

# VICARIOUS LIABILITY OF OIL REFINERS FOR CONTAMINATION OF UNLEADED GASOLINE UNDER THE CLEAN AIR ACT

*Mitchell Jed Geller\**

## I. INTRODUCTION

In the last decade air pollution has become one of the most significant problems in the country. Only passing reference need be made to the voluminous writings of scientists or the spate of Senate and House hearings on the subject to demonstrate the widespread concern this crisis has produced in the society-at-large.<sup>1</sup> Everyone, particularly the urban dweller, becomes aware of the ever present and ever increasing pollution by the simple act of breathing. It is no longer disputable that air pollution leads to serious health effects in human beings.<sup>2</sup> The belief that the continued degradation of the air is an inherent by-product of progress can no longer be sustained.

The chief villain, the automobile, accounts for at least 60% of air pollution.<sup>3</sup> Concern over the pollution caused by motor vehicle emission has produced comprehensive legislation, most notably the far-reaching and stringent programs of the Clean Air Amendments of 1970 and 1977.<sup>4</sup> The crux of the 1970 legislation was § 202(b) which

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\* Staff Member, ENVIRONMENTAL AFFAIRS

<sup>1</sup> E.g., *Hearings on S. 3229, S. 3466 and S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess. 167-69, 465, 1639-45, 1295-96 (1970). See also 116 CONG. REC. 32901 (1970) (remarks of Sen. Muskie).

<sup>2</sup> "Clean air in some parts of our Nation is in such short supply that, if we continue along the same lines we have for the past decade, we have been warned that mass deaths may result in this decade." 116 CONG. REG. 19210 (remarks of Rep. Rogers).

<sup>3</sup> See 116 CONG. REC. 19205 (1970) (remarks of Rep. Staggers). See generally NAT'L ACADEMY OF SCIENCES COMM. ON BIOLOGIC EFFECTS OF ATMOSPHERIC POLLUTANTS, AIRBORNE LEAD IN PERSPECTIVE (1972); Dep't of Health, Education and Welfare, SYMPOSIUM ON ENVIRONMENTAL LEAD CONTAMINATION, (Public Health Service Pub. No. 1440, 1966); EPA's Position on the Health Implications of Airborne Lead, 38 Fed. Reg. 33734 (1973).

<sup>4</sup> 42 U.S.C. § 1857 et seq. (1970); and H.R. REP. No. 564, 95th Cong., 1st Sess. (1977)

established the maximum levels for new motor vehicle emissions permissible by 1975 and 1976.<sup>5</sup> The Act gave the Environmental Protection Agency (EPA) the authority to regulate the sale and use of fuels,<sup>6</sup> as well as the power to enforce compliance.<sup>7</sup>

Pursuant to the Clean Air Act, the EPA promulgated regulations mandating the availability of unleaded gasoline to the motoring public.<sup>8</sup> Contamination of unleaded gasoline,<sup>9</sup> however, is inherent in a distribution system that supplies retailers with both unleaded and leaded gasoline from the same facilities. Pipelines, barges and trucks transport both types of gasoline in separate sections of the same system.<sup>10</sup> The contamination problem obviously would not exist if lead additives were prohibited in all grades of gasoline. Such a prospect, however, does not seem likely in the near future.<sup>11</sup>

Faced with this unique regulatory problem the EPA had to determine how best to ensure compliance with its regulation requiring availability of pure unleaded gasoline to the motorist. Central to the regulatory scheme was the allocation of responsibility for lead con-

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(Conference Report on Clean Air Act Amendments of 1977). For a comprehensive analysis of the scope of the 1970 amendments and their importance to environmental air pollution enforcement, see Comment, *The Clean Air Amendments of 1970: Better Automotive Ideas From Congress*, 12 B.C. IND. & COM. L. REV. 571 (1971). The proposed 1977 amendments do not address the issue of unleaded gasoline contamination.

<sup>5</sup> 42 U.S.C. § 1857f-1(b) (1970). This section required "[a] reduction of at least 90 per centum from emissions of carbon monoxide and hydrocarbons allowable . . . in model year 1970" for 1975 and post-1975 model cars and a "reduction of at least 90 per centum from the average of emissions of oxides of nitrogen actually measured during model year 1971" for 1976 and post-1976 model cars. However, the Energy Supply and Environmental Coordination Act of 1972, 42 U.S.C. § 1857f-1(b) (Supp. V 1975), amending 42 U.S.C. § 1857f-1(b) (1970), deferred these required reductions for two years. On March 5, 1975 the Administrator of the EPA suspended these 1977 statutory standards establishing interim standards for that model year. 40 Fed. Reg. 11901 (1975).

<sup>6</sup> 42 U.S.C. § 1857f-6c (1970).

<sup>7</sup> 42 U.S.C. § 1857g (a) (1970).

<sup>8</sup> 38 Fed. Reg. 1254-56 (1973). On February 23, 1972 the Administrator published proposed regulations requiring the sale of unleaded gasoline. 37 Fed. Reg. 3882-84 (1972). Comments were solicited and hearings were held in three cities. The oil refiners fully participated in these hearings. *Amoco Oil Co. v. EPA*, 501 F.2d 722, 728 (D.C. Cir. 1974).

<sup>9</sup> Contaminated gasoline is gasoline not meeting the definitional standard of unleaded gasoline of not more than .05 grams of lead per gallon. 40 C.F.R. § 80.2(g) (1976).

<sup>10</sup> *Standard Oil Co. of Cal., Trace Lead Program Operating and Monitoring Procedures*, Record at 378-444, *Amoco Oil Co. v. EPA*, 543 F.2d 270 (D.C. Cir. 1976); L. Duffy, *Lead Monitoring Program*, Record at 153-175, *Amoco Oil Co. v. EPA*, 543 F.2d 270 (D.C. Cir. 1976).

<sup>11</sup> The EPA has issued regulations requiring a gradual reduction of lead in all other grades of gasoline as a public health measure, 40 C.F.R. § 80.20 (1976). These regulations were upheld by the Court of Appeals for the District of Columbia Circuit, *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976).

tamination. Because of the various stages of the gasoline distribution system, identification of the actual party at fault would in some cases be virtually impossible.<sup>12</sup> Having defined a "violation" as occurring at the time of actual sale to the motorist,<sup>13</sup> prevention of such a violation was an even greater problem. In the United States there are over 220,000 retail gasoline outlets and about 250 gasoline refiners.<sup>14</sup> Controlling the lead output at the refinery would have been a simple matter because the extensive quality control system used at the refinery would detect any degree of lead contamination. This procedure, however, would not ensure the sale of unleaded gasoline to the public, since most contamination occurs during distribution from the refinery to the retail service station.<sup>15</sup>

In light of this difficult enforcement problem, the EPA had several means to allocate liability for the contamination of unleaded gasoline. First, strict liability could be imposed upon the refiner; thus, the refiner would be liable for every violation regardless of its cause or of its location in the distribution process. This type of liability, attaching to a party irrespective of fault, recognizes the difficulty of identifying the negligent party within the gasoline distribution network. It also reflects the belief that refiners, with their extensive control over gasoline distribution, are in the best position to prevent such violations. A second approach, imputed or vicarious liability, would hold the refiner liable for the negligence of any party under his control. This type of liability is less stringent than strict liability because it requires proof of the negligence of the controlled party. A final method could be the imposition of either vicarious liability, coupled with a shift in the burden of proof to the refiner, or strict liability, coupled with the allowance of certain limited defenses. In the former, negligence of the retailer is presumed, but the refiner is allowed the opportunity to rebut that presumption. In the latter, the refiner can escape liability only upon a showing that the violation occurred due to acts such as sabotage or unpreventable breach of contract.

This article will analyze the attempts of the EPA to deal with the

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<sup>12</sup> 39 Fed. Reg. 13175 (1974).

<sup>13</sup> *Id.* at 13174.

<sup>14</sup> Teknekron, Inc., Analysis of Existing Relationships in the Distribution of Gasoline, Record at 454, *Amoco Oil Co. v. EPA*, 543 F.2d 275 (D.C. Cir. 1976).

<sup>15</sup> L. Duffy, "Keeping the Lead Out of Unleaded Gasoline," Record at 134-152, *Amoco Oil Co. v. EPA*, 543 F.2d 270 (D.C. Cir. 1976). The EPA is not worried about deliberate contamination by the refiner. 39 Fed. Reg. 13174 (1974).

enforcement problem by holding refiners strictly and vicariously liable for the contamination of unleaded gasoline sold by the retailer. The central questions are: (1) whether the EPA has the authority, under either the Clean Air Act or the common law to impose strict or vicarious liability for lead contamination; and (2) if not, whether it should have been given such statutory authority.

These issues shall be considered in the light of two cases, *Amoco Oil Co. v. EPA (Amoco I)*<sup>16</sup> and *Amoco Oil Co. v. EPA (Amoco II)*,<sup>17</sup> which reviewed the liability provisions of the EPA regulations promulgated under the Clean Air Act. First, the correctness of the decision in *Amoco II*, based on the analysis of the findings of the EPA and the decision in *Amoco I*, will be considered. Second, the law of vicarious liability will be examined to determine whether the facts of *Amoco II* warranted the EPA's imposition of strict liability principles. The article centers almost exclusively on *Amoco I* and *II* due to the lack of strict liability standards in most other anti-pollution statutes.

An in-depth analysis of the EPA's novel attempt to promulgate strict liability standards in an area heretofore barren of such standards will demonstrate the formidable obstacles that must be overcome in order to impose such expansive liability. This analysis will also discuss the validity of such provisions in the context of the Clean Air Act compared to other areas of environmental enforcement. Finally, the article will address the issue of whether the ends sought by the EPA have been achieved, despite the courts' invalidation of the strict liability provisions in the gasoline distribution regulations.

## II. OVERVIEW OF THE GASOLINE DISTRIBUTION SYSTEM

Basic to an understanding of the allocations of responsibility and risks for violations is a knowledge of the gasoline distribution system:<sup>18</sup> who controls what facilities, and how is gas transported from the refiner to the middleman (if there is one) and to the retailer. Where along this distribution chain do refiners lose "control" of their gasoline so as to be incapable of ensuring its quality.

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<sup>16</sup> 501 F.2d 722 (D.C. Cir. 1974).

<sup>17</sup> 543 F.2d 270 (D.C. Cir. 1976).

<sup>18</sup> The EPA contracted with Teknekron, Inc., a private consulting firm, to investigate the relationship of refiners, distributors, jobbers, and retail service station operators. Parts of the Teknekron report were incorporated into the findings of the EPA, 39 Fed. Reg. 13174-75 (1974).

Gasoline is marketed in the United States through a complex network of distributors, jobbers,<sup>19</sup> and retail service stations.

The transport of gasoline from the refinery to the bulk terminals is, for the most part, under some sort of refiner control through transport facilities which he either owns or operates under long term leases; through contracts that specify no comingling; and through storage in bulk terminals that are segregated and which he owns. . . . During this period the product is monitored fairly closely through elaborate quality and process control testing. . . . [The] gasoline is [then] marketed to the consumer directly through (1) service stations which the refiner owns and operates by salaried employees or which are independently operated through lease agreements; and indirectly through (2) jobbers who themselves either directly own and operate service stations or lease service stations to independent operators. It is estimated that, on the average, the industry . . . distributes to 50% of the service stations through jobbers.<sup>20</sup>

Of the approximately 220,000 retail stations in the United States about 5% are operated by salaried oil company employees.<sup>21</sup> These stations are used primarily for training and testing purposes, not for marketing gasoline to the consumer.<sup>22</sup> In such situations refiner control over the sale of contaminated gasoline is manifest. Gasoline is usually transported from the refinery to the refiner-owned or leased outlet in the refiner's vehicles, or by contract, or by common carriers engaged by the refiner.

In the indirect distribution chain, on the other hand, gasoline is sold by the refiner to a branded jobber under a supply contract. This distribution chain is more complex because of the various business and contractual relations between refiner and jobber and between jobber and subjobber.<sup>23</sup> The transfer of gasoline from the bulk terminal to the jobber's facilities is generally through non-refiner-owned methods in which refiner personnel are often unable to oversee most of the procedures carried out by jobbers or other independent operator personnel. This is because most refiner-to-jobber contracts do not cover the inspection of jobber-owned or operated facilities.<sup>24</sup> This complex distribution scheme led the refiners to argue

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<sup>19</sup> Branded jobbers are referred to as resellers in the regulations. 40 C.F.R. § 80.2(n) (1976).

<sup>20</sup> Teknekron Memo, *supra* note 94, at 453-4 (emphasis in original).

<sup>21</sup> *Id.* at 456.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 457.

<sup>24</sup> *Id.*

that "in most instances, a refiner loses possession of gasoline at some point before ultimate sale to the motorist; and having lost possession, the refiner's control over the gasoline is limited to whatever lawful contract obligations it can impose on distributors and retailers."<sup>25</sup>

### III. REVIEW OF THE REGULATIONS— AMOCO I AND II

#### A. *Background of the Regulations*

On January 10, 1973, the EPA promulgated regulations pursuant to § 211(c)(1)(B) of the Clean Air Act,<sup>26</sup> providing for the general availability of unleaded gasoline by July, 1974, for use in 1975 model and post-1975 model cars fitted with catalytic converters.<sup>27</sup> Catalytic converters, designed to reduce unburned hydrocarbon emissions, were the means chosen by the auto manufacturers to comply with the stringent statutory emission requirements of § 202(b) of the Clean Air Act.<sup>28</sup> The EPA determination that emission products of lead additives would greatly impair the catalytic converters led to the above regulations.<sup>29</sup> Section 211(d) of the Act provided for a \$10,000 per day penalty for violations of either the Act or its regulations.<sup>30</sup>

The EPA regulations purported to impose strict liability on refiners for gasoline contamination in cases where the retailer displayed a refiner's trademark.<sup>31</sup> "The refiner shall be deemed in violation irrespective of whether any refiner, distributor, or retailer or the employee or agent of any refiner, distributor or retailer may have caused or permitted the violation."<sup>32</sup> Although the provision declared joint liability for the retailer and refiner, the retailer was

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<sup>25</sup> Brief for Petitioner at 5, *Amoco Oil Co. v. EPA*, 501 F.2d 722 (D.C. Cir. 1974).

<sup>26</sup> 42 U.S.C. § 1857f-6c(c)(1)(B) (1970).

<sup>27</sup> 38 Fed. Reg. 1254-56 (1973).

<sup>28</sup> 42 U.S.C. § 1857f-1(b) (1970).

<sup>29</sup> 37 Fed. Reg. 3882 (1972). Consequently, impairment of the catalytic converter leads to serious harmful effects in human beings. "Fuel additives often survive the combustion process to become air pollutants in the exhaust. The major additives in gasoline are members of the lead alkyl family. . . . [The lead] materially diminishes the size of other particles emitted, thereby allowing them to penetrate the respiratory system of animals and humans inhaling the pollutants." CATALYST PANEL, COMM. ON MOTOR VEHICLE EMISSIONS, NAT'L ACADEMY OF SCIENCES, EVALUATION OF CATALYSTS AS AUTOMATIVE EXHAUST TREATMENT DEVICES 33 (1973) cited in Comment, *The Automobile Controversy—Federal Control of Vehicular Emissions*, 4 *ECOLOGY* L.Q. 661, 688 n.156 (1975).

<sup>30</sup> 42 U.S.C. § 1857f-6c(d) (1970), 40 C.F.R. § 80.5 (1976).

<sup>31</sup> 40 C.F.R. § 80.23(a)(1) (1973).

<sup>32</sup> *Id.*

allowed an affirmative defense: the retailer could avoid liability by demonstrating "that the violation was not caused by him, his employee or agent."<sup>33</sup> No similar defense was permitted for the refiner, who was held strictly liable for all acts of contamination.<sup>34</sup>

The EPA based its decision to place strict liability on the refiners on three grounds:

- (1) branded refiners' legal obligation as marketers of a trademarked and nationally advertised product to protect the quality of the trademarked product, (2) the extensive quality control already operated by the branded oil companies to meet this obligation and to protect business good will, and (3) the success of the American Oil Company [Amoco] in developing and implementing quality control procedures for distribution of unleaded gasoline.<sup>35</sup>

Moreover, the agency claimed authority to place strict liability on oil refiners under § 211(c)(1)(B)<sup>36</sup> and § 301(a)<sup>37</sup> of the Clean Air Act.<sup>38</sup> Section 211(c)(1)(B) authorizes the Administrator to "control or prohibit the manufacture, introduction into commerce, [or] offering for sale or sale" of certain designated fuels and fuel additives. Section 301(a) grants broad rule making power to the Administrator to accomplish the Act's objectives.<sup>39</sup>

The EPA reasoned that the adoption of a strict liability standard would induce all branded refiners to adopt a quality control program similar to Amoco's.<sup>40</sup> The agency felt that this "liability without fault" was justified on a theory consistent with the imposition of strict liability on manufacturers in the consumer, food, and drug cases.<sup>41</sup> In those situations, the products affect the health and well-

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<sup>33</sup> 40 C.F.R. § 80.23(b)(1) (1973).

<sup>34</sup> Strict liability "was based on the assumption that the refiner has maximum control and attempts to exercise quality assurance all the way through the chain of distribution." Statement of Leslie Carothers, Counsel for EPA, Record at 649, *Amoco Oil Co. v. EPA*, 543 F.2d 270 (D.C. Cir. 1976).

<sup>35</sup> 39 Fed. Reg. 13175 (1974). "Petitioners agree that refiners are vitally interested to see that gasolines marketed under their brand names are of high quality, and that refiners expect consumers to consider the refiner's brand as a measure of quality." Petitioners assert, however, that their readiness to stand behind their marketed product in no way justifies the imposition of strict liability for acts of persons over whom the refiner has no actual control. Reply Brief for Petitioners at 3, *Amoco Oil Co. v. EPA*, 501 F.2d 722 (D.C. Cir. 1974).

<sup>36</sup> 42 U.S.C. § 1857f-6c(c)(1)(B) (1970).

<sup>37</sup> 42 U.S.C. § 1857g(a) (1970).

<sup>38</sup> Brief for Respondent at 4 & n.4, 543 F.2d 270 (D.C. Cir. 1976).

<sup>39</sup> 42 U.S.C. § 1857g(a) (1970).

<sup>40</sup> 39 Fed. Reg. 13176 (1974).

<sup>41</sup> Brief for Respondent at 15, 543 F.2d 270 (D.C. Cir. 1976), citing *United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1975), cases involving

being of a public which is unable to protect itself. The burden of protection, therefore, falls on the manufacturer who has control over the quality of the products. Consistent with the EPA's emphasis on control as the basis for refiner liability, the refiner was not to be held liable for violations connected with the sale of unbranded gasoline. Under the provision covering unbranded gasoline,<sup>42</sup> the retailer and the distributor were to be held jointly liable for a violation. However, both the retailer and the distributor were permitted to show that they did not "cause" the violation, and thus avoid liability.<sup>43</sup>

### B. *The Amoco I Decision*

In February, 1973, sixteen branded oil refiners<sup>44</sup> sought judicial review<sup>45</sup> of the EPA regulations pursuant to § 307(b)(1) of the Clean Air Act.<sup>46</sup> The gravamen of the appeal in *Amoco I* was that the imposition of strict liability was beyond the EPA's statutory authority and, indeed, without support in the record of the EPA's administrative proceedings. The petitioners alleged that the EPA could not, within the bounds of their statutory grant, impose strict liability upon refiners for the acts of others not controlled by the refiner.<sup>47</sup>

In *Amoco I*, the United States Court of Appeals for the District of Columbia Circuit<sup>48</sup> upheld all but the liability provisions of the regulations. The court invalidated these provisions "because they impose liability upon a refiner for sales of contaminated gasoline irrespective of the actual fault of the refiner."<sup>49</sup> The court concluded that the record lacked sufficient support to impose an irrebuttable presumption of refiner fault, and that affirmative defenses to the liability imposed had to be permitted.<sup>50</sup> Agreeing with the refiners, the court stated that liability should not ensue:

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criminal violations of the food and drug laws. They are distinguishable from the *Amoco* cases as the defendants were in possession of the product when contamination was found and thus had the power to ensure compliance with the purity standards. The oil refiners maintain they lack that degree of control over the product. See also Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

<sup>42</sup> 40 C.F.R. § 80.23(a)(2) (1973).

<sup>43</sup> 40 C.F.R. § 80.23(b)(1)-(2) (1973).

<sup>44</sup> Amoco Oil Co., Atlantic-Richfield Co., Continental Oil Co., Exxon Corp., Getty Oil Co. (Eastern Operations), Gulf Oil Co.-U.S., Mobil Oil Corp., Phillips Petroleum Co., Shell Oil Co., Standard Oil Co. (Ohio), Sun Oil Co. of Pa., Tenneco Inc., and Union Oil Co. of Cal.

<sup>45</sup> *Amoco Oil Co. v. EPA*, 501 F.2d 722 (D.C. Cir. 1974).

<sup>46</sup> 42 U.S.C. § 1857h-5(b)(1) (1970).

<sup>47</sup> 501 F.2d at 748.

<sup>48</sup> The three judge panel was composed of Hastie, Wright, and Robb, Circuit Judges.

<sup>49</sup> 501 F.2d at 748-9.

<sup>50</sup> *Id.*

[if the] refiner can show that the contamination of the branded product resulted from an unforeseeable act of vandalism by a third party or from an unpreventable breach of contract by a distributor or jobber. . . . Refiners and distributors must have the opportunity to demonstrate freedom from fault. . . . A refiner which can show that its employees, agents or lessees did not cause the contamination at issue, and that the contamination could not have been prevented by a reasonable program of contractual oversight may not be held liable under 40 C.F.R. § 80.23 (a)(1).<sup>51</sup>

The oil refiners had conceded in their briefs and during oral argument, that "lead contamination of gasoline sold at retail is typically caused in the pre-retail stages of the distribution chain."<sup>52</sup> The refiners also acknowledged that they could "exert considerable control over the other facilities (jobbers, retailers) through contractual agreements providing for regular inspections and for stiff damages upon contramination of the branded product."<sup>53</sup> To this extent, the refiners did not challenge the EPA's findings that "the contamination of unleaded gasoline associated with transportation of the product can best be prevented by the major refiners who have control or the ability to control their distribution network."<sup>54</sup> Nevertheless, the refiners contended that the presumption of liability had to be rebuttable.<sup>55</sup>

The result of *Amoco I* was that strict liability could not be imposed on the oil refiners. The court, however, did not consider the outer limits of the authority granted in the statute to the EPA. During oral argument, counsel for the EPA had agreed that strict liability could not be imposed in the circumstances outlined by the refiners: i.e., sabotage, vandalism, and unpreventable breaches of contract.<sup>56</sup> These circumstances were adopted by the court in its opinion.<sup>57</sup> During the review proceeding and prior to the decision in *Amoco I*, the EPA had proposed revisions in the regulations adopting these circumstances. These revised regulations had not become final by the time of the *Amoco I* decision.<sup>58</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 748

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 749. See text at note 51, *supra*.

<sup>57</sup> 501 F.2d at 749.

<sup>58</sup> The proposed revisions of 40 C.F.R. § 80.23 (1973) were made in 39 Fed. Reg. 13174-76 (1974).

In their briefs and comments to the EPA on the proposed regulations, the refiners made only slight reference to the relation of the refiner to his directly supplied lessee.<sup>59</sup> Clearly, the EPA thought the judgment in *Amoco I* left undisturbed the retailer-lessee issue;<sup>60</sup> indeed, they later construed the holding to mean that "where a retailer is the lessee of the refiner, the refiner may be held strictly liable for sale of contaminated gasoline by the retailer."<sup>61</sup> This interpretation was based on the court's incorporation of the term lessee with that of employee and agent.<sup>62</sup> The refiners in *Amoco I* expressed specific concern only about being held strictly liable for acts of sabotage by third parties and distributors. They never expressly conceded that strict liability could be placed on them for the acts of independent lessees, whom they did not control. The refiners emphasized the *Amoco I* statement, that "[r]efiners must have the opportunity to demonstrate freedom from fault."<sup>63</sup>

In essence, the court in *Amoco I* had converted the strict liability standards of the regulations into vicarious liability standards. Though the distinction between strict and vicarious liability is narrow,<sup>64</sup> the effect of the conversion was to provide the refiner with a defense to liability.<sup>65</sup> The EPA, however, did not view the regulations in this manner. The language of the regulations, according to the EPA, predicated liability not on the basis of negligence, but on the finding of a violation.<sup>66</sup> A violation, as construed by the EPA,

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<sup>59</sup> Statement of Exxon Oil Co., Record at 32-37; Statement of Shell Oil Co., Record at 48-53.

<sup>60</sup> Brief for Respondents at 17, 543 F.2d 270.

<sup>61</sup> *Id.* at 18.

<sup>62</sup> "A refiner which can show that its employees, agents or lessees did not cause the contamination at issue, and that the contamination could not have been prevented by a reasonable program of contractual oversight may not be held liable under 40 C.F.R. § 80.23(a)(1)." 501 F.2d at 748-49. The EPA simply read and relied upon the converse of the statement, i.e., if the refiner cannot show that its lessees did not cause either by affirmative act or negligence the contamination, then strict liability would be imposed upon the refiner.

Unlike the principal-agent and employer-employee relationship, a lessor traditionally is immune from liability for the acts of his lessee. W. PROSSER, LAW OF TORTS, § § 63, 80 (4th ed. 1971) [hereinafter cited as W. PROSSER].

<sup>63</sup> 501 F.2d at 749. The oil companies characterized the new liability provisions as an attempt to facilitate enforcement of the regulations by decreasing the EPA's burden of proof and illegally placing it on the oil refiners. Similarly, the court in *Amoco II* stated, "the real objective [of the strict liability provisions] is to strengthen the arbitrary hand of the agency and ease its burden of collecting its penalties." 543 F.2d at 274 n.12.

<sup>64</sup> See text at notes 134-36, *infra*.

<sup>65</sup> 40 C.F.R. § 80.23(b)(2)(iv) (1975).

<sup>66</sup> Telephone conversation with Robert Weisman, Mobile Source Enforcement Division, EPA, Washington, D.C. (April 15, 1977).

was negligence per se. The absence of negligence standards was further evidenced by the lack of any standard of reasonableness expressed in the regulations.<sup>67</sup> The EPA attempted to hold the refiner liable based upon his control over the product, not, as in vicarious liability at common law, on the imputation of negligence from the retailer to the refiner.

The liability of refiners for the acts of their lessors was not settled by *Amoco I* because the court only addressed the regulations relating to contamination from an unforeseeable act of vandalism or an unpreventable breach of contract by a distributor or jobber.<sup>68</sup> Further, the court in *Amoco I* did not rule on the new liability provisions that specifically delineated the liability of refiners for directly supplied lessees. This relation of refiner to directly supplied lessee became the focal point of *Amoco II*.

### C. *The Amoco II Decision*

Following *Amoco I*, the EPA issued the redrafted liability sections of the regulations.<sup>69</sup> The revised regulations provided for, except in the case of directly supplied lessees, vicarious refiner liability subject to certain narrowly defined affirmative defenses.<sup>70</sup> The regulations also placed the burden of proof on the refiner.<sup>71</sup> Under § 80.23(b)(2), the refiner, to avoid liability, first had to show that the violation was not caused by it or by its employees or agents. Second, the refiner had to prove that the violation "was caused" by an action of a purchaser down the line of distribution, "in violation of a contractual undertaking imposed by the refiner . . . and despite reasonable efforts by the refiner (such as periodic sampling) to ensure compliance with such contractual obligation."<sup>72</sup> The regulations also permitted the refiner to escape liability for the deliberate acts

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<sup>67</sup> *Id.* The court in the *Amoco* decisions, however, did not view the regulations in this manner. Confusing the issue in *Amoco I* by naming the liability provisions "strict vicarious liability," 501 F.2d at 748, the court applied negligence standards in their interpretation of the regulations. Although the court mistakenly used the concepts of strict and vicarious liability interchangeably, they construed the liability provisions as vicarious because fault, concomitantly with control, was stated as the basis of liability. In this case no matter what terms, "vicarious," "strict," or "strict vicarious," are used to describe the provisions, the effect is identical.

<sup>68</sup> 501 F.2d at 748.

<sup>69</sup> 40 C.F.R. § 80.23 (1975)

<sup>70</sup> See 40 C.F.R. § 80.23(b)(2) (1975).

<sup>71</sup> See note 77, *infra*. The EPA still does not have the burden of proving the negligence of the lessee in order to hold the refiner liable.

<sup>72</sup> 40 C.F.R. § 80.23(b)(2)(iii)-(v) (1975).

of directly supplied retailer-lessees, as well as non-retailer-lessees, and for acts of sabotage or the like.<sup>73</sup>

Although the court in *Amoco I* stated that refiners must be permitted a defense, the revised regulations continued to impose strict liability on the refiner if the retailer was "supplied directly by the refiner (and not by a reseller)," and his assets or facilities were "substantially owned, leased or controlled by the refiner."<sup>74</sup> Thus, in the case of the directly supplied retailer-lessee, the refiner was deemed strictly liable for all incidences of contamination and breaches of contract, irrespective of fault. However, if the branded retailer was directly supplied but not a lessee, the refiner would not be liable for contamination provided:

- (1) that the violation was not caused by an employee or agent; and
- (2) that the violation was caused by the action of the independent (non-lessee) retailer; and
- (3) that the retailer's action was in violation of a contractual undertaking imposed by the refiners upon the retailer and designed to prevent such action; and
- (4) that the refiner had made reasonable efforts to insure compliance with that contractual obligation.<sup>75</sup>

Justification for strict liability in the directly supplied lessee situation, the EPA reasoned, was based on the great degree of control which refiners had over retailers, as evidenced by detailed lease agreements.

In sum, the redrafted regulations created two classes of directly supplied, branded retailers. In the case of directly supplied retailer-lessees, the refiner was held strictly liable for violations unless the retailer had deliberately introduced leaded gasoline into a car requiring unleaded gasoline. In the case of directly supplied non-lessees (independent retailers), however, the refiner was held vicariously liable for negligent violations, such liability being rebuttable only by the above mentioned defenses. In conclusion, the refiner was not provided a defense for the lessee's negligent contamination, whereas for the non-lessee's negligent contamination, the refiner could escape liability by meeting particular defense conditions.

In *Amoco II*, eleven<sup>76</sup> of the sixteen branded refiners sought review

<sup>73</sup> 40 C.F.R. § 80.23(e) (1975).

<sup>74</sup> 40 C.F.R. § 80.23(b)(2)(iv) (1975).

<sup>75</sup> *Amoco Oil Co. v. EPA*, 543 F.2d 270, 274 (D.C. Cir. 1976), citing 40 C.F.R. § 80.23(b)(2)(i) & (iv) (1975).

<sup>76</sup> *Amoco Oil Co.*, *Atlantic-Richfield Co.*, *Continental Oil Co.*, *Exxon Corp.*, *Getty Oil Co.*,

of the revised regulations.<sup>77</sup> The petitioners claimed<sup>78</sup> that the EPA had no statutory authority to impose strict liability on them in relation to directly supplied lessees; that the EPA's determination was not supported in the record; and that the EPA, in designing the new regulations, had not followed the mandate of the court in *Amoco I*.<sup>79</sup>

The court in *Amoco II* upheld all the new regulations except a portion of § 80.23(b)(2)(iv).<sup>80</sup> The court found that § 80.23(b)(2)(iv) had retained an irrebuttable presumption of refiner fault and held that "vicarious liability cannot be imposed on *all* refiners for *any and all* negligent contaminations which occur *regardless* of the circumstances and the degree of control exerted by the refiner over the retailer-lessee."<sup>81</sup>

The Clean Air Act authorized no specific scope of judicial review;<sup>82</sup> therefore, the court chose the standard of review set out in § 706(2)(A) of the Administrative Procedure Act.<sup>83</sup> The court held the strict liability provision to be clearly arbitrary. It concluded that the escape provision of (b)(2)(iv) would *never* apply to a lessee-retailer "even if the refiner [had] imposed upon the retailer a strict contractual undertaking to avoid contamination and made every human effort possible to ensure compliance with it."<sup>84</sup>

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Gulf Oil Co., Mobil Oil Corp., Phillips Petroleum Co., Shell Oil Co., Standard Oil Co. (Ohio), and Union Oil Co. of Cal.

<sup>77</sup> The three panel bench was composed of Mackinnon, Robb, and Wright, Circuit Judges. "The petitioners also objected to provisions in the new regulations which required a refiner, in order to avoid strict liability, to prove affirmatively that the violation 'was caused' by another party. See 40 C.F.R. § 80.23(b)(2)(ii-vii)." 543 F.2d at 273, n.8. The petitioners asserted that under the Clean Air Act, 42 U.S.C. § 1857f-6c(d) (1970) only "violators," not non-violators, are to be held liable. The parties met following oral argument and agreed to the creation of an additional subsection that would dispose of the "burden of proof" issue. This new subsection, 40 C.F.R. § 80.23(b)(2) (viii) provided that: "In subparagraphs (ii) through (vi) thereof, the term 'was caused' means that the refiner must demonstrate by reasonably specific showings by direct or circumstantial evidence that the violation was caused or *must have been caused by another*." (emphasis added). 543 F.2d at 273, n.8.

<sup>78</sup> Brief for petitioner at 10-12, *Amoco Oil Co. v. EPA*, 543 F.2d 270 (D.C. Cir. 1976).

<sup>79</sup> *Id.* at 12.

<sup>80</sup> 543 F.2d at 279. The court struck from § 80.23(b)(2)(iv) the phrase, "whose assets or facilities are not substantially owned, leased or controlled by the refiner."

<sup>81</sup> *Id.* at 276.

<sup>82</sup> The Clean Air Act provides that review shall be available exclusively in the Court of Appeals for the District of Columbia Circuit. 42 U.S.C. § 1857h-5(b)(1) (1970).

<sup>83</sup> 5 U.S.C. § 706(2) (1970). Section 10e directs the court to "hold unlawful and set aside agency actions . . . found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

<sup>84</sup> 543 F.2d at 274.

The *Amoco II* holding eliminates the distinction between the strict liability connected with directly supplied, branded retailer-lessees and the vicarious liability connected with directly supplied, branded independent retailers. Therefore, the refiner can avoid liability even as to directly supplied lessees if he can establish the four affirmative defenses of § 80.23(b)(2).

The court in *Amoco II* concluded that the EPA's finding that *all* lessees are mere appendages of the refiner was erroneous because of the differences among leases.<sup>85</sup> Control, the court reasoned, must be examined in terms of the individual lease agreement: this will be determinative on the issue of vicarious liability.<sup>86</sup> The court further stated that the EPA had failed to consider even one lease agreement.<sup>87</sup> Therefore, their findings lacked support for the proposition that refiners had control over the day-to-day operations of all lessees.<sup>88</sup> "[T]he burden of supporting the agency regulation with evidence of control by lessors rests upon the agency and not upon the refiners."<sup>89</sup> That burden had not been satisfied.

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<sup>85</sup> The EPA relied, to a great extent, on the FTC REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE (June 30, 1967), Record at 214-288, in *Amoco II*, to show what control refiners have over their lessees. 543 F.2d at 282 & n.11. The report stated:

Prior to the mid-1930's . . . the companies owned and operated most of their service stations . . . Then the majors [about 20 refiners that account for about 80% of the gasoline marketed in the U.S.] moved away from ownership integration on the retail level. Service stations were erected or leased by the companies and in turn leased to retail dealers. The latter assumed the burdens of the individual entrepreneur such as taxes, direct employee liabilities and final decision in the sale of product. Record at 243.

The FTC Report concluded that "[a]s a result of marketing practices on the part of suppliers, the retail dealer's position is largely that of an economic serf rather than that of an independent businessman." *Id.* at 256. This conclusion was based on the coercive refiner-retailer lease that ran from one-to-three years. Thus, the EPA concluded that this coercive control would induce all lessees to take the utmost care to protect the quality of the unleaded gasoline. If violations occurred, the lease would be terminated by the refiner. "The turnover rate among branded retailers in 1972 was 25%." 39 Fed. Reg. 13176 (1974).

The court, however, noted that the FTC report dealt with price-fixing rather than with control over equipment maintenance and station procedures. The court also noted the absence of a standardized lease arrangement used in every refiner-lessee situation. 543 F.2d at 278 n.21. See Comment, *Master & Servant, The Filling Station as an Independent Contractor*, 38 MICH. L. REV. 1063, 1071 (1940).

<sup>86</sup> 543 F.2d at 278.

<sup>87</sup> *Id.*

<sup>88</sup> "It is a well-settled principle of administrative law that agency action cannot be sustained on the basis of information not relied upon by the Administrator and disclosed in the record." *Tanners Council of America v. Train*, 540 F.2d 1188, 1193 n.13 (4th Cir. 1976).

<sup>89</sup> 543 F.2d at 278. The challenge to the new regulations appears to have caught the EPA off-guard. As a result of its interpretation of *Amoco I*, (see notes 60-62 and accompanying text), *supra*, and the almost complete silence of the industry about the retailer-lessee issue,

Judge Wright, who wrote the opinion in *Amoco I*, dissented in *Amoco II*. He construed the *Amoco I* holding to mean that a refiner could be held responsible when contamination results from the negligent acts of a lessee.<sup>90</sup> He further stated that the EPA findings illustrated the great degree of control refiners exercise over their lessees.<sup>91</sup> In the narrow context of the directly supplied retailer-lessee, he believed that the strict liability provisions of the new regulations should have been upheld.<sup>92</sup> The majority, however, disagreed with both Judge Wright and the EPA. They stated that *Amoco I* "address[ed] the circumstances under which a refiner may not be held liable," not when it may be held liable.<sup>93</sup>

The court and Judge Wright also disagreed over the extent of the EPA's authority as granted by the statute. The EPA had unquestionable authority to determine the liability standards for violations of the Clean Air Act or its regulations.<sup>94</sup> However, the court concluded that this authority did not imply that the EPA had the power to impose liability without fault, thus altering "the settled law between lessor and lessee as to their respective responsibilities in tort so as to make the refiner liable for *independent* lessees as though they were mere subservient employees."<sup>95</sup> The court was clearly correct, for the Clean Air Act grants no such authority on its face, and its legislative history does not support such a position.<sup>96</sup> Judge Wright, in dissent, argued that the EPA was nonetheless the "properly authorized body" to determine the liability standards that would best accomplish the aims of the Act.<sup>97</sup>

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the EPA did not believe entry of sample lease arrangements in the record was necessary. The Agency maintained that any serious substantive challenge to the regulations had been settled by *Amoco I*. Brief for Respondents at 17, 534 F.2d 270.

<sup>90</sup> 543 F.2d at 280 (Wright, J., dissenting).

<sup>91</sup> *Id.*

<sup>92</sup> Although the dissent refers to the liability provisions as vicarious, the regulations did, in fact, set up strict liability provisions. If a negligent violation occurred, the refiner, in the case of retailer-lessees, was held strictly liable with no opportunity to prove freedom from fault.

<sup>93</sup> 543 F.2d at 279.

<sup>94</sup> See text at notes 38-9, *supra*.

<sup>95</sup> 543 F.2d at 275. "The authority to promulgate the regulations must not be confused with the effect of these regulations." *E.I. duPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1027 (4th Cir. 1976).

<sup>96</sup> For the legislative history of the Clean Air Act Amendments and the Air Quality Act of 1967, see 1970 U.S. CODE CONG. & AD. NEWS, 5356-91, 1967 U.S. CODE CONG. & AD. NEWS 1938-89. Determining the congressional intent of § 211 is difficult in this case because of the lack of legislative history for the liability standards.

<sup>97</sup> 543 F.2d at 282 (Wright, J., dissenting).

Although an agency is given considerable discretion in construing a statute that falls within its area of expertise,<sup>98</sup> the precise degree of this discretion must be determined by the courts with appropriate reference to the statute and its legislative history.<sup>99</sup> Had Congress decided that strict liability was necessary to enforce the Act, such power could have been expressly delegated in the statute.<sup>100</sup> Silence on the part of the legislature is not sufficient to express such an intent. "The change [to strict liability] is massive and legislative in character and if Congress wants to impose such liability without fault it can be authorized in a proper way."<sup>101</sup>

The distinction must be drawn between the invalidation of a regulation because an administrative agency acts *ultra vires*, that is, it acts beyond the scope of its statutory authority,<sup>102</sup> and the invalidation of a regulation because of insufficient findings to support its determination. In the first category, the agency simply lacks congressional authority to create such a rule or regulation. In the second category, the agency has the authority to create such rules, but did so in an arbitrary and capricious manner. The holding in *Amoco II*,

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<sup>98</sup> *Ethyl Corp. v. EPA*, 541 F.2d 1, 31 n.64 (D.C. Cir. 1976), citing *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975).

<sup>99</sup> "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather it is the 'power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976), quoting *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936). See *NLRB v. Hearst Publications*, 322 U.S. 111, 128-31 (1944). In *Ernst & Ernst* the Court held that a private cause of action for damages will not lie under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970) and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1974) in the absence of any allegation of scienter. After reviewing the intent and legislative history of that statute, the Court was unwilling to accept the Commission's theory that the statute was intended to cover negligent conduct. Similarly, the EPA attempted to broaden the standard of liability in the gasoline contamination regulations, relying on *Mourning v. Family Publications, Inc.*, 411 U.S. 536 (1973) to sustain the reasonableness of the strict liability provisions. Brief for Respondent at 15-18, 501 F.2d 722 (D.C. Cir. 1974). In *Mourning*, however, the Court used the express statutory language and clear legislative history of the statute to uphold the regulations. 411 U.S. at 365.

<sup>100</sup> *E.g.*, The Trans-Alaska Pipeline Authorization Act, 34 U.S.C. § 1653 (Supp. III, 1973), illustrates an unequivocal delegation by Congress of authority to impose strict liability on the owners of the pipeline for all injuries incurred in connection with activities near the right of way. This interpretation is also supported by the lack of strict liability standards in other anti-pollution statutes. See the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1321(f)-(g) (Supp. III, 1973).

<sup>101</sup> 543 F.2d at 275 n.13.

<sup>102</sup> The *ultra vires* doctrine states that the administrative action is invalid because it is outside the powers conferred to the agency by Congress. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 365 (1965); K.C. DAVIS, *ADMINISTRATIVE LAW TEXT* (3d ed. 1972) at 26-36.

that the EPA lacked the statutory authority to supplant the principles of vicarious liability with those of strict liability, clearly falls within the first category.<sup>103</sup> Thus, no matter how complete the record, the EPA could not impose strict liability.

Yet, the inference can be drawn that the provision imposing vicarious liability was invalidated because of the insufficiency of the EPA's findings.<sup>104</sup> The court never held that the EPA could not hold the refiner vicariously liable for the acts of his lessee, but held only that the strict liability provision of the regulation was arbitrary and capricious because it applied to *all* refiners in *all* directly supplied lessee situations.<sup>105</sup> Thus, despite the absence of express statutory authority to impose vicarious liability, the court implicitly held that the EPA had such authority. That determination was based on the broad regulatory powers embodied in the statute as well as by reference to the well-defined body of common law vicarious liability principles.<sup>106</sup> "In the absence of any indication of a specific intent on the part of Congress to create a 'new tort' the traditional common law rule of vicarious liability must apply."<sup>107</sup>

The court ruled that the EPA had not adequately considered which directly supplied lessee situations would justify the imposition of vicarious liability on refiners.<sup>108</sup> The EPA had to create a record sufficient to justify the application of vicarious liability in every refiner-lessee situation.<sup>109</sup> The court's review of refiner "control" over his lessee, therefore, illustrates the manner of inquiry applied during judicial review of the sufficiency of an agency's findings. Hence, the EPA had the statutory authority to impose vicarious liability but did so in an arbitrary and capricious manner.

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<sup>103</sup> 543 F.2d at 275. "Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long established principles except when a statutory purpose to the contrary is evident." *Isbrandt Co. v. Johnson*, 343 U.S. 779, 783 (1952).

<sup>104</sup> The refiners asserted violations by the EPA of both categories. Had the court decided that the EPA did not have the authority to impose vicarious liability on refiners, the petitioners would have defeated the provisions on a much stronger point. If EPA had the authority to promulgate the regulations but merely erred in producing a sufficient record, the identical regulations could be repromulgated after creation of a more complete record. It is doubtful, however, whether EPA could ever substantiate their contention that almost all refiners control their lessees.

<sup>105</sup> 543 F.2d at 274. Liability in every refiner-lessee situation, without examination of the control in the individual case, is, in effect, strict liability.

<sup>106</sup> *Id.* at 275.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 277.

<sup>109</sup> *Id.*

Noting that the silence of a statute in regard to liability standards is not dispositive,<sup>110</sup> the dissent asserted that the court's review was too rigorous under the "arbitrary and capricious" standard,<sup>111</sup> and that the court should merely have verified that the record revealed sufficient control by the refiners over their lessees.<sup>112</sup> Since the requisite degree of "control" had been found to exist by the EPA, the court, maintained Judge Wright, was not to second guess the EPA's judgment.<sup>113</sup>

In conclusion, the court's holding allows imposition of vicarious liability on those refiners who control the activities of their retailer-lessees.<sup>114</sup> Had the regulation been worded in a more specific manner, for example, by imposing vicarious liability based upon the actual control the refiner exercised over his lessee, the entire vicarious liability provision might have been upheld.

#### IV. VICARIOUS LIABILITY STANDARDS

Basic to an understanding of the *Amoco I* and *Amoco II* decisions is a sense of the principle and policy of common law vicarious liability.<sup>115</sup>

A is negligent. B is not. 'Imputed negligence' means that by reason of some relation existing between A and B, the negligence of A is to be charged against B, although B has played no part in it, has done nothing

<sup>110</sup> *Id.* at 281 n.7 (Wright, J., dissenting).

<sup>111</sup> See *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); see also *Hooker Chemicals & Plastics Corp. v. Train*, 537 F.2d 620 (2d Cir. 1976) and *Hooker Chemicals & Plastics Corp. v. Train*, 537 F.2d 639 (2d Cir. 1976).

<sup>112</sup> The APA authorizes a reviewing court to demand of rulemakers only the most basic minimal sort of rationality. . . . The reviewing court is not even authorized to examine whether a rulemaker's empirical conclusions have support in substantial evidence. . . . Exercising review under it a court cannot disturb a fact finder's weighings of conflicting evidence merely because these seem 'clearly erroneous;' only those determinations which are patently unreasonable can be upset. . . .

Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 391 (1974).

<sup>113</sup> 543 F.2d at 282 (Wright, J., dissenting).

<sup>114</sup> The burden of showing refiner control over his lessee is not difficult to sustain in most cases. Telephone conversation with Robert Weisman, Mobile Source Enforcement Division, EPA, Washington, D.C., April 15, 1977.

<sup>115</sup> See W. PROSSER, *supra* note 62, § § 69-73. Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584-604, 720-45 (1929); Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L.J. 494 (1935); Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923); Steffen, *Independent Contractor and The Good Life*, 2 U. CHI. L. REV. 501 (1935).

whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it.<sup>116</sup>

Consequently, vicarious liability analysis focuses on the relationship between the parties. That relation may be one of employer-employee, principal-agent, or one based on contract, as in the lessor-lessee situation. In general, an employer will be held liable for the tortious acts of his employee if the employee was acting within the scope of his employment.<sup>117</sup> However, no liability will be imputed to the employer for the actions of an independent contractor.<sup>118</sup> Thus, the first issue in *Amoco II* was whether the negligent party was an employee or independent contractor. The critical point of controversy between the majority and Judge Wright in *Amoco II* centered on the determination of "control."

Only 5% of retail gasoline outlets are operated by salaried personnel of the refiner.<sup>119</sup> In such cases, the refiner should be vicariously liable under the common law for all negligent actions of the retailer because of the employment relationship.<sup>120</sup> The rest of the retail outlets operated under leases can be characterized as "employees" only when the refiner-lessor exhibits sufficient control over the acts of the lessee.<sup>121</sup> Where this control exists, the traditional broad immunity of the lessor will not bar liability for the acts of his lessee.<sup>122</sup>

Even the EPA conceded that refiners do not exercise absolute control over the day-to-day affairs of the retailer.<sup>123</sup> Therefore, at common law no vicarious liability could be imposed on the refiner for the tortious acts that inhere in the daily activities of the retail service station. The agency, however, believed that the traditional tort standards governing personal injury cases should not be used in cases involving contamination of unleaded gasoline.<sup>124</sup>

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<sup>116</sup> W. PROSSER, *supra* note 62, at 458.

<sup>117</sup> *Id.* at 460.

<sup>118</sup> *Id.* at 468 and cases cited therein.

<sup>119</sup> Teknekron Memo, *supra* note 14, at 454.

<sup>120</sup> Because these retailers are considered employees the refiner is held strictly liable for the employees' tortious acts. See W. PROSSER, *supra* note 62, at § 80.

<sup>121</sup> 543 F.2d at 276. See *Miller v. Sinclair Refining Co.*, 268 F.2d 114 (5th Cir. 1959); Annot., 83 A.L.R. 2d 1282 (1962); Annot., 116 A.L.R. 457 (1938); Schrader, *Agency-Liability of National Oil Companies for Acts of Service Station Operators*, 43 Ky. L.J. 543 (1955); Comment, *The Filling Station Operator as an Independent Contractor*, *supra* note 85.

<sup>122</sup> 543 F.2d at 276.

<sup>123</sup> 39 Fed. Reg. 13176 (1974).

<sup>124</sup> Leslie Carothers has correctly suggested that the oil companies decided to attack the strict liability provisions because of their concern that these regulations might become a precedent for other kinds of liability, such as in personal injury cases or contract cases. Such

The EPA relied upon several arguments to support its assertion that traditional vicarious liability standards should not apply. First, they asserted that in designing the regulations the agency had established a regulatory program to control a unique problem. There was no parallel line of cases against which to test the liability provisions. Vicarious liability at common law is based on compensation for damage to a particular individual. By contrast, the EPA was setting up liabilities in the regulatory, not in the damage (contract or tort) sense to compensate for individual injury.<sup>125</sup> The provisions were written to achieve the regulatory ends of the EPA, not to increase the revenue of the government through collection of a civil penalty.<sup>126</sup>

The EPA also asserted that the traditional compensation goals of vicarious liability were not applicable because of the difficulty of identifying the damage to individuals from the contaminated gasoline.<sup>127</sup> The motorist would not incur immediate tangible damage to his car by the introduction of contaminated gasoline. By the time his catalytic converter was significantly impaired, he probably would not know where he purchased the contaminated gasoline. Also, by that time the contaminated batch of gasoline would have been replaced. Thus, the EPA tried to impose strict liability on refiners for contaminated gasoline sold through directly supplied retailer-lessee outlets because they felt that the refiner had absolute control over all the equipment used in the transportation and sale of the gasoline. According to the EPA's theory, control was not to be defined in terms of authority over the daily activities of the service station.<sup>128</sup> The refiners supply the gasoline to the retailer, who cannot purchase gasoline from any other company or sell any other brand through his pumps. In the branded retailer-lessee relationship, the refiner owns the pumps, the equipment, and all other

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a precedent could cause a great deal of disruption in the relationship between the refiner and the retail service station operator. Interview with Leslie Carothers, Counsel for EPA, Boston, Massachusetts (Oct. 15, 1976).

<sup>125</sup> Interview with Leslie Carothers, Counsel for EPA, Enforcement Division, Boston, Massachusetts (Oct. 15, 1976). Strict and vicarious liability are always used in the damage sense.

<sup>126</sup> Although § 211(d) of the Clean Air Act and § 80.5 of the Regulations, 42 U.S.C. § 1857f-6c(d) (1970), 40 C.F.R. § 80.5 (1976), provide for the assessment of a \$10,000 per day penalty, the EPA has set up a civil penalty assessment table that lowers dollar amounts for each violation. 40 Fed. Reg. 39974-76 (1975). For an analysis of the civil money penalty, see Comment, *Environmental Protection and The Rule of The Civil Money Penalty: Some Practical and Legal Considerations*, 4 ENV. AFF. 323 (1975).

<sup>127</sup> 39 Fed. Reg. 13175 (1974).

<sup>128</sup> *Id.* at 13176.

facilities relevant to the control over unleaded gasoline. "It is clear . . . that even at the service station level, basic decisions respecting the conditions of sale of unleaded gasoline are being made by the owner or lessor of the station and not by the operator."<sup>129</sup> The EPA, in *Amoco II*, argued that the court should have focused on this type of control.

Judge Wright, agreeing with the EPA's findings, strongly believed that the traditional standards of vicarious liability did not have to be applied lock, stock and barrel.

[The] EPA is not trying to hold the refiners liable for every personal injury caused by lessees or their employees. Its regulations are narrowly focused on one specific evil, and in this limited area, because of the realities of the gasoline distribution system, . . . vicarious liability of refiner-lessors is a sensible and permissible control strategy.<sup>130</sup>

Judge Wright further argued that:

The lessee has precious few opportunities to cause non-deliberate negligent contamination. The refiner both controls deliveries of gasoline to the station by tank truck . . . and maintains substantial control over the equipment that will handle the gasoline at the station, since the refiner initially installed the equipment and remains the owner of it, charged with its continuing care.<sup>131</sup>

The *Amoco II* court, however, disagreed and believed that whether the refiner or the lessee would continue to care for the equipment is a fact to be determined only by inquiry into the individual lease agreement.<sup>132</sup>

In conclusion, the court in *Amoco II* applied the traditional tenets of common law vicarious liability. By refusing to apply these legal concepts in a novel manner, the court failed to recognize the unique problems involved in the regulation of contamination of unleaded gasoline.

## V. STRICT LIABILITY STANDARDS

The EPA's redrafted regulations still sought to impose strict liability on refiners for the negligent acts of their retailer-lessees.<sup>133</sup> This standard of liability was created by the lack of any exception

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<sup>129</sup> *Id.* at 13177.

<sup>130</sup> 543 F.2d at 281 (Wright, J., dissenting).

<sup>131</sup> *Id.* at 280.

<sup>132</sup> *Id.* at 274 n.10.

<sup>133</sup> 40 C.F.R. § 80.23 (1975).

to liability for refiners. *Amoco II* held that the EPA lacked the statutory authority to impose strict liability. It is instructive to ask, therefore, whether the EPA should have been or should now be given such statutory authority by Congress. This analysis must be based upon the nature of strict liability and the policies behind it.

Although vicarious liability is occasionally characterized as a form of strict liability,<sup>134</sup> the two must be clearly distinguished. The crucial distinction is that, in the former, the injured party must prove the negligence of the employee or agent before that negligence will be imputed to the employer, whereas, in the latter, the plaintiff is relieved of the burden of proving fault; the question of negligence is eliminated. Fault is not the basis of liability in strict liability.<sup>135</sup> Thus, under strict liability principles, the employer or manufacturer is held liable although he has not departed from a reasonable standard of care; liability is imposed even for injuries caused by pure, unavoidable accident.<sup>136</sup>

Dissenting in *Amoco II*, Judge Wright justified the strict liability standards by analogy to the recent products liability cases, which have upheld strict liability of the manufacturer to the ultimate consumer and to the abnormally dangerous activity cases, which have constituted the traditional law of strict liability.<sup>137</sup> Judge Wright's analogy premises a discussion of whether Congress should expressly delegate to the EPA the authority to impose strict liability. Also to be asked is whether its imposition is justified under common law strict liability principles.

In the area of products liability, the "citadel of privity" between manufacturer and consumer fell as a result of the expansion of the "implied warranty" rationale in a line of contaminated food cases.<sup>138</sup> This change, in turn, led to the widespread application of the concept of "strict liability in tort,"<sup>139</sup> which operates to "insure that the cost of injuries resulting from defective products are borne by manu-

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<sup>134</sup> W. PROSSER, *supra* note 62, at 539.

<sup>135</sup> *Id.* at 492-96. See HARPER, LAW OF TORTS, § § 155, 203 (1933); Smith, *Tort and Absolute Liability*, 30 HARV. L. REV. 241 (1917).

<sup>136</sup> W. PROSSER, *supra* note 62, at § 79, 81.

<sup>137</sup> 543 F.2d at 281 (Wright, J., dissenting).

<sup>138</sup> See Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 799 (1966); Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

<sup>139</sup> *Greenman v. Yuba Products, Inc.*, 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1963); see also Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); Keeton, *Products Liability—The Nature and Extent of Strict Liability*, 1964 U. ILL. L.F. 693; Peck, *Negligence and Liability without Fault in Tort Law*, 46 WASH. L. REV. 225 (1971); Comment, *The Expanding Scope of Enterprise Liability*, 69 COLUM. L. REV. 1084 (1969).

facturers that put such products on the market rather than the injured persons who are powerless to protect themselves."<sup>140</sup>

Strict liability statutes are often based on the public policy that industry can best bear the burden of the loss because of its ability to allocate the cost of liability to the consumer of its services and products, usually in the form of higher prices.<sup>141</sup> Another justification is the likelihood that the manufacturer of the product will insure himself against liability for unavoidable harm caused by his enterprise and thus distribute the risk.<sup>142</sup> Under this rationale, the cost of liability insurance is treated as a cost of the business.<sup>143</sup> Contamination of unleaded gasoline, however, may be distinguished from traditional products liability cases by the absence of a single injured plaintiff. While this environmental tort causes an abstract injury to society-at-large, the extent of the damages caused by this impure leaded gasoline is difficult to determine.

A comparison of the gasoline distribution system with common law strict liability principles based upon ultra-hazardous activities might also prove useful.<sup>144</sup> Considerable support is maintained among writers for classifying threats to the environment, such as oil spillage and sonic booms, as ultra-hazardous in order to impose absolute liability on those engaged in such activities regardless of social and economic value.<sup>145</sup> For example, "[t]he potential harm from oil pollution is typically associated with the oil transport busi-

<sup>140</sup> *Greenman v. Yuba Products, Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

<sup>141</sup> [T]he needs of the modern state require that the burden of loss of life, or personal injury in industry, shall be charged to the expenses of production, shall be borne, that is to say, by the employer. He knows well enough that eventually the cost will be paid by the community in the form of increased prices, but that is something it is not unwilling to pay.

Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 126-27 (1916).

<sup>142</sup> For a general discussion of the question of the effect of insurance on tort law see W. PROSSER, *supra* note 62, at § § 82-84. A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

<sup>143</sup> W. PROSSER, *supra* note 62, at § § 82-84.

<sup>144</sup> W. PROSSER, *supra* note 62, at § 78; see also Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. PA. L. REV. 298 (1911); Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1072-75 (1972); Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).

<sup>145</sup> See, e.g., Avins, *Absolute Liability for Oil Spillage*, 36 BROOKLYN L. REV. 359 (1970); Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. REV. 1, 50-53 (1968); Bergman, *No Fault Liability for Oil Pollution Damage*, 5 J. MARITIME L. 1 (1973); Stone, *The Trans-Alaska Pipeline and Strict Liability for Oil Pollution Damage*, 9 URBAN L. ANN. 179 (1975).

ness and is thus calculable and reasonably insurable. Since such damages are foreseeable when the hazardous activity begins, liability to the injured parties is merely a cost of doing business."<sup>146</sup> Strict liability standards are of great importance to the injured plaintiff because of the virtual impossibility of proving negligence by the owners of the tanker.<sup>147</sup> The public and the legislature have recognized the abnormally hazardous character of oil transportation. Imposition of absolute liability on oil bearing tanker vessels for all damage from any oil spillage therefore seems highly warranted.<sup>148</sup>

The argument for treating lead contamination as an ultra-hazardous activity is not based on the short term result of air pollution, but rather upon suspected long term effects which are not yet understood. Under this view, any significant increase in air pollution may cause mankind to suffer in the future. Had the *Amoco II* court been more progressive, the EPA strict liability standards could have been upheld on the grounds that no further deterioration of the atmosphere could be tolerated, and that the refiners, who derive the greatest profits and control the industry, should be held responsible for acts of gasoline contamination.

Another major justification exists for the imposition of strict liability; that is, the extent to which the law of torts serves a preventative function.<sup>149</sup> Although an early legal commentator stated that the law of negligence has as its primary function the allocation of risk,<sup>150</sup> legal writers now agree that the preventative function is important.<sup>151</sup> Deterrence, the basis of the challenged EPA regulation, was the means sought to reduce the percentage of contaminated gasoline.

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<sup>146</sup> Stone, *supra* note 145, at 197.

<sup>147</sup> Avins, *supra* note 145, at 366; see generally Mendelsohn, *Maritime Liability for Oil Pollution-Domestic and International Law*, 38 GEO. WASH. L. REV. 1 (1969); Sweeney, *Oil Pollution of the Oceans*, 37 FORDHAM L. REV. 155 (1968).

<sup>148</sup> Stone, *supra* note 145, at 193 and n.79. The strict liability provisions enunciated in the Trans-Alaska Pipeline Act are proposed for application to all damages resulting from the transportation of oil by pipeline or tanker from any location. *Id.* at 193-97.

<sup>149</sup> W. PROSSER, *supra* note 62, at 23; see generally Douglas, *Vicarious Liability and Administration of Risk*, *supra* note 115.

<sup>150</sup> Harper, *The Basis of the Immunity of an Independent Contractor*, *supra* note 115.

<sup>151</sup> See generally Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Calabresi, *The Decision for Accidents: An Approach to Non Fault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 449 (1961); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961).

Perhaps the strongest reason which can be given for the imposition of 'absolute' liability . . . [is] the fact that one who is responsible for all consequences is more apt to take precautions to prevent injurious consequences from arising. If the law requires a perfect score in result, the actor is more likely to strive for that than if the law requires only the ordinary precautions to be taken.<sup>152</sup>

Strict liability provisions would serve as a substantial deterrent to contamination of unleaded gasoline to directly supplied retailer-lessees. The existing quality control programs could be expanded to cover all stages of the distribution system. Further, a refiner would be even more prudent in choosing his directly supplied lessees. His decision would be based on a consideration of who would best maintain the equipment and facilities to ensure the absence of contamination. The lessee would have to exercise the utmost care, not simply ordinary care, in the handling of the unleaded gasoline in order to ensure renewal of his short term lease.<sup>153</sup> Strict liability would thus lead to an unbroken chain of the highest degree of care from the refiner to the retail service station and, ultimately, to the motorist.

Nevertheless, the difficulty in imposing strict liability standards based on the preventative function is that this function, standing alone, will not sustain such a high degree of liability. Rather, this preventative function seems to be outweighed by the two major policies of tort law, the compensation of the injured plaintiff for damage caused to his body or property and the capacity of a certain party to bear that loss.<sup>154</sup> Neither of these two underlying policies, however, apply to gasoline contamination because of the absence of the cognizable injury to the individual or society.

The case for strict liability for sale of contaminated gasoline is not as persuasive as it seems at first glance. Contaminated gasoline, according to the regulations, is simply leaded gasoline,<sup>155</sup> which is still sold throughout the United States. Although the EPA issued

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<sup>152</sup> Seavey, *Speculations as to "Respondent Superior,"* Harvard Legal Essays, at 447-49, quoted in SHULMAN AND JAMES, *CASES AND MATERIALS ON TORTS*, 116 (2d ed. 1952); see also Bergman, *supra* note 145, at 32-34; McNichols, *The Kirkland v. General Motors, Manufacturers' Products Liability Doctrine—What's In A Name?* 27 OKLA. L. REV. 347, 352 (1974).

<sup>153</sup> The lease term ranges from one to three years. Teknekron Memo, *supra* note 14, at 383.

<sup>154</sup> W. PROSSER, *supra* note 62, at 23; Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, *supra* note 138 at 1099, 1119, 1122-24; Williams, *The Aims of the Law of Torts*, 4 CURR. LEG. PROB. 137 (1951).

<sup>155</sup> 40 C.F.R. § 80.2(g) (1976).

fuel content regulations under the Clean Air Act<sup>156</sup> because airborne lead may present a serious threat to public health,<sup>157</sup> the court distinguished those regulations from the ones at issue in *Amoco II*.<sup>158</sup> The regulations reviewed in *Amoco II* dealt exclusively with the determination that leaded gasoline impairs the catalytic converter fitted on recent model cars.<sup>159</sup> The hazard and injury are not to a specific individual but rather to the society-at-large forced to breathe air of a steadily deteriorating quality. Although contamination of unleaded gasoline is arguably an ultra-hazardous activity, it may not be any more hazardous than other forms of environmental damage. Yet other federal anti-pollution statutes, some dealing with risks far greater than those of lead, do not impose strict liability.<sup>160</sup>

In conclusion, the traditional law of strict liability, as established in the abnormally dangerous activity cases and the products liability cases, does not justify imposition of strict liability on oil refiners for contamination of unleaded gasoline. This conclusion is supported by the following reasons: (1) the lack of injury to a single injured person; (2) the difficulty of ascertaining the degree of the abstract injury to society-at-large; (3) the difficulty of identifying the potential harm from contamination of unleaded gasoline as an abnormally hazardous activity; (4) the lack of strict liability standards in other anti-pollution statutes; and (5) the extremely low incidence of contamination of unleaded gasoline.<sup>161</sup>

## VI. EFFECT OF AMOCO I AND II ON ENFORCEMENT OF THE REGULATIONS

Regulations establishing standards of liability for statutory violations must be judged by their effectiveness; have they brought about the desired results? An examination, therefore, must be made to determine whether the end sought by the EPA, that is, reduced

<sup>156</sup> § 211(c)(1)(A), 42 U.S.C. § 1857f-6c(c)(1)(A) (1970).

<sup>157</sup> *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976). In *Ethyl* the court concluded that EPA's interpretation of the "will endanger" standard of § 211(c)(1)(A) as meaning "presents a significant risk of harm" was correct. See Comment, *Public Health Endangerment and Standards of Proof; Ethyl Corp. v. EPA*, 6 ENV. AFF. 227 (1977).

<sup>158</sup> 543 F.2d at 271-2 n.2.

<sup>159</sup> 37 Fed. Reg. 3882 (1972).

<sup>160</sup> See note 100. But see *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). In *Askew*, a unanimous Court upheld the Florida Oil Spill Prevention and Pollution Control Act, FLA. STAT. ANN. § § 376.011 *et seq.* (West Supp. 1973) that imposed strict liability on waterfront oil handling facilities and ships for any oil spill damage to the state or private persons.

<sup>161</sup> See text at Section VI, *infra*.

contamination of unleaded gasoline, has been achieved despite the setbacks from the *Amoco I* and *II* decisions.

Since promulgation of the regulations in January, 1973, the national percentage of violations has been between 1% and 2%.<sup>162</sup> EPA officials have conceded that the oil companies are doing their utmost to prevent contamination.<sup>163</sup> Since *Amoco II* there has been a slight increase in the percentage of contamination in certain regions of the country but this increase cannot be traced to that decision.<sup>164</sup>

Would the incidence of contamination be at such a low level had the EPA not sought to impose strict liability on the refiners? The EPA failed in its attempts to impose strict liability on refiners; first, in *Amoco I*, for the acts of vandalism by third parties, or unpreventable breaches of contract by distributors or jobbers, and then, in *Amoco II*, for the acts of directly supplied lessees. However, the EPA demonstrated to the refiners that contamination of unleaded gasoline was an immediate and serious problem. Further, all but the liability provisions relating to directly supplied branded retailer-lessees were upheld in *Amoco II*. The regulations, therefore, still create a difficult burden for the refiner to overcome in order to avoid liability.<sup>165</sup> The court did not preclude the EPA from imposing vicarious liability upon refiners who exercise sufficient control over their lessees.<sup>166</sup> The key phrase of *Amoco I* and *II* remains: "Refiners must have the opportunity to demonstrate freedom from fault."<sup>167</sup>

At present, violations of the regulations have resulted in roughly \$225,000 in fines levied against oil refiners, distributors and retailers.<sup>168</sup> Although the EPA must, according to *Amoco II*, make a case-by-case showing to determine whether the negligence of the lessee will be imputed to the refiner,<sup>169</sup> only narrow breach of contract defenses are allowed. Most of the contested violations have hinged on the issue of the contractual undertaking. This contractual obligation between the refiner and the retailer has become the keystone

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<sup>162</sup> Statistics are based on random EPA testing of about 5% of retail service stations in the United States. Telephone conversation with James Sakalosky, Chief Field Coordination Branch, Mobile Source Enforcement Division, EPA, Washington, D.C. (Oct. 19, 1976).

<sup>163</sup> *Id.* EPA, Environmental News (March 11, 1976).

<sup>164</sup> Telephone conversation with Robert Muessler, Mobile Source Enforcement Division, EPA, Washington, D.C. (Oct. 26, 1976).

<sup>165</sup> See text at notes 74-5, *supra*.

<sup>166</sup> 543 F.2d at 278.

<sup>167</sup> 501 F.2d at 749.

<sup>168</sup> Conversation with Robert Weisman, *supra* note 114.

<sup>169</sup> 543 F.2d at 277.

of effective enforcement by the EPA.<sup>170</sup> Whether refiners would have created the extensive quality control systems now in operation at most stages of the distribution system without the stringent liability standards in the regulations is of little consequence. Of greater import is the attainment of the purpose of the regulations, the sale of pure unleaded gasoline to the motorist.

The problem of contamination of unleaded gasoline may be only temporary. At present, retailers are required to provide only one grade of unleaded gasoline to the motorist since only recent model cars are fitted with catalytic converters. As the percentage of leaded gasoline decreases and that of unleaded gasoline increases, the possibility of contamination of unleaded gasoline will diminish and eventually disappear.<sup>171</sup> In the interim, the regulations will have served their purpose of promoting the sale of pure unleaded gasoline to the motorist.

## VII. CONCLUSION

The objective of the regulations reviewed in *Amoco I* and *II*, to ensure the sale of uncontaminated lead-free gasoline to the motorist, has for the most part been achieved. The decision in *Amoco II* was consistent with the clear wording of the statute, the traditional law of vicarious liability, and the principle of administrative law that an agency's determinations must be supported by a sufficient record.

Striking down the strict liability standards in *Amoco II* does not foreclose their imposition in other environmental contexts, should Congress so decide, or should the courts determine that pollution is an abnormally hazardous activity. Strict liability may yet be the solution to many other major environmental problems.

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<sup>170</sup> Telephone conversation with Robert Muessler, Mobile Source Enforcement Division, EPA, Washington, D.C. (Oct. 22, 1976).

<sup>171</sup> Interview with Leslie Carothers, *supra* note 124.