The Hazardous Materials Transportation Act: Chemicals at Uncertain Crossroads

STUART C. THOMPSON

I. INTRODUCTION

Advances in applied chemistry have unquestionably benefitted modern society, although recurring episodes of chemical mishap reveal hidden side-effects to both human health and the environment fostered by these developments. In large part, public chemophobia has focused on the dilemmas posed by chronic toxic wastes, which emerge from their inadequate confines to antagonize unwary communities.[1] However, an industrial catastrophie during 1984 in Bhopal, India has awakened anxiety over more sudden chemical disasters.[2] As a result, social concern is gathering more over a transient peril to public safety in the transportation of hazardous materials.[3]

Commodities possessing dangerous characteristics are indisputably significant to the economy, and, while an estimated 250,000 chemical shipments are made safely throughout the United States on a daily basis,[4]

1. Public repugnance to hazardous waste facilities is a well-documented phenomenon. *Siting of Hazardous Waste Management Facilities*: A Major Problem Facing Industry and States, [12 Curr. Dev.] Envtl. Rep. (BNA) 871 (Nov. 13, 1981).

2. *Time*, Dec. 17, 1984, at 22-35.

3. The public has become aware of what the chemical industry, the shippers, and the federal government have known for a long time: millions of tons of hazardous chemicals travel throughout the U.S. each year carrying with them the potential for truly catastrophic disasters. *Chemical & Environmental News*, Nov. 24, 1980 at 20.

4. *Time, supra*, note at 35.

mishaps are inevitable.[5] As a result, citizens are becoming less tolerant of the toxic traffic rumbling through their towns and competing for space on their highways. With ebbing confidence, the public is peering past the innocuous appearance of trucks and trains hauling chemical cargoes to perceive them as rolling bombs.[6]

Congress addressed the increasing challenge presented by dangerous commodities in transit by enacting the Hazardous Materials Transportation Act of 1974 (HMTA).[7] Through the HMTA, the federal government excercises an overshadowing, though not exclusive, role in this area; however, in spite of their efforts, government action has been less than successful. As states and lesser jurisdictions continue to realize the inadequacy of the federal scheme to meet their needs, they become more proactive, enacting laws and regulations to shield their constituents from the ills perceived in hazardous materials transportation.[8] The issue further is joined by industry, which contends unilateral local efforts place on onerous burden on commerce, often in conflict with the Constitution and federal statutory law.[9]

This article analyzes the legal ramifications of hazardous materials transportation, particularly via highway,[10] illustrating the uncertain interplay of state and federal powers embossed throughout various hazardous

---

5. Statistics compiled by the U.S. Department of Transportation indicate 8 fatalities and 191 injuries related to hazardous materials transportation occurred during 1983. U.S. Dept. of Transp., *1983 Annual Report on Hazardous Materials Transportation*, at 15-21 [Hereinafter cited as *1983 Annual Report*]. The accuracy of the Department's reporting methodology, however, has been called into question. See Lamkin and Burke, *Highway Transport of Hazardous Materials in Texas: Propensity for Disaster*, 15 Tex. Transp. Research (1983).

6. As in the case of a train derailment during early July 1986, involving a tank car of phosphorus, forcing the evacuation of 47,000 residents of Miamisburg, Ohio. *Newsweek*, July 21, 1986, at 19. Yet, apprehension is not peculiar to the United States. A British publication recently reported:

> Unscrupulous tanker operators are ignoring chemical transport regulations and increasing the danger of a major hazardous goods accident on Britain's roads. *Truck*, Jan. 1986, at 38.

7. Transportation Safety Act of 1978, Pub. L. No. 93-633, 88 Stat. 2156 (codified as amended at 49 U.S.C. §§ 1801-1812 (1976)).

8. Leonard R. Lenihan, an Erie County, New York legislator, recently observed that his district is a high-risk area for hazardous materials accidents, adding that " . . . on any day, Erie County is potentially threatened with a truck or railroad accident involving a variety of hazardous materials such as PCBs, corrosive chemicals or explosives." Kenmore (N.Y.) Record-Advertiser, June 11, 1986, at 9.

9. "These jurisdictions are very well-intentioned," comments Andrew Doyle, counsel for the National Paint & Coatings Assn. (NPCA). "They see there's a problem out there and a danger inherently involved in moving flammable, combustible, and poisonous types of materials. But instead of working with the federal government, they often work against it by promoting different or conflicting regulations."

Handling & Shipping Management, April 1985, at 64.

10. Highway transportation leads all modes in numbers of hazardous materials related incidents and casualties. *1983 Annual Report*, at 15.

materials transportation decisions. While the discussion naturally centers on constitutional and statutory implications, it also addresses the relationship between constitutional and statutory rules and the evolving common law of hazardous materials transportation.

II. The Hazardous Materials Transportation Act of 1974

The Hazardous Materials Transportation Act[11] is the basic federal safety net for hazardous materials in transit. It vests broad power in the Secretary of Transportation to adopt such measures he or she deems proper to secure protection from hazardous materials. Specially, Section 104[12] of the Act accords the Secretary authority to designate materials, which, by nature of their quantity and form, are hazardous to public health and safety. Under Section 105[13] and 106, the Secretary may adopt regulations covering all aspects of the safe transportation and handling of these materials by all modes, including packaging, labeling, marking, and routing. Section 110[14] provides for civil penalties of up to $10,000 per violation, and criminal penalties of up to $25,000 and five years imprisonment for willful violation of the statute or its regulations.

Legislative history of the HMTA reflects a congressional concern that the fragmented state of federal hazardous materials law prior to the Act failed to address many risks critical to safe movement of these goods.[15] A primary motivation in passage was to close this gap by charging a single federal agency with overseeing hazardous materials safety, thereby to:[16]

> . . . preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation.

The purpose of the HMTA is set forth in Section 102, which states:[17]

> It is declared to be the policy of Congress in this title to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.

The essential duality of purpose—protecting the nation through uniform standards—is not without judicial support.[18] Yet, this goal has also been bifurcated. *City of New York v. Ritter Transp., Inc.*[19] upheld a local ordinance which imposed stringent restrictions on certain tank trucks trav-

11. Transportation Safety Act of 1974, *supra*, note 7.
12. 49 U.S.C. § 1803 (1976).
13. 49 U.S.C. § 1804, 1805 (1976).
14. 49 U.S.C. § 1809 (1976).
15. S. Rep. No. 1192, 93rd Cong., 2d Sess. (Sept. 30, 1974).
16. *Id.* at 37.
17. 49 U.S.C. § 1801 (1976).
18. National Tank Truck Carriers v. Burke, 608 F.2d 819, (1st Cir. 1979).
19. City of New York v. Ritter Transp., Inc., 515 F. Supp. 663 (S.D.N.Y. 1981).

ersing New York City. The District Court upheld the provision, finding the "underlying" intent of the HMTA to:[20] " . . . ensure protection against the risks to life and property which are inherent in the transportation of hazardous materials," reasoning that state regulations must be examined in order to determine whether they conflict with the "full purposes and objectives of Congress."[21] However, in abbreviating the uniformity inherent with the HMTA, *Ritter* promotes a hodgepodge of dichotomous state and local regulations, entirely contradictory to the clear intent of Congress.

III. Expectations of Safety Under the HMTA

An important inquiry into the HMTA regards the degree of safety it provides the public. The Act obliges the Secretary of Transportation to promulgate regulations which "adequately" protect the public.[22] The Secretary has chosen to satisfy this mandate through an exhaustive regulatory scheme, covering substantially all aspects of hazardous materials transportation.[23]

While comprehensive, the HMTA does not presume to eradicate the risks inherent in hazardous materials transportation. Rather than attempting to maximize safety, Congress expected the Secretary to exercise discretion in balancing the competing interests of absolute safety and economic efficiency.[24]

Thus, in *Akron, Canton, & Youngstown R.R. Co. v. I.C.C.*,[25] the Sixth Circuit affirmed an Interstate Commerce Commission (ICC) order requiring petitioner railroads to accommodate shipments of radioactive materials. Although the rail carriers asserted carriage of nuclear goods was too dangerous, the Court held they could not refuse items comporting in all respects to federal safety regulations.

Similarly, in *Consolidated Rail Corp. v. I.C.C.*,[26] certain railroads sought to overturn an ICC denial to grant special tariffs for unique precautionary measures they had implemented for transporting radioactive materials. The Commission found such unilateral steps to be unneces-

20. *Id.* at 671.

21. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

22. 49 U.S.C. § 1801 (1976).

23. Regulations promulgated by the Department of Transportation under the HMTA are codified in Title 49, Code of Federal Regulations, Subchapter C, and encompass approximately 1,100 pages. The extensive list of affected materials, published at 49 C.F.R. 172.101, covers a span of materials ranging from wet rags to radioactive materials.

24. City of New York v. U.S. D.O.T., 715 F.2d 732, 740 (2nd Cir. 1983); cert. denied, 104 S. Ct. 1403 (1984).

25. Akron C. & R.R. Co. v. I.C.C., 611 F.2d 1162 (6th Cir. 1979).

26. Consolidated Rail Corp. 626 F.2d 642 (D.C. Cir. 1981); cert. denied, 454 U.S. 1047, 102 S. Ct. 587 (1981).

sary, and, upon review, the Court agreed. While the railroads laudably desired to reduce the potential for radiation mishaps, their efforts were superfluous in light of the extensive transportation safety regulations already in place to minimize such risks and would impress exorbitant costs on shippers of these materials.

IV. PREEMPTION OF STATE HAZARDOUS MATERIALS LAW

Article VI of the U.S. Constitution[27] has frequently been applied to displace state law which intrudes into areas exclusively occupied by the federal government.[28] In matters in which state governance is not totally divested, the Supremacy Clause has also been employed to invalidate state legislation conflicting with duly enacted federal law.[29]

In this latter category, the Supreme Court has found state law to be preempted when either a direct conflict between federal and state measures makes compliance with both a physical impossibility,[30] or in the absence of such conflict, when the state law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[31]

The HMTA is not so pervasive as to entirely withdraw hazardous materials from the reach of state and local law.[32] Permitting a degree of state regulation, Section 112(a) preempts state requirements which are "consistent."[33]

Section 112(b)[34] provides an administrative means whereby the Secretary may nonetheless exempt state regulations which have been found to be inconsistent under Section 112(a). An administrative override of inconsistency under this section must include separate determinations

27. U.S. Const., art. VI, cl. 2.

28. Jones v. Rath Packing Co., 430 U.S. 519, 97 S. Ct. 1305 (1977).

29. Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 67 S. Ct. 1146 (1947).

30. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210 (1963).

31. Hines v. Davidowitz, *supra*, note 21, at 67.

32. Chemclene Corp. v. Dept. of Envir. Resources, 497 A.2d 268 (Pa. Commonwealth Ct., 1985).

33. 49 U.S.C. § 1811(a) (1976) provides:

> Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.

34. 49 U.S.C. § 1811(b) provides, in pertinent part:

> Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce.

that the protection afforded the public is "equal [to] or greater [than]" to that provided by the HMTA, and that the state measure "does not unreasonably burden commerce."[35] As a result, the HMTA gives effect to all consistent, and those inconsistent, but specially exempted, state and local hazardous materials laws.

While the drafters failed to supply a statutory definition of inconsistency, the explicit direction to the Secretary to implement a comprehensive federal scheme provides "strong support" that Congress intended the HMTA to embody a rule of state preemption significantly stricter than espoused in Supreme Court interpretations of the Supremacy Clause.[36]

V. Premption and Primary Jurisdiction

Section 112(b)[37] explicitly accords the Secretary sole original jurisdiction for exempting inconsistent state and local regulations. Yet, this exclusivity of forum was not drafted into Section 112(a)[38] inconsistency proceedings. This statutory silence suggests a congressional intent to have either the courts or the Secretary make determinations of inconsistency.[39]

Where courts and executive agencies concurrently share jurisdiction over a subject, uncertainty can arise respecting the entity having precedence to hear a particular controversy. In such an instance, juxtaposition of power may foster rivalry and create an undesirable conflict between the actions of the agency and a decision of the courts.[40] The need to coordinate overlapping jurisdictional authority has prompted courts to apply the doctrine of primary jurisdiction.[41] Where consistency and uniformity are expedient, a court, not having the benefit of an agency's posture through a full record of its views, may defer to the agency as a resource in sensibly resolving a controversy.[42]

Primary jurisdiction is not jurisdictional per se, in that invocation of the doctrine does not cede original judicial power to hear a particular matter.[43] While not abrogating original jurisdiction, a court may elect to re-

35. *Id.*
36. National Tank Truck Carriers, Inc. v. Burke, 608 F.2d 824.
37. 49 U.S.C. § 1811(b).
38. 49 U.S.C. § 1811(a).
39. See U.S. Dept. of Transp., Inconsistency Ruling No. IR-2, 44 Fed. Reg. 75566, (Dec. 20, 1979) at 75567.
40. Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 441, 27 S. Ct. 350, 51 L. Ed. 553 (1907).
41. United States v. W. R.R. Co., 352 U.S. 59, 63, 77 S. Ct. 161, 1 L.Ed.2d 126 (1956).
42. Far E. Conference v. United States, 342 U.S. 570, 574, 72 S. Ct. 492, 96 L.Ed. 579 (1952).
43. See Botein, Primary Jurisdiction: The Need For Better Court/Agency Interaction, 29 Rutgers L. Rev. 867 (1976).

frain from its exercise in matters raising "issues of fact not within the conventional experience of judges or cases requiring the exercise of judicial discretion."[44] Where not called upon to resolve factual issues within an adversarial context, courts have recognized an inability through their conventional means to frame relief suited to shaping broad administrative policy.

In *Kappelmann v. Delta Air Lines, Inc.*,[45] an airline traveler, prompted by accidental exposure to radioactive cargo during a flight, sued to enjoin Delta from transporting radioactive materials in its aircraft without first providing specific warning to boarding passengers. While alleging neither violation of the HMTA nor specific injury, plaintiff nevertheless maintained such carriage constituted a nuisance to the traveling public.

The Court applied a "doctrine in the nature of primary jurisdiction"[46] to affirm dismissal of the complaint and decline exercise of jurisdiction which, in effect, invited it to promulgate regulations by injunction:

> The injunction which appellants would have the court fashion here would in effect constitute a regulation covering one phase of the interstate transportation of one group of hazardous materials on one airline. Such determinations are better made on an industry-wide basis in any agency rulemaking proceeding, and this indeed is the choice which Congress made in enacting the Hazardous Materials Transportation Act.[47]

Numerous factors militate for and against the application of primary jurisdiction to hazardous materials transportation. For example, courts may see little advantage in holding judicial proceedings in abeyance, as first applying the views of the Department of Transportation to a novel set of facts may entail protracted notice and comment procedures, eventually culminating in a formal agency inconsistency ruling.[48] Yet, it is this very character which permits the Department to thoroughly research questions, employing the use of public comments, public hearings, documented risk studies, and past accident experience to develop an informed decision.[49]

On the other hand, a court may decline exercise of original jurisdiction, in favor of the Department, in the knowledge that a party may thereafter seek to have the agency final decision set aside. A final order issued by Department of Transportation is subject to appeal, and a court may

---

44. United States v. W. Pac. R.R. Co., 352 U.S. 64.

45. Kappelman v. Delta Airlines, Inc., 539 F.2d 165 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1061, 97 S. Ct. 784, 50 L.Ed.2d 776 (1977).

46. *Id.* at 169.

47. *Id.* at 172.

48. Regulations have been promulgated, at 49 C.F.R. § 107.201-211 (1985), providing for administrative procedures for issuing agency inconsistency rulings.

49. For an exhaustive example, see U.S. Dept. of Transp., Docket No. HM-164, 46 Fed. Reg. 5298 (January 19, 1981) at 5299 (codified at 49 C.F.R. Sections 171-173, 177 (1985)).

choose to conserve judicial resources for possible review.[50] As a matter of policy, however, the Department of Transportation is reluctant to issue inconsistency rulings, putting itself in a position adversarial to jurisdictions with which the agency seeks cooperation.[51] There are also legal limitations inherent in this approach. Department inconsistency rulings consider only statutory preemption, failing to examine questions of constitutionality.[52] Additionally, pursuant to Section 553 of the Administrative Procedures Act,[53] a court is limited to reviewing the substantive reasonableness of agency final rulings.[54]

VI. Commerce Clause Bases For Hazardous Materials Regulation

Being articles of trade, hazardous materials fall within the plenary power accorded Congress under the Constitution to regulate interstate commerce.[55] As opposed to merely functioning as an economic dynamic, the Commerce Clause has increasingly assumed a federal environmental and safety character, becoming a primary tool for sustaining legislation such as the HMTA.[56]

The constitutional underpinnings of hazardous materials transportation also support a degree of state regulation. Under the power reserved them by the 10th Amendment, states may regulate matters of health and public safety, despite some impact upon interstate commerce.[57] Protection against accidents upon public highways is a valid subject of the residual state police power.[58] States enjoy a well-established interest in the safe operation of their highway systems, and non-discriminatory laws

---

50. Using the courts as a super agency to effect environmental policy has, in a similar context, been criticized as "an attempt to ask a court under the guise of a common law nuisance doctrine to establish pollution standards in an area which is already subject to federal, state and local regulations . . . . such matters are best handled by regulatory agencies." City of Chicago v. Commonwealth Edison Co., 24 Ill. App.3d 624, 321 N.E.2d 412 (1974).

51. Inconsistency rulings by the Department, however, have the effect of contributing to an adversarial, confrontational relationship with regional entities and militate against the creation of a nationwide, consistent hazardous materials transportation policy.

U.S. Dept. of Transportation, *1982 Annual Report on Hazardous Materials Transportation*, at 40.

52. *Supra*, no. 39, at 75567.

53. 5 U.S.C. § 553 governs Department inconsistency rulings under 49 C.F.R. Part 107, Subpart C.

54. Independent Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975), *cert. denied* 424 U.S. 966, 96 S. Ct. 1461, 47 L.Ed.2d 733 (8th Cir. 1975).

55. U.S. Const., Art. I, § 8, cl. 3.

56. See State Environmental Protection Legislation and the Commerce Clause, 87 Harv. L. Rev. 1762 (1974).

57. Southern Pac. Co. v. Arizona, 325 U.S. 761, 764. 65 S. Ct. 1515 (1945).

58. Bradley v. Public Util. Comm'n, 289 U.S. 92, 53 S. Ct. 577, 77 L.Ed. 1053 (1933).

touching upon this interest are accorded special deference.[59] However, there are instances where this traditional deference in unwarranted. Foremost of these measures are passed off as promoting public welfare, but are truly aimed at protecting the economic interests of the particular state.[60]

Thus, in *Philadelphia v. New Jersey*,[61] the Supreme Court struck down a state requirement forbidding importation of hazardous wastes. While articulating health and environmental reasons for excluding out-of-state wastes, New Jersey kept its landfills open to domestic waste. Ostensibly banning unsafe goods, New Jersey subjectively excluded wastes on the basis of their origin, not out of any innate toxic harmfulness. Discriminating against foreign wastes was not a valid legislative means for New Jersey to reserve domestic landfill capacity for its own consumption.

Philadelphia has application to the broader spectrum of hazardous materials.[62] But as significant risk is involved in chemical transportation, it may be difficult to extrapolate protectionist motivations from state laws governing its safety. Additionally, economic protectionism may not be readily evident where the effect is to create an economic deficit, shunting trade away from the state. Laws severely restricting or prohibiting hazardous materials transportation may appear to deprive a jurisdiction of tangible economic benefit, thereby failing to coincide with notions of protectionism as unfair retention of benefit within the jurisdiction.

However, economic protectionism may also be viewed as enjoyment of a disproportionate advantage in favor of intrastate interests, "throwing the attendant burdens on those without the State."[63] A state may see itself in a better long-term economic posture by refusing certain trade, such as toxic wastes, which could eventuate into environmental contamination, or hazardous materials, which might result in catastrophe en route.[64]

State hazardous materials regulations, purporting to promote local safety interests, may clandestinely intend to detour perceived dangers onto the highways and rails of other jurisdictions. In this respect, similarity can be drawn to the truck and train-length cases. As illustrated in *Kas-*

59. South Carolina Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 58 S. Ct. 510, 82 L.Ed. 734 (1938).

60. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 44, 98 S. Ct. 787, 54 L.Ed.2d 664 (1977).

61. Philadelphia v. New Jersey, 437 U.S. 617, 98 S. Ct. 2531, 57 L.Ed.2d 475 (1978).

62. See, e.g., Washington State Bldg. & Const. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982); *cert. denied*, 461 U.S. 913, 103 S. Ct. 1891 (1983).

63. South Carolina Highway Dep't v. Barnwell Bros., Inc., 303 U.S. at 186.

64. See, e.g., Jersey Cent. Power & Light Co. v. Lacey, 772 F.2d 1103 (1985), where an ordinance prohibited importation of spent radioactive fuel intended for storage or disposal within defendant locality, which just happened to host a large nuclear waste processing facility.

sel v. Consolidated Freightways, Corp.,[65] the State of Iowa unsuccessfully sought to exclude sixty-five-foot cargo trailers from its highways. Iowa maintained its motives were purely to further highway safety. However, the Supreme Court pointed out several economically favorable domestic exemptions which indicated " . . . Iowa seems to have hoped to limit the use of its highways by deflecting some through traffic."[66]

Illinois v. General Electric Co.[67] struck down an Illinois statute banning the importation of spent nuclear fuel into the state. As in *Philadelphia*, the statute lacked a basic fairness, being directed against interstate shipment of nuclear wastes destined for final storage in Illinois, while not presuming to regulate such transportation within the state itself. Employing origin as a basis for banning nuclear waste from its highways, Illinois impermissibly discouraged legitimate, albeit unwanted, interstate commerce.

Having satisfied the requirement of evenhandedness, the constitutional inquiry turns to whether the measure nevertheless unduly burdens interstate commerce.[68] Cases in which non-discriminatory local safety measures run afoul of the Commerce Clause are exceptional.[69] But while there exists a strong presumption of validity in favor of state safety laws, the presumption is not irrebuttable. Legitimate safety statutes may still exceed the limits permitted under the Commerce Clause and are subject to a multifaceted constitutional inquiry, including whether the effect on commerce is direct or incidental, what the actual burdens and putative local benefits are, whether the benefits might be promoted in a less burdensome way, and whether, in the total analysis, the burden on interstate commerce is clearly excessive in relation to the benefits derived from the local measure.[70]

In one of the few cases striking down evenhanded state safety measures, *Bibb v. Navajo Freight Lines, Inc.*,[71] the Supreme Court affirmed an injunction against enforcement of an Illinois law requiring all trucks operating within the state to be equipped with a peculiar style of splash guard. The overwhelming majority of states sanctioned a standard splash guard now outlawed within Illinois. Plaintiffs affirmatively overcame the strong presumption of validity by showing the innovation represented substantial

65. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 101 S. Ct. 1309, 67 L.Ed.2d 580 (1981).

66. *Id.* at 677.

67. Illinois v. General Elec. Co., 683 F.2d 206 (7th Cir. 1982), *cert. denied* 103 S. Ct. 1891 (1983).

68. Southern Pac. R.R. Co. v. Arizona, 325 U.S. 761 (1945).

69. Raymond Motor Transp. v. Rice, 434 U.S. 440.

70. Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L.Ed.2d 174 (1970).

71. 359 U.S. 520, 3 L.Ed. 1003 (1959).

expense and inconvenience, while having little contribution to truck safety. Out of step with a prevailing standard, the Illinois provision was not offset by an viable safety benefit warranting such a deviation.

The presumption of validity was not overcome, however, in *National Tank Truck Carriers, Inc. v. Burke*[72] where a Rhode Island regulation called for hazardous materials trucks to be equipped with "two-way radios." The Court found such novel equipment would enhance communications in the event of an emergency and entail minimal cost. A citizenband radio, a relatively inexpensive item already installed in many trucks, would satisfy the requirement.

VII. Preemption of Particular State Measures

Certain aspects of hazardous materials transportation are so stringently regulated at the federal level and demand standardization to such a degree that " . . . it is difficult to envision any situation where State or local regulations would not present an obstacle to the accomplishment and execution of the HMTA and the Hazardous Materials Regulations."[73]

This federal exclusivity particularly resides in the area of cargo packaging and containment. Thus, where Rhode Island required a special compartment lock on certain tank trucks, such was found to be in direct conflict with the HMTA.[74]

The preemptive effect of federal law upon state driver and operational safety equipment regulations is considerably less scope. Vehicle equipment and driver requirements are incorporated by reference into the HMTA from the Federal Motor Carrier Safety regulations.[75] A less far-reaching preemption test governs this body of regulation:[76]

> Except as otherwise specifically indicated, Parts 390-397 of this subchapter are not intended to preclude States or subdivisions from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the person subject thereto.

In *National Tank Truck Carriers, Inc. v. Burke*,[77] a state requirement for illuminated rear bumpers on tank trailers was found to conflict with federal regulations. Of particular note is *Ranger Division, Ryder Truck Lines, Inc. v. Bayne*,[78] where Federal Motor Carrier Safety regulations

72. 535 F. Supp. 509 (D.R.I. 1982).
73. *Supra*, note 39, at 75568.
74. *Id.* at 75566.
75. 49 C.F.R. § 177.804 (1984):
> Motor carriers and other persons subject to this part shall comply with 49 C.F.R., Parts 390 through 397 (excluding Sections 397.3 and 397.9) to the extent those rules apply.
76. 49 C.F.R. § 390.30 (1985).
77. *Supra*, note 72.
78. 214 Neb. 251, 333 N.W.2d 891 (1983).

mandating minimum physical qualifications for drivers were found to preempt a state law prohibiting discrimination against the handicapped. Appellee motor carrier did not discriminate in refusing to hire appellant driver-applicant, who had previously lost the fingers of his right hand.

VIII. PREEMPTION OF STATE ROUTING MEASURES

Admission of growing localized participation is evidenced by increasing organization of the highway routing of hazardous materials vehicles; a matter " . . . different from the more traditional safety controls such as packaging, package marking, vehicle placarding and loading."[79] The power to prescribe specific hazardous materials corridors continues to become a thriving issue among states and localities; however, the HMTA[80] empowers the Secretary of Transportation to promulgate regulatings governing highway routing of hazardous materials.[81]

True routing measures are characterized as those which seek to avoid some indigenous landmark or are otherwise "directly related to characteristics that are peculiar to a special geographic location."[82] A general routing provision, codified at 49 C.F.R. 397.9, exists within the Federal regulations, stating in pertinent part:[83]

> Unless there is no practicable alternative, a motor vehicle which contains hazardous materials must be operated over routes which do not go through or near heavily populated areas, places where crowds are assembled, tunnels, narrow streets, or alleys . . .

While more detailed regulations have been adopted covering radioactive materials,[84] courts have not been persuaded that Section 397.9 evinces a general federal intent to preempt state hazardous materials routing measures.[85] The Secretary concurs with this assessment.[86]

Apart from the HMTA, routing measures nevertheless remain open to constitutional inquiry. Local routing measures are more likely to pass muster where their focus is limited to averting some potentially hazardous obstacle, such as a bridge, tunnel, school, or populated area, by redi-

---

79. *Supra*, note 49, at 5300.

80. In 1985, for example, State Senator Norman Levy introduced several hazardous materials transportation bills into the New York State Senate. S.4954 proposed creation of a state Hazardous Materials Transportation Board with broad powers to establish routes. While the measure passed the Senate after modification, it was not signed by Governor Cuomo. Undaunted, Senator Levy reintroduced his seminal bill as S.9012 into the 1986 Senate Session, where it remained.

81. 49 U.S.C. § 1804(a) (1976).

82. *Supra*, note 49, 5303.

83. 49 C.F.R. § 397.9(a)(1985).

84. 49 C.F.R. § 177.825 (1985); covering routing and training requirements for radioactive materials transportation.

85. People v. Dempsey, 120 Misc. 2d 1035, 466 N.Y.S.2d 923 (1983).

86. *Supra*, note 49, at 5300.

recting transportation of hazardous materials over safer alternate thoroughfares.

For example, in *National Tank Truck Carriers, Inc. v. City of New York*,[87] certain fire department directives imposed restrictions upon trucks carrying hazardous gases through New York City. In large part, the measures kept these trucks at arm's length, forcing them to circumvent urban New York primarily by driving through New Jersey.

Appellants sought declaratory relief, maintaining the regulations posed an unconstitutional burden on interstate commerce. However, the Court found the modest increase of about one hour's journey in bypassing New York City supportable by unique local conditions. Metropolitan New York possesses unusual demographic features, such as high structures and population densities, not prevalent in outskirting communities. Additionally, it has an extensive network of subterranean utility tunnels, prone to accumulate explosive liquids and vapors in the event of a hazardous materials incident. The imposition of specific routes and curfews for hazardous bulk gas transporters was found to be in harmony with the HMTA, and constitutionally minimal, when balanced against the public interests in avoiding a catastrophe in densely populated urban New York.

IX. Preemption of State Curfew Measures

Within the framework of the HMTA, state restrictions on the permissible times of travel for hazardous materials trucks are treated differently than routing measures and may have effects extending well beyond the enacting jurisdiction.

In *National Tank Truck Carriers, Inc. v. Burke*,[88] a state-wide curfew forbade hazardous gas transportation during certain prescribed hours. The District Court found the measure had the effect of preventing entry into Rhode Island, forcing a shift in the flow of commerce which unnecessarily exposed adjacent states to risk:[89]

> In order to protect Rhode Island citizens, the Division could have increased the risk of accidents involving hazardous materials for the citizens of Massachusetts and Connecticut.

While a temporary delay occasioned by a single curfew may not be overly burdensome, the unavoidable effect of a multiplicity of curfew restrictions is significant and cumulative delay. Additionally, as trucks course their way through various jurisdictions, time of operation limitations imposed upon them en route may produce a ripple effect, relieving one location from exposure to risk, while at the same time transmitting

87. 677 F.2d 270 (2d Cir. 1982).
88. *Supra*, note 72.
89. *Id.* at 518.

that risk to other locations. Postponing entry of hazardous materials trucks encourages extra-jurisdictional chokepoint, jeopardizing persons and property remote from those localities deriving a direct, pecuniary benefit from the shipment. A terminus jurisdiction may thereby endanger other communities without like economic interest or foresight to pass the risk further away.

The Department views local restrictions on times of travel as defeating Congress' intent for uniformity and as an impediment to the safe movement of hazardous materials:[90]

> The manifest purpose of the HMTA and the hazardous materials regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation. Given that the materials are hazardous and their transportation is not risk-free, it is an important safety aspect of the transportation that the time between loading and unloading be minimized.

As a practical matter, routing and curfew requirements will always impose a degree of burden, bringing their validity into question. Instead of suppressing essential products and services, states and localities would do well to orient their thinking towards improving hazardous materials response capability.

When a chemical mishap occurs, ofttimes the consequences are exacerbated by the local emergency responders' lack of familiarity with hazardous materials.[91] Insufficient training, funding and planning are facts which plague the local fire departments typically called upon to quell hazardous materials transportation incidents.[92]

Rising public concern recently prompted State Senator Raymond Lesniak to form a group within his heavily industrialized district in northern New Jersey to comprehensively address hazardous materials response. The Hazardous Materials Advisory Council of Union and Middlesex Counties (HMAC) pools resources and expertise of industry, local government and community groups into a highly effective emergency response program.[93] The success of HMAC serves as a pattern for other communities.

---

90. *Supra*, note 39, at 75571.

91. The local fire department usually is called upon to deal with a major transportation disaster . . . Many fire departments—particularly in rural areas have inadequate training in dealing with the products that are nowadays shipped in such profusion in large volumes.
Fawcett & Wood, *Safety and Accident Prevention in Chemical Operations* at 681-82 (1982).

92. U.S. Dept. of Transportation, *Community Teamwork: Working Together to Promote Hazardous Materials Transportation Safety*, (May 1983).

93. Hazardous Materials Advisory Committee of Union & Middlesex Counties, *1985 Annual Report* (Available from HMAC, P.O. Box 23, Linden, NJ 07036).

X. PREEMPTION OF STATE PERMIT AND LICENSE MEASURES

Various entities require parties to obtain permits or licenses before transporting hazardous materials through their jurisdictions.[94] It has been held that a "bare" permit or license requirement is not inconsistent with the HMTA.[95] However, " . . . a permit itself is inextricably tied to what is required in order to get it."[96]

New Hampshire Motor Transport Assoc. v. Flynn[97] validated a state hazardous materials permit scheme. Plaintiffs argued that the mandatory permit, available only during weekday business hours, would result in delay of transportation in contravention to the HMTA, and particular, a federal regulation which mandates the expeditious movement of hazardous materials:[98]

> No unnecessary delay in movement of shipments. All shipments of hazardous materials shall be transported without necessary delay, from and including the time of commencement of the loading of the cargo until its final discharge at destination.

Offering the permit on an annual basis afforded ample opportunity to truckers anticipating transportation to be conducted after business hours to secure a permit in advance. Those unable to foresee this need would be compelled to either wait until the next business day or substitute equipment already possessing an annual permit, inconveniences the Court found insufficient to offend the HMTA.

By way of contrast is *National Tank Truck Carriers, Inc. v. Burke*,[99] where a state regulation required certain liquid natural gas carriers to obtain a hazardous materials transportation permit, available solely on a per-trip basis. Additionally, application had to be submitted not less than four hours prior to shipment. This requirement was held inconsistent with the HMTA, particularly the "unnecessary delay" language of Sec. 177.853(a).[100]

Evidence before the Court indicated it would be impossible to submit the permit application until truck loading operations were completed. As it was shown the chemical tended to become increasingly volatile when en route for long periods, this hiatus in shipment imposed needless risks

---

94. For example, Sec. 403.7, Hazardous Substances Transportation Board Rules, Penn. Turnpike Comm., requires motor carriers to obtain annual permits and maintain certain records to transport hazardous materials on the turnpike. Carriers must also name the Commission as an additional insured party under their automobile liability policy and hold the Commission harmless for all claims incurred while using the turnpike.

95. New Hampshire Motor Transp. Ass'n v. Flynn, 751 F.2d 43 (1st Cir. 1984), at 51.

96. *Supra*, note 39, at 75570-71.

97. *Supra*, note 95.

98. 49 C.F.R. § 177.853(a) (1985).

99. *Supra*, note 72.

100. *Supra*, note 98.

onto neighboring states, which could expect to host queues of gas-laden trucks awaiting permission to lawfully enter Rhode Island.

While dissimilar in result, the above two decisions provide a cohesive approach by linking the validity of such requirements to the ease with which a permit may be obtained. Diminished obtainability, as *Burke* indicates, invites preemption. Hazardous materials transportation permits more readily available, as in *New Hampshire*, stand a greater likelihood of validity.

Restrictive hazardous materials truck permit requirements may also carry with them undesirable reciprocal effects. By adopting stringent permit requirements, states may themselves become hazardous materials havens. Unilateral permit restrictions could produce retaliatory prohibitions, causing a jurisdiction which thwarts entries to unwittingly retain shipments neighboring localities refuse to accept.

In *Browing-Ferris, Inc. v. Anne Arundel County*,[101] defendant county passed an ordinance prohibiting disposal of hazardous wastes within its boundaries. The measure also imposed restrictions on hazardous waste transportation, including a minimum license fee of $1000 and detailed paperwork to be carried on each truck passing through the country.

In striking the measure down, the Court recognized the deleterious effect of a "battle of the permits," observing that:[102]

> . . . if Anne Arundel County may enact such requirements consistent with the Commerce Clause, so may other counties in Maryland, and counties in every other state as well. If each county has that power to regulate, it follows that each would have authority to enact regulations unique unto itself. Every county, then, could have regulations in this area different from those of every other county. If those other counties enacted regulations in the area, a person transporting hazardous wastes from New York through Maryland to Virginia would be burdened not simply with the responsibility of meeting the requirements of Anne Arundel County, and those of several other counties in Maryland, but of every other local government in every state on his route.

As more jurisdictions adopt such restrictive measures, the cumulative obstacle to commerce may compel alternative means of controlling hazardous materials over the highways. An alternative with measurable benefit to highway safety would be to develop the skills needed by drivers who haul hazardous materials. Special licensing for this category of driver would document a minimum level of hazardous materials competence.[103]

---

101. Browning-Ferris, Inc. v. Anne Arundel, 438 A.2d 269 (1981).

102. *Id.* at 274-275.

103. While it has been estimated that human error accounts for more than 64% of hazardous materials incidents, training requirements under the hazardous materials regulations remain woefully inadequate:

> Most drivers transporting hazardous cargoes simply have to take, but not necessarily

The U.S. Department of Transportation recently issued a notice of proposed rulemaking which would strengthen existing hazardous materials driver qualifications.[104] Unfortunately, their approach falls short of promulgating a national hazardous materials operator's license. The National Transportation Safety Board strongly advocates some form of special hazardous materials operator licensing. The Board's proposal represents a positive and workable means to improving hazardous materials safety on the highway.[105]

XII. Survival of Common Law Actions Under the HMTA

Where there have been parties who have been injured in some manner by hazardous materials transportation activities, the threshold inquiry regards the extent to which the HMTA abrogates private rights of recovery. Other than preempting inconsistent state "requirements,"[106] the Act remains silent as to the survival of individual actions either imposed by virtue of the statute,[107] or arising under common law.[108]

The validity of actions alleging a breach of duty created by statute has been determined through the following variously applied criteria, including: whether the plaintiff qualifies as part of the class intended to come within the enactment's scope of protection; and whether the hazard was of a nature the enactment intended to prevent.[109]

The HMTA provides protection of the public from accidents involving

---

pass, a 66-question, open-book examination; must be certified on various driver qualification requirements, including a road test; and be "thoroughly instructed" on the regulations. The eight questions on DOT's written examination dealing with the HMTA [hazardous materials transportation regulations] do not comprehensively test knowledge or understanding of these regulations. DOT's examination does not test whether someone is trained in, or has a basic understanding of, emergency response procedures appropriate to the job, and the responsibilities of being a driver of a truck transporting hazardous materials.

P. Rothberg, "Should DOT's Rule Affecting Hazardous Materials Handling and Transport Be Strengthened?", The Private Carrier (June 1986) at 34.

104. FHWA Qualifications of Drivers; Drugs, § 391.1 (1986).

105. The Safety Board also believes that there is a need to collect data for use in determining the minimum level of operational experience for a special license or certification as well as for determining the number of traffic accidents, the traffic violation convictions, and the license suspensions that should disqualify drivers who apply for a special class of license or certification to transport hazardous materials.

National Transportation Safety Board, Safety Recommendation No. H-83-84 (July 8, 1983), at 4.

106. 49 U.S.C. 1811(a) (1976).

107. Unlike citizen suit provisions drafted into other environmental and safety statutes (for example, 42 U.S.C. Section 6972, Resource Conservation and Recovery Act of 1976), the HMTA does not allow for individuals to assume the role of private attorney general in seeking to redress perceived violations of the Act or its regulations. Borough of Ridgefield v. New York Susquehanna & Western R. Co., 632 F. Supp. 582 (D.N.J. 1986).

108. It has been held that the HMTA " . . . evidences no intent to affect state regulation of tort liability." S. Pac. Transp. Co. v. United States, 462 F. Supp. 1193, 1225 (E.D.Ca. 1978).

109. Solomonson v. Melling, 664 P.2d 1271, 134 Wash. App. 687.

hazardous materials transportation.[110] Thus, where a plant employee was injured while pouring acid from a drum shipped some twenty days previous, he failed to demonstrate the delivering carrier owed him any duty by virtue of the HMTA.[111]

In *Seaboard Coast Line Railroad v. Mobil Chemical Co.*,[112] a rail tank car containing phosphorus trichloride derailed, causing the evacuation of a community. Substantial third-party claims were incurred by Seaboard, the rail carrier. Seaboard's investigation attributed the accident to a tank car defect. Mobil, shipper of the chemical and lessee of the car, applied for a declaratory judgment to determine its liability.

Seaboard counterclaimed on negligence and strict liability for breach of express and implied warranties, alleging Mobil had made representations under certain hazardous materials regulations[113] which required certification that, among other things, the materials were in condition suitable for transportation.

The Court found no duty in warranty under the relevant regulations, stating the clear import of the HMTA:[114]

> . . . is to provide a system designed to protect the general public from unreasonable risks to health, safety or property posed by the transportation of such hazardous materials in commerce, not to impose a strict liability on the part of shippers of these materials, burdening them with an absolute duty to insure against all risks of harm."

Hazardous materials transportation activities, conforming to the minimum proscriptions embodied in the HMTA or regulations thereunder, may nonetheless fall short of a reasonable standard of care. Mere conformance with statutes and regulations is insufficient to insulate a party from responsibility for his tortious conduct, and injuries arising from such activities which may involve a breach of duty owed under common law.[115]

Generally speaking, where causes of action merely air some personal grievance concerning the HMTA, alleging damages merely prospective or speculative, courts have relegated plaintiffs to their available administrative remedies.

Causes of action at common law for nuisance, seeking to enjoin activities condoned by the HMTA, have not found judicial support. *Consolidated Rail Corp. v. City of Dover*[116] involved a suit to enjoin local railyard

110. Williams v. Hill Mfg. Co., Inc., 589 F. Supp. 20 (D.S.C. 1980).

111. Garrett v. E.I. Dupont De Nemours & Co., 257 F.2d 687 (3d Cir. 1958).

112. 172 Ga.App. 543, 323 S.E.2d 49 (1984).

113. 49 C.F.R. § 172-204 (1985).

114. *Supra*, n.112, 323 S.E.2d at 52.

115. Adherence to statutes and administrative regulations may be some evidence of due care, but compliance does not preclude a finding that defendant failed to meet a reasonable standard of care. Blasing v. P.R.L. Hardenberg Co., 94 N.W.2d 697 (Minn. 1975).

116. Consol. Rail Corp. v. The City of Dover, 450 F. Supp. 966 (D. Del. 1978).

switching of chemical-laden freight cars. The complaint, based in tort for public nuisance, did not allege a violation of HMTA standards and failed to state how the movement of hazardous materials injured the plaintiff.

The Court, while declining injunctive relief on the basis of primary jurisdiction, went on in dicta, to postulate that Section 112(a)[117] of the HMTA would operate to preempt state common law nuisance remedies, as well as state statutory law:[118]

> What Dover may not do directly through enforcement of its ordinance, it may not do indirectly by means of a common law claim for nuisance. It would be incongruous for the Court to hold otherwise.

A similar result was achieved on the merits in another nuisance action, *Kappelman v. Delta Air Lines, Inc.*,[119] discussed above, where the Court refused to paint activities, sanctioned by the Act, with a broad brush of liability, pointing out the absurdity of providing a hazard warning to airline passengers when a plane carries materials regarded within the federal regulations as safe.

The HMTA does not operate to preempt all relief at common law. Apart from the nuisance torts, negligence actions are more survivable where aggrieved parties have incurred substantial damages. Some doubt exists, however, concerning the availability of strict tort liability for injury arising out of the shipment of hazardous materials.[120]

Under Section 402A, Restatement (Second of Torts, strict liability may be imposed upon those introducing into commerce " . . . any product in a defective condition unreasonably dangerous to the user or consumer or to his property."[121] A second formulation of strict tort liability rests in Section 519, Second Restatement for injury from abnormally dangerous activities.[122]

---

117. 49 U.S.C. § 1811(a) (1976).

118. Consol. Rail Corp. v. The City of Dover, 450 F. Supp. 974 (D. Del. 1978).

119. Kappelman v. Delta Airlines, Inc., 539 F.2d 165.

120. A number of jurisdictions have relegated plaintiffs to a negligence cause of action. Forrest v. Imperial Distrib. Services, 712 P.2d 488; Ozark v. Stubb's Transports, 351 F. Supp. 351 (W.D.Ark. 1972); Christ Church Parish v. Cadet Chemical Corp., 25 Conn. Sup. 191, 199 A.2d 707 (1964); Garrett v. E.I. DuPont de Memours & Co., 257 F.2d 687 (3d Cir. 1958); Reddick v. General Chem. Co., 124 Ill.App. 31 (1905). Several of these cases turned on defendant's status as a common carrier of property, the theory being that strict liability should not be imposed on common carriers having an obligation to accept and transport public goods, including hazardous materials. Actiesselskabet Ingrid v. Central Railroad, 216 F.72 (2d Cir.); *cert. denied*, 238 U.S. 615 (1914). The fairness of excepting common carriers from a strick liability standard has been questioned, in that they are remunerated for their transportation services. *Common Carriers and Risk Distribution: Absolute Liability for Transporting Hazardous Materials*, 67 Ky. L.J. 441 (1978-79). This argument overlooks the liability of the party controlling the shipment and enjoying the lion's share of economic benefit, namely, the shipper.

121. Restatement (Second) of Torts § 402A (1977).

122. (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he

While product liability concerns goods containing some unreasonably unsafe flaw, considerations of product defect are largely irrelevant under Section 519. This provision looks not only to the nature of the thing or activity, but also to the relationship to its surroundings.[123]

The origins of Section 519 trace themselves to a niche carved from common law negligence to accommodate the use of blasting explosives.[124] More recently, some courts have expanded strict liability to include activities involving chemical shipments.

It may seem incongruous for activities condoned by safety regulations to be considered abnormally dangerous. However, courts, unwilling to bind themselves by legislative definitions, are free to inquire independently as to the tortious nature of an activity.[125]

Section 520 of the Second Restatement[126] is straightforward in outlining the conditions operant for the rule of abnormally dangerous strict liability:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

While what constitutes an abnormally dangerous activity is a question of law for the courts to decide,[127] judicial application of these criteria to a particular activity may produce arbitrary results. For example, although increasingly applied to injury from chemicals, abnormally dangerous strict liability has not generally been extended to harm arising from the use of other non-defective products, such as handguns.[128]

---

has exercised the utmost care to prevent the harm. (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous. Restatement (Second) of Torts § 519 (1977).

123. Emphasizing this aspect, the Second Restatement substitutes an "abnormally dangerous" concept for "ultrahazardous," used in the First Restatement.

124. See, for example, Federoff v. Harrison Constr. Co., 362 Pa. 181, 66 A.2d 817 (1949).

125. See, for example, S. Nat. Gas. Co. v. Gulf Oil Corp., 320 S.2d 917 (1975); *cert. denied*, 324 S.2d 812 (La. App. 1976).

126. Restatement (Second) of Torts § 520 (1977).

127. Langan v. Valicopters, Inc., 88 Wash.2d 855, 567 P.2d 218 (1977).

128. Imposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision by Illinois to allow its citizens to possess handguns. A change in this policy . . . would require that manufacturers of guns, knives, drugs, alcohol, tobacco and other dangerous products act as insurers against all dangers produced by their products.

Strict liability was applied to the highway transportation of gasoline in *Siegler v. Kuhlmann*,[129] where a tractor and tank-trailer combination separated while underway, spilling the flammable contents over the highway. The ensuing fire engulfed plaintiff's decedent, driver of an automobile traveling the same road.

Ostensibly drawing authority from Section 519, the *Siegler* court encounters difficulty with the concepts underlying abnormally dangerous liability, observing that no degree of due care can protect the public:[130]

> . . . from the disastrous consequences of concealed or latent mechanical or metallurgical defects in the carrier's equipment, from the negligence of third parties, from latent defects in the highways and streets, and from all of the other hazards not generally disclosed or guarded against by reasonable care, prudence and foresight.

Had the court restricted its focus, rather than interspersing irrelevant concepts of defect more suited to product liability, it is doubtful the defendant's conduct would have supported a recovery of damages predicated solely on abnormally dangerous liability. Gasoline delivery is hardly an uncommon venture in which the public acts as a disinterested observer. Society, fundamentally reliant upon the customary and safe delivery of gasoline, has an important stake in the accessibility such widespread distribution provides. Ascribing abnormally dangerous liability to gasoline transportation is inconsistent with the prerequisites for strict liability outlined in Section 520 of the Second Restatement. As a result, *Siegler* presents an unsound restatement of the theory underlying abnormally dangerous strict liability.[131]

Another decision affecting common law duties of hazardous materials transporters is *Indiana Harbor Belt Railroad v. American Cyanamid Co.*,[132] involving a railcar leak of acrylonitrile which resulted in substantial damage. The matter appeared before the Northern District of Illinois on a pretrial motion to dismiss. The Court, sitting in diversity, concluded as a matter of first impression that Illinois law would support an actionable duty for transporting acrylonitrile under abnormally dangerous strict liability theory. Leaving the issue of breach of this duty to the trier of fact, it re-

---

> Whatever the economic wisdom of such a policy might be, there is no basis for assuming that Illinois law wishes to adopt it.

Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984).

129. Siegler v. Kuhlman, 81 Wash2d. 448, 502 P.2d 1181 (1972); *cert. denied*, 411 U.S. 983, 93 S. Ct. 2275 (1973).

130. A rule of abnormally dangerous strict liability for gasoline transportation has been rejected in Kentucky, because " . . . of the general usage of gasoline, the need of using the public highways in its distribution, the administrative facilities available for the regulation of its transportation, and the great care ordinarily followed in handling it." Collins v. Liquid Transporters, 262 S.W.2d 381 (Ky. 1953).

131. Siegler v. Kuhlman, 502 P.2d at 1187.

132. Indiana Harbor Belt R.R. v. Am Cyanamid Co., 517 F. Supp. 314 (N.D. Ill. 1981).

viewed the complaint, observing:[133]

> The complaints here allege shipping acrylonitrile is an inherently dangerous activity both because of the characteristics of the chemical and the type of equipment upon which it was transported. Plaintiff argues that the natural and probable consequences of loading and transporting acrylonitrile in a *defective tank care* is property damage and personal injuries and cites the actual damage which allegedly occurred. [emphasis supplied]

As *Indiana Harbor Belt* concerned pretrial issues, the eventual outcome of plaintiff's proofs is merely speculative. Yet, plaintiffs won a stirring victory by establishing abnormally dangerous strict liability at this preliminary stage. Assuming the trial evidence indicated a tank car defect to be the sole proximate cause, plaintiff would then have had no sustainable action against the non-negligent transporter. Plaintiff deftly eliminated some troublesome elements of proof from his prima facie case against the transporter. The successful result not only spread liability, it shifted the burden to the transporter to implead other defendants, such as the tank car manufacturer, with which to participate in his damages. By way of *Indiana Harbor Belt*, chemical transporters become insurers of all perils associated with the movement of their cargoes.

Imposition of strict liability is viewed as a socially expedient means to gather money damages sufficient to properly compensate a loss.[134] As an overriding judicial policy aim is to insure the costs of injury are borne by someone deriving a benefit from an injurious activity, nexus to the injury becomes less relevant in framing relief than a defendant's accessibility and ability to pay.[135] Objective analysis of the bases of strict liability for abnormally dangerous activity will continue to be difficult where fault is assigned primarily on the depth of the defendant's pockets. In the interests of building objective case law, and in elemental fairness to chemical defendants, courts should abandon the confusing semblance of logic in this approach and apply a rule of strict liability honestly tempered by the criteria in Section 520.

---

133. *Id.* at 317.

134. There is a growing belief, however, that in this mechanical age the victims of accidents can, as a class, ill afford to bear the loss; that the social consequences of uncompensated loss are of far greater importance than the amount of the loss itself; and that better results will come from distributing such losses among all the beneficiaries of the mechanical process than by letting compensation turn upon an inquiry into fault.

New Meadows Holding Co. v. Wash. Water Power Co., 34 Wash. App. 25, 659 P.2d 1113, 1121 (dissenting opinion); *aff'd.*, 687 P.2d 212 (1984).

135. . . . the commercial transporter can spread the loss among his customers who benefit from this extrahazardous use of the highways. Also, if the defect which caused the substance to escape was one of manufacture, the owner is in the best position to hold the manufacturer to account.

Siegler v. Kuhlmann, 502 P.2d 1188 (concurring opinion).

XIII. CONCLUSION

As a result of their indispensible nature, the safe and economical transportation of hazardous materials is a critical necessity. The federal government, through its legislative and rulemaking authority, has made large advances toward this goal. Yet, public antipathy to chemicals has also stimulated local regulatory activity, resulting in a proliferation of oft-times conflicting controls on hazardous materials transportation.

Hazardous materials are subject to simultaneous and divergent social pressures from industry, regulators, and the public at large. While the nature and sheer volume of chemical substances in transit presents concern to government on all levels, the Balkanization of hazardous materials regulation can only impede commerce and, in the final analysis, community safety. Uniformity, a primary goal of Congress in enacting the Hazardous Materials Transportation Act, remains an elusive one. As a result, courts will continue to play a more active role, reconciling turf disputes over hazardous materials, as well as common law suits stemming from hazardous materials injuries.