Interpretation of the Consumer Products Exception in the Definition of Facility under CERCLA; Legislative Reform

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INTERPRETATION OF THE CONSUMER PRODUCTS EXCEPTION IN THE DEFINITION OF “FACILITY” UNDER CERCLA

I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or the “Act”) in response to growing concern over the possible effects of hazardous waste sites on public health and the environment. Through CERCLA, Congress intended to “provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.”

To accomplish these goals, CERCLA imposes a system of strict liability. Liability results where the federal or state government has incurred necessary response costs due to a release or threatened release of a hazardous substance by a person from a vessel or facility. The definition of “facility” in the Act exempts “any consumer product in consumer use” from CERCLA liability.

CERCLA was quickly cobbled together from existing proposals and passed with relatively little debate by a lame duck Congress. This process is reflected in the limited legislative history and often ambiguous language of the Act. Numerous terms in

2. The public demand for Congressional action regarding the control and cleanup of hazardous materials was heightened following the discovery of the disaster at Love Canal. It has been estimated that there are more than 47,000 sites contaminated by hazardous substances in the United States. See Daniel Riesel, Private Hazardous Substance Litigation, C855 ALI-ABA 485 (1993).
   The term “facility” means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.
the statute suffer for lack of clarity and explanation. In particular, Congress neglected to include a definition of "consumer product" in the statute or to discuss the consumer products exception to any significant degree during drafting or debate. As a result, federal courts have been obliged to interpret the meaning of "consumer product" with little Congressional guidance.

With respect to the consumer products exception, courts have split over the meaning which Congress intended in section 9601(9)(B). The court in Reading Company v. Philadelphia limited the exception to cases of individual consumer use of a hazardous substance and so preserved the broad remedial reach of CERCLA. In contrast, the 5th Circuit in Dayton Independent School District v. U.S. Mineral Products Co. interpreted the exception to apply to "useful consumer products." Using the Dayton interpretation, a current or past owner or operator may seek to avoid liability for cleanup at a hazardous waste site by claiming that the hazardous substances involved have a commercial character and are in consumer use. Continued judicial application of the Dayton sense of "consumer product in consumer use" will expand the exception and ultimately restrict the scope of the Act in a manner contrary to legislative intent and damaging to the statutory purpose.

II. ALTERNATIVE INTERPRETATIONS

A. The "Useful Consumer Products" Interpretation of § 9601(9)(B)

In Dayton Independent School District v. U.S. Mineral Products Co., a school district sought to recover from the manufacturer and suppliers the costs of removing asbestos-containing materials ("ACMs") from school buildings. The plaintiffs brought a consolidated claim under CERCLA section 9607(a)(3), arguing that the buildings in which the ACMs were installed constituted "facilities" for the purposes of


CERCLA has been widely criticized as difficult to interpret. See, e.g., Artesian Water Company v. Gov't of New Castle County, 851 F.2d 643, 648 (3d Cir 1988) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage."); Retirement Community Developers Inc. v. Merine, 713 F. Supp. 153, 156 (D. Md. 1989) ("It is undisputed that CERCLA presents difficult questions of interpretation."); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history").

14. 906 F.2d 1059.
15. Id. at 1061.
CERCLA liability. In dismissing the case for failure to state a claim upon which relief can be granted under CERCLA, the Fifth Circuit held "that Congress did not contemplate recovery under this statute of the costs incurred to effect asbestos removal from buildings."17

In part, the court based its decision on its analysis of the term "facility" in section 9607(a)(3) of CERCLA. The plaintiffs argued that the "facilities" in question were the buildings in which the asbestos-containing materials were installed.18 Rejecting this argument as "wasted effort," the court concluded that the building materials themselves were the "facilities" and constituted "consumer products in consumer use."19 Without citing any legislative history or statutory purposes, the court stated that "the provision exempting consumer products obviously was meant to protect from liability those who engage in production activities with a useful purpose, as opposed to those engaged in the disposal of hazardous substances."20 Therefore, clearly "Congress did not intend CERCLA to target legitimate manufacturers or sellers of useful products."21

The court in Vernon Village, Inc. v. Gottier,22 following the Dayton decision, held that CERCLA did not apply to hazardous materials found in a useful consumer product.23 The chromium and radionuclides contained in a drinking water supply system were within the consumer products exception and thus outside the ambit of CERCLA.24 In People v. Blech,25 the court held that the lessee of a commercial property could not recover from the lessor any costs for removing asbestos dust even though the dust was produced as a result of a fire.26

B. The Individual Consumer Interpretation of § 9601(9)(B)

In Reading Company v. Philadelphia,27 the Reading railroad company sought contribution from the city of Philadelphia and other railroads for clean-up costs incurred and anticipated in removing polychlorinated biphenyls (PCBs) from facilities in and around the Reading Terminal train shed.28

Beginning in the 1930's, Reading converted the passenger lines which ran in and out of this terminal from steam to electric power, completing the electrification in 1961. Each electric rail car housed a traction motor which in turn was equipped with a transformer to reduce the voltage running to the railcar from the overhead catenaries. The transformers were cooled by a pump-driven liquid cooling system containing either mineral oil or PCB based fluids. Through normal operation of these transformers plus leaks and lack of maintenance, PBCs were released into the railbeds and contami-

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16. Id. at 1065.
17. Id. at 1066.
18. Id.
19. Id.
20. Id. (emphasis added).
21. Id.
23. Id. at 1151.
24. Id.
25. People v. Blech, 976 F.2d 525 (9th Cir. 1992).
26. Id. at 526.
28. Id. at 1229.
nated the Reading terminal and nearby viaduct.\textsuperscript{29}

Reading maintained that part of the contamination occurred during the time when the defendants owned and operated railcars in the Reading Terminal and therefore the defendants should contribute to cleanup costs of the contaminated area under CERCLA.\textsuperscript{30} The defendants argued, among other things, that because the railcars were used by passengers, they were "consumer products in consumer use" and were thus outside the ambit of the statute.\textsuperscript{31}

Noting that CERCLA fails to define "consumer product," the Reading court employed the rules of statutory construction to interpret the term.\textsuperscript{32} First, the court quoted definitions of "consumer product" in Black's Dictionary\textsuperscript{33} and in the Consumer Products Safety Act\textsuperscript{34} for the ordinary meaning of the term. The court then examined the statute's legislative history, citing Senator Cannon's remarks during floor debate of the bill and in explanation of the amendment\textsuperscript{35} plus the Senate report on the Superfund Amendments and Reauthorization Act ("SARA").\textsuperscript{36} Concluding that Congress intended the phrase to exempt individual consumers from CERCLA liability, the court held that an entity operating a commuter train service does not operate the railcars as consumer products in consumer use.\textsuperscript{37}

Following Reading, the court in \textit{KN Energy, Inc. v. Rockwell International Corporation}\textsuperscript{38} ruled that pipelines do not constitute consumer products for the purposes of CERCLA exemption.\textsuperscript{39} The defendant, using the "useful consumer products" interpretation in \textit{Dayton}, argued that the consumer products exception insulates from liability those engaged in productive activities.\textsuperscript{40} The court disagreed, citing the statutory analysis in Reading and holding that the exception to the definition of "facility" applied to individual consumers, not a commercial business.\textsuperscript{41} The pipelines were commercial facilities used to provide a consumer service just like the railcars used in commuter train service in Reading.\textsuperscript{42} Again, in \textit{CP Holdings, Inc. v. Goldberg-Zoino & Associates},\textsuperscript{43} purchasers sought to recover costs of cleaning up ACMs found in a hotel building after its demolition.\textsuperscript{44} Using the same Senate committee report as the Reading court to clarify the meaning of the exclusion, the court held that the site was a "facility" and not a "consumer product in consumer use."\textsuperscript{45}

\textsuperscript{29} Id. at 1222.
\textsuperscript{30} Id. at 1224.
\textsuperscript{31} Id. at 1234.
\textsuperscript{32} Id. at 1232-33 (citing the "canons of statutory interpretation").
\textsuperscript{33} Id. at 1233 (quoting Black's Law Dictionary 317 (6th ed. 1990): "Any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes . . . .").
\textsuperscript{34} Id. See infra note 53 and accompanying text.
\textsuperscript{35} Id. See infra notes 48-49 and accompanying text.
\textsuperscript{36} Id. at 1233-34. See infra note 50 and accompanying text.
\textsuperscript{37} Id. at 1233.
\textsuperscript{39} Id. at 99.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 438.
III. RECOMMENDED AMENDMENT TO CERCLA

The "consumer products in consumer use" exception to the definition of "facility" in CERCLA "helps define the overall scope of CERCLA by excluding consumer products being used by consumers who thereby cause what would otherwise be a CERCLA release." The legislative history cited by the Reading court "shows that the exclusion was intended to prevent "an individual consumer" from possibly being subject to strict liability under CERCLA for a "release" from a product in consumer use." During floor debate on the original bill, Senator Cannon, later the sponsor of the amendment, stated that:

[The bill] contains no exclusion for consumer products. Therefore, it has been suggested that this would mean that an individual consumer is subject to strict, joint and several liability for a "release" from any product that contains one of the numerous hazardous substances listed on Pages 24 to 28 of the Senate Environmental and Public Works Committee report. While staff has been informed that such a result was not intended, the term "facility" as it is presently defined would include consumer products, and the report does not in any way clarify that this term does not include consumer products. An amendment will be offered to clarify this matter.

Senator Cannon, upon introduction of the amendment, stated that the it "would exclude consumer products from the definition of "facility", thus precluding any unintended notification requirements and liability provisions to consumers." The official Senate report in support of the passage of SARA in 1986 plainly supports this interpretation of section 9601(9)(B). Clearly, Congress intended the consumer products exception to protect individual consumers from liability, not to shield a current or former owner or operator responsible for the release of hazardous substances.

The Dayton court makes sweeping application to CERCLA legislative history but fails to cite specific language in support of its "useful purpose" interpretation. Nowhere in the legislative history of this exception does the legislature refer to the purpose, useful or otherwise, of the product to interpret the definition of "consumer product in consumer use."

Nevertheless, in cases citing Dayton, judicial application of the "useful consumer products exception" has limited the broad reach of CERCLA liability and thus frustrated the goals of the exception and the Act itself.

In order to clarify CERCLA and promote judicial interpretation of the Act consistent with legislative intent, Congress should amend the statute to include a definition of "consumer product" like that used in Reading. The definition of "consumer product"
in the Consumer Products Safety Act of 1980, a statute in force at the time of the passage of CERCLA, effectively emphasizes the nature of the exception and promotes limited application to individual consumers and would thus be an appropriate amendment. The language would be inserted following the section 9601(5) definition of "claimant" and would read:

(6) The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.

As courts continue to hear claims under CERCLA, more potentially responsible parties may try to employ the "useful consumer products" interpretation of section 9601(9)(B) to escape liability for release of hazardous substances into the environment. By adopting the above definition of "consumer product," Congress may prevent those parties from avoiding liability under the Act. The legislature should address this problem of interpretation and others like it in order to improve CERCLA and show that public health and the environment are matters of concern not only to the American people but to Congress as well.

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52. Alternatively, the section could read:
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