹⁵¹ The Court rejected any finding of strict liability, but remanded the case to the district court to consider possible liability under a negligence theory.¹⁵²

Playing into the court's ruling was the principle that liability under a negligence theory is appropriate when there is a workable regime.¹⁵³ The court found such a workable regime here.¹⁵⁴ In this instance, the shipper "participated actively in the transportation of the acrylonitrile [, which] imposed upon it a duty of care and by doing so brought into play a threat of negligence liability that, for all we know, may provide an adequate regime of accident control in the transportation of *this particular chemical*."¹⁵⁵

The court found it instructive that the shipper was an active shipper, or as it phrased it, a "shipper-transporter," rather than simply a "passive shipper."¹⁵⁶ Facts pointing in this direction included Cyanamid's role in leasing, loading, and "undertaking by contract with North American Car Corporation to maintain the tank car in which the railroad carried Cyanamid's acrylonitrile to Riverdale."¹⁵⁷ These actions by Cyanamid led the court to believe Cyanamid had a duty of care that brought negligence

147. *Id.* at 1181-82.

148. *Id.* at 1181.

149. *Id.* at 1179.

150. *Id.* at 1181.

151. *Id.*

152. *Id.* at 1183 (the plaintiff asserted the district court initially threw out the negligence claim to create an appealable order on the strict liability claim).

153. *Id.* at 1177.

154. *Id.* at 1179 ("[W]e have been given no reason . . . for believing that a negligence regime is not perfectly adequate to remedy and deter, at reasonable cost, the accidental spillage of acrylonitrile from rail cars.").

155. *Id.* at 1181 (emphasis added).

156. *Id.*

157. *Id.*

liability to the fore.¹⁵⁸

The Seventh Circuit's language discussing the adequacy of negligence principles for governing the transportation of "this particular chemical" (acrylonitrile) naturally leads to this question: Would the court have ruled differently had a more volatile, more poisonous, or explosive material been involved? And, might the court have applied a higher standard had it felt negligence principles might not suffice to compensate victims? As noted, all commodities classified as "hazardous materials" by the US DOT do not have the same characteristics. A more serious accident involving more dangerous products might not lead to the same legal conclusion.

C. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 (CERCLA) LIABILITY

Plaintiffs have pointed to environmental laws to impose liability on shippers for cleanup costs following the release of hazardous materials in transportation.¹⁵⁹ The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)¹⁶⁰ imposes strict liability for clean up costs in the event of a hazardous materials release upon certain classes of persons, including the "owner and operator of a vessel or a facility."¹⁶¹ CERCLA includes common carriers and shippers of hazardous substances in its definition of "owner or operator."¹⁶² However, a shipper "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."¹⁶³

While carriers, and shippers acting as carriers, have been found liable under CERCLA,¹⁶⁴ attempts to impose CERCLA liability on shippers

158. *Id.*

159. See *Rhodes v. Cnty. of Darlington*, 833 F. Supp. 1163 (D.S.C. 1992); see also *In re Chicago, M. & St. P. & Pac. R.R.*, 974 F.2d 775 (7th Cir. 1992).

160. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 103, 42 U.S.C. §§ 9601-9675 (2013).

161. 42 U.S.C. § 9607(a). There are three defenses available to circumvent liability: "(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant . . ." § 9607(b). A "facility" is defined as:

"(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or

(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." § 9601(9).

162. 42 U.S.C. § 9601(20)(B)(i).

163. 42 U.S.C. § 9601(20)(B)(ii).

164. See *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993) (finding a shipper acting as a carrier liable for hazardous materials spill from the shipper's own trucks);

who do not participate in the transportation of the chemicals have not been successful.¹⁶⁵ For example, in *E.S. Robbins*, the court considered and rejected the plaintiff's CERCLA theory of liability on the grounds that the shipper did not exercise any control over the transportation, loading, or off-loading of the hazardous materials.¹⁶⁶ Therefore, the shipper was not the owner or operator of the facility (the transportation vehicle) involved in the spill.¹⁶⁷

In a maritime case, *U.S. v. M/V Santa Clara I*, the court considered whether the shipper was strictly liable for a toxic chemical release under CERCLA.¹⁶⁸ The vessel owner and operator asserted third-party claims against shippers and consignees following the loss overboard of containers containing arsenic trioxide during a storm at sea.¹⁶⁹ The vessel owner sought recovery under CERCLA, as well as under the terms of the bill of lading.¹⁷⁰ The court rejected the carrier's theory that the shippers were in some way culpable for the release itself.¹⁷¹ The court applied CERCLA, but held "nonculpable shippers who arrange for the shipment of hazardous substances from which there is a later release or threatened release. . . cannot be held liable for any release during transportation that resulted from circumstances beyond its control."¹⁷² In this particular case, the Court denied the motion for summary judgment because the shipper did not properly label the magnesium phosphide in the bill of lading.¹⁷³ The case was remanded to the lower court to determine whether the failure to properly label the dangerous substance contributed to the damages resulting from its release.¹⁷⁴

The United States brought a CERCLA claim against Union Pacific following the release of chlorine at Macdona, Texas, in June 2004.¹⁷⁵ The complaint asserted the discharge of the chlorine gas constituted a "release" under CERCLA and Union Pacific, as the owner and/or operator

Idaho v. S. Refrigerated Transport, Inc., No. 88-1279, 1991 WL 22479, at *1, *23 (D. Idaho Jan. 24, 1991) (carrier liable under CERCLA for damages caused by an accident involving the truck "facility" which resulted in the rupture of drums carrying a toxic fungicide).

165. See *E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1485 (N.D. Ala. 1995).

166. *Id.*

167. *Id.* at 1483-85.

168. See *U.S. v. M/V Santa Clara I*, 887 F. Supp. 825, 831-32 (D.S.C. 1995).

169. *Id.* at 830.

170. *Id.* at 837-38.

171. *Id.* at 832.

172. *Id.* at 839 (*citing* 42 U.S.C. § 9601(20)(B)).

173. *Id.* at 832.

174. *Id.* at 844.

175. Complaint ¶¶ 1, 10, *United States v. Union Pac. R.R. Co.*, No. SA10CA0251 FB, 2010 WL 3494880 (W.D. Tex. April 2, 2010).

of the train, was the operator of a “facility.”¹⁷⁶ This meant Union Pacific should be liable for any costs the Environmental Protection Agency (EPA) incurred in responding to the accident.¹⁷⁷ In May 2010, the suit resolved through a consent judgment.¹⁷⁸ CERCLA liability was not asserted against any of the shippers, receivers, or others potentially involved in the accident.¹⁷⁹

When it comes to releases of toxic chemicals during transport, courts have shown reticence to impose liability on shippers absent evidence that shippers contributed to the release, through failure to warn the carriers of the properties and inherent dangers in the chemicals or through a failure to properly package or store the chemicals. Where there is no evidence that any action by the shipper contributed to the release, and in particular where the shipper had no control over the product at the time of the release, courts are unlikely to impose liability on the shipper under any theory of liability. In order to impose liability on the shipper, it is likely necessary to establish some negligent act on the part of that party.

II. NEED FOR LIABILITY REFORM

Railroads have repeatedly voiced concern over the potentially ruinous liability associated with transporting TIH products. Several major railroads publicly have stated that if they had a choice they would elect not to participate in the transport of TIH products.¹⁸⁰ No railroad has persuaded regulatory authorities either to ban the transport of TIH products by rail or to give railroads the freedom to choose for themselves whether or not to transport these products. This issue has been debated in numerous proceedings and hearings.¹⁸¹ The District of Columbia’s Con-

176. *Id.* ¶¶ 14, 16, 17.

177. *Id.* ¶ 20.

178. *See* Consent Decree at 1, *United States v. Union Pac. R.R. Co.*, No. 5:10-cv-00251-FB (W.D. Tex. May 19, 2010).

179. *Id.*

180. *See, e.g.*, Comments of CSX Transp. Inc., *Union Pac. R.R. Co.—Petition for Declaratory Order*, S.T.B. Finance Docket No. 35219, at 3 (Apr. 9, 2009) [hereinafter *CSX Comments*] (“If given a choice, CSXT would decline to participate in the business [of transporting TIH commodities] under any circumstances not essential to the public health of the communities we serve.”); Comments of the Assoc. of Am. R.R.s., S.T.B. Ex Parte 677 (Sub-No. 1), at 4 (July 10, 2008) (“ . . . the transportation of TIH materials as currently mandated under the railroads’ common carrier obligation subjects the railroads to significant risks and raises the specter of ‘bet the company’ exposure in case of the release of such materials.”).

181. *See, e.g.*, *Common Carrier Obligation of Railroads: Hearing before the Surf. Transp. Bd.*, S.T.B. Ex Parte No. 677 (Sub-No. 1) (2008) [hereinafter *S.T.B. Hearings*] (considering the railroad duty to carry TIH commodities in conjunction with the common carrier obligation); *Current Issues in Rail Transportation of Hazardous Materials: Hearing before the Subcomm. on R.R.s. of the H. Comm. on Transp. & Infrastructure*, 109th Cong., 2nd Sess. (2006) [hereinafter *Rail Hearings*], available at <http://www.gpo.gov/fdsys/pkg/CHRG-109hhr30648/html/CHRG-109hhr30648.htm>; *Classification Ratings of Chemicals—Conrail*—April 30, 1986, 3 I.C.C. 2d 331, 331

gressional representative Eleanor Holmes Norton has recognized “the railroads are in an inherently impossible position”¹⁸² with regard to the possible ruinous liability they endure by being forced to transport high-hazard commodities. Indeed, during an oral hearing regarding Ex Parte 677 (Common Carrier Obligation of Railroads), then-STB Commissioner Buttrey stated he did not believe the common carrier obligation required railroads to carry TIH commodities.¹⁸³ In his opinion, it is not “a ‘reasonable request’ for a shipper to ask a railroad to transport these types of commodities without some kind of meaningful protection from the unreasonably high, ‘bet-the-company’ type liability exposure.”¹⁸⁴ Former ICC General Counsel, Fritz Kahn, has expressed a similar view.¹⁸⁵ Despite the acknowledgement of potentially ruinous cost, railroads are still required to transport TIH commodities pursuant to the common carrier mandate.¹⁸⁶

For this reason, in addition to regulatory challenges discussed above, railroads actively promoted the idea of legislation to address the dilemma. In 2009, one of the authors publicly described a possible framework for a legislative approach to TIH liability at the Association of Transportation Law Professionals Spring Forum.¹⁸⁷

This proposal suggested a three-tiered liability approach to TIH incidents in transportation. Railroads would be liable for the first \$500 mil-

(1986) (rejecting Conrail’s attempt to “flag out” certain highly dangerous chemical commodities and finding that Conrail’s tariffs could address its operating and liability concerns); Union Pac. R.R. Co.—Petition for Declaratory Order, S.T.B. Finance Docket No. 35219, 74 Fed. Reg. 10,991, 10,991 (proposed Feb. 18, 2009) (requesting that the Board clarify the common carrier obligation to quote rates for long-haul movements of TIH materials); Canexus Chems. Can. L.P. v. BNSF Ry. Co., S.T.B. Docket No. NOR 42131, 2012 WL 426210, at *1 (decided Feb. 7, 2012) (ordering UP and BNSF to establish through routes for the haulage of chlorine).

182. *Rail Hearings*, *supra* note 182 (statement of Rep. Eleanor Holmes Norton, D.C.).

183. *S.T.B. Hearings*, *supra* note 182, at 44.

184. *Id.*

185. Fritz Kahn, Commentary, *Railroads as Common Carriers*, 13 J. COM. 15 (2012), available at http://www.joc.com/railroads-common-carriers_20120206.html.

186. Much has happened since the 1980s cases finding a common carrier mandate for railroads to transport high-hazard commodities. It is not the purpose of this paper to assemble a comprehensive evaluation of whether a similar result would obtain today on a full record before the STB.

187. See Paul Hitchcock, A Proposal for TIH Liability Legislation: A Win-Win Proposition for Railroads and Their Customers, Address at the Ass’n of Transp. Law Prof’ls Spring Forum (Apr. 17, 2009) (on file with authors). The need for a legislative solution has also been discussed in STB Proceedings, see Comments of CSX Transp. Inc., *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No. 1), at 19-22 (July 8, 2008); see also Supplemental Comments of CSX Transp. Inc., *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials*, Ex Parte No. 677 (Sub-No. 1), at 3-4 (Aug. 21, 2008) (filed on Aug. 20, 2008 at www.stb.dot.gov); Written Testimony of the Ass’n of Am. R.R.s., *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials*, S.T.B. Ex Parte No. 677 (Sub-No. 1), at 29-32 (July 10, 2008).

lion in damages under currently applicable legal standards. A national insurance pool funded by shippers of TIH would cover all parties associated with the movement for all liability between \$500 million and \$1 billion. Between \$1 billion and \$2 billion, a federally backed trust fund would be created, which would be fully funded gradually. The federal backing would apply only if the fund were exhausted before the full availability of the \$1 billion. The trust fund would be built from a tax on every shipment of TIH products.

A \$2 billion incident cap on liability is absolutely critical to the concept. This cap would reflect that railroads have no option but to accept and transport these products, and that public policy favors transportation of the products by rail. Without a liability cap, no other aspect of the proposal would solve the ruinous liability exposure forced by law upon the carriers.

To its credit, The Fertilizer Institute informally advanced a proposal attempting to address the liability issues faced by the carriers through enhanced insurance.¹⁸⁸ While such a proposal could certainly ameliorate the risk, without a cap on liability it falls far short of truly solving the problem.

The chemical industry, as a whole, has been uninterested in adopting any such insurance scheme. The Fertilizer Institute stands alone on the shipper side in its informal expression of serious interest in the three-tiered proposal just outlined. The Chemical Manufacturers Association (now the American Chemistry Council (ACC)) rejected it.¹⁸⁹ When asked directly by the Chairman of the STB at a public hearing whether the ACC would support legislative relief, the ACC president stated it would consider the idea only as part of a “holistic approach” to rail transportation policy.¹⁹⁰ That is, the ACC would only support limiting railroad liability if such limitations were paired with other legislative concessions by the rail industry. With the ACC taking the position that

188. See Testimony of Fertilizer Inst., *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials*, S.T.B. Ex Parte No. 677 (Sub-No. 1), at 15-16 (July 10, 2008) (proposing that “TFI would act as an agent for ammonia shippers by forming an ammonia shippers insurance group . . . [which] would purchase an amount of insurance in excess of the primary insurance that the railroad would agree to maintain [in order to] compensate for third-part bodily injury and property damage liability costs arising out of the release of anhydrous ammonia associated with a rail accident”); see also *S.T.B. Hearings, supra* note 182, at 326 (statement of Mr. Bob Felgenhauer, Vice President, Potash Corp.) (“TFI is willing to work with the railroads if they will carry primary insurance and then TFI would pick up insurance over this amount to cover in the event of a release”).

189. See *S.T.B. Hearings, supra* note 182, at 372-73 (statement of Mr. Jack N. Gerard, President & CEO, Am. Chemistry Council).

190. *Id.*

its members gained nothing from liability cap legislation, no consensus seemed to be achievable.

Many other liability-limiting statutory schemes could be developed. Another possible approach would be to combine a liability cap with a trade-off between a common carrier mandate and limited indemnification by the rail customer.

Under this approach, a railroad would be relieved of any common carrier mandate to transport enumerated high-hazard commodities, but a customer could compel transport by agreeing to indemnify the carrier for any liability above \$1 billion. Thus, the railroad would bear all exposure up to \$1 billion, and the shipper would bear the exposure on the next \$1 billion. Both would be free to obtain insurance in the commercial marketplace.¹⁹¹ Total liability of all parties combined would be capped at \$2 billion.

There is certainly considerable public policy precedent for recognizing the many desired social benefits from activity X, despite the substantial risks of legal liability associated with providing X. Congress has recognized legal risk will discourage certain actions it affirmatively wants private enterprises to follow. For example, to encourage private industry to develop nuclear power, Congress adopted the Price-Anderson Act to provide a cap on overall liability for incidents associated with releases of radiation from nuclear facilities.¹⁹² Advocating for continuation of the Act in 1998, the U.S. Nuclear Regulatory Commission reported to Congress that “Price-Anderson embodies two core values of the United States . . . the development of technology to improve living standards for all and the compensation of those who may suffer from the consequences of deploying or testing advanced technologies.”¹⁹³

Similarly, pharmaceutical companies began to exit the vaccine market due to high liability claims, believing “[t]he potential costs of such lawsuits were more than [they] were willing to risk . . . resulting in serious vaccine shortages throughout the United States.”¹⁹⁴ Congress responded

191. There are numerous alternatives available to eliminate any gap in insurance coverage for incidents on small railroads like the MM&A.

192. U.S. GEN. ACCOUNTING OFFICE, GAO-04-654, NUCLEAR REGULATION: NRC'S LIABILITY INSURANCE REQUIREMENTS FOR NUCLEAR POWER PLANTS OWNED BY LIMITED LIABILITY COMPANIES 1, 4-6 (2004), available at <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-04-654/pdf/GAOREPORTS-GAO-04-654.pdf>.

193. U.S. NUCLEAR REGULATORY COMM'N, NUREG/CR-6617, THE PRICE-ANDERSON ACT-CROSSING THE BRIDGE TO THE NEXT CENTURY: A REPORT TO CONGRESS xi (1998).

194. *Statement on National Vaccine Injury Compensation Program: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, & Human Resources of the H. Comm. on Government Reform* (Sept. 28, 1999) (statement of Thomas E. Balbier, Jr., Director, Nat'l Vaccine Injury Compensation Program, U.S. Dep't of Health & Human Services) [hereinafter *Vaccine Hearing*], available at <http://www.hhs.gov/asl/testify/t990928b.html>.

by enacting the National Childhood Vaccine Injury Act, which created the National Vaccine Injury Compensation Program.¹⁹⁵ That program allowed claims of injury due to vaccines to be filed directly with, and adjudicated by, the government.¹⁹⁶ After its passage, program director Thomas Albier and Secretary of Health and Human Services Donna Shalala hailed it as “the cornerstone of our Nation’s successful childhood immunization program.”¹⁹⁷

In each case, Congress recognized the public benefit of the activity, and concluded if it truly wished private enterprise to participate in that activity there must be a policy decision to limit legal exposure.

In 2008, citing “good public policy,” STB Commissioner Buttrey called for “a liability cap for hazmat transport, perhaps something akin to Price-Anderson.”¹⁹⁸ To date, the most interested sectors involved in TIH production and transportation have not taken up Commissioner Buttrey’s suggestion, failing to see eye to eye about these policies. However, as the case law develops, and as litigation proves increasingly directed at shippers and receivers, the time may have come for both rail carriers and their customers to meaningfully address the problem legislatively.

CONCLUSION

Liability for the release of high-hazard products during rail transportation is not a novel topic. This is also not the first paper to propose an insurance scheme as a possible solution to the potential for ruinous liability in the event of a catastrophic rail accident involving the release of TIH chemicals.¹⁹⁹ One of the authors has been among the group of people speaking out about this topic for many years. To date, however, no action in the industry, at the STB, or in Congress has been taken to properly address the issue or to move the dialogue beyond mere pleas for action.

Bringing this debate to a head was the horrific accident in Lac-Mégantic, Quebec, on July 6, 2013. The Lac-Mégantic accident illustrates the potentially grave consequences of chemical releases. In this case, the released product, petroleum crude oil, was not a TIH commodity, and yet the spill and subsequent explosion resulted in 47 deaths and near total destruction of a town. It is unknown what the total financial impact of the Lac-Mégantic tragedy will be. Thus far, railroads and shippers alike have

195. National Child Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to 300aa-34 (2013).

196. *National Vaccine Injury Compensation Program*, HEALTH RES. & SERVS. ADMIN., <http://www.hrsa.gov/vaccinecompensation/index.html> (last visited Feb. 23, 2015).

197. *Vaccine Hearing*, *supra* note 197 (statement of Thomas E. Albier, Jr.).

198. Oral Hearing Transcript at 43, *Common Carrier Obligation of Railroads*, S.T.B. Ex Parte No. 677 (Apr. 24, 2008) (statement of W. Douglas Buttrey, Comm’r, Surface Transp. Bd.).

199. *See, e.g.*, Branscomb, et. al., *supra* note 14, at 33-35 (reviewing various insurance schemes as models to address the issue of TIH liability).

been named in numerous suits on both sides of the border. Environmental costs and further investigations are sure to add to the total, and possibly to the list of defendants. What is clear from this accident, however, is shippers (and other rail services providers) cannot continue to sit idly by and assume railroads will be the only parties named in subsequent suits and potentially held liable for punishing damages awards.

Shippers are not immune from liability in the aftermath of chemical spills. It would behoove not only the rail industry, but rail shippers as well, to develop a liability scheme that balances the duties of all parties involved and ensures redress for the American public in the event of a major catastrophe. A liability limit and insurance mechanism in which both railroads and shippers contribute has successful policy precedent in other industries and would provide an appropriate financial mechanism for achieving this result.

