No. 01-6008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES and STATE OF NEW YORK,

Appellees,

v.

ALCAN ALUMINUM CORPORATION,
Appellant.

On Appeal from the United States District Court
for the Northern District of New York
Civil Action No. 3:87-CV-920

BRIEF OF THE WASHINGTON LEGAL FOUNDATION; U.S. SENATOR LARRY E. CRAIG; U.S. REPRESENTATIVES JOHN E. PETERSON, JOHN M. McHUGH, AND MICHAEL G. OXLEY; N.Y. STATE SENATOR JAMES W. WRIGHT; N.Y. STATE ASSEMBLYWOMAN FRANCES T. SULLIVAN; JOHN J. GOSEK, MAYOR OF THE CITY OF OSWEGO, NEW YORK; N.Y. STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF MANUFACTURERS; NATIONAL RESTAURANT ASSOCIATION; NATIONAL FOOD PROCESSORS ASSOCIATION; MANUFACTURERS ASSOCIATION OF CENTRAL NEW YORK; OPERATION OSWEGO COUNTY, INC.; THE BUSINESS COUNCIL OF NEW YORK STATE, INC.; AND THE ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF APPELLANT ALCAN ALUMINUM CORPORATION

DANIEL J. POPEO
PAUL D. KAMENAR
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Date: May 29, 2001

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes and Rules:

Other Authorities:

IDENTITY AND INTERESTS OF AMICI CURIAE

Amici curiae are the Washington Legal Foundation; U.S. Senator Larry E. Craig; U.S. Representatives John E. Peterson, John M. McHugh, and Michael G. Oxley; N.Y. State Senator James W. Wright; N.Y. State Assemblywoman Frances T. Sullivan; John J. Gosek, Mayor of the City of Oswego; N.Y. State Conference of Mayors and Municipal Officials; Chamber of Commerce of the United States of America; National Association of Manufacturers; National Restaurant Association; National Food Processors Association; Manufacturers Association of Central New York; Operation Oswego County, Inc.; The Business Council of New York State, Inc.; and the Allied Educational Foundation. Amici, their members, and constituents, all support a balanced and reasonable interpretation of our nation's environmental laws as intended by Congress. The lower court decision frustrates that purpose and unfairly imposes substantial liability upon businesses, municipalities, and other entities which operate responsibly in handling and disposing of waste materials. Amici's interests are more fully described in the accompanying motion for leave to file this brief. All parties consent to the filing of this brief.

STATEMENT OF THE CASE AND INTRODUCTION

In the interests of judicial economy, amici adopt by reference the Statement of the Case and Statement of the Facts as presented by appellant Alcan

Aluminum Corporation (Alcan) in its brief. However, amici wish to highlight certain aspects of this case.

Alcan operates a facility in Oswego, New York, where it manufactures sheets of aluminum by pressing aluminum ingots through a hot rolling line. To cool and lubricate the ingot and machinery, Alcan uses an emulsion that is composed of approximately 95% de-ionized water and 5% mineral oil.[1]

Significantly, neither the virgin emulsion as a whole, nor its water and mineral oil components, are "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601(14). Rather, the used emulsion sent to the Pollution Abatement Services of Oswego, Inc. (PAS) for disposal contained traces of certain metal compounds, namely, copper, zinc, cadmium, lead, and chromium. These substances are technically "hazardous substances" under CERCLA, but were essentially harmless because of their below background levels.

Because the used emulsion was essentially benign, Alcan had been allowed to dispose of it in an environmentally safe and relatively inexpensive manner by having the emulsion spray-irrigated on its lawn or land spread at the

---

[1] Since almost all of the emulsion is water, however, it would be more accurate to refer to Alcan's substance as a "water emulsion" rather than an "oil emulsion" as it has been called in this litigation. Amici will simply refer to the liquid as "emulsion" in their brief.

Sealand facility as permitted by government authorities, both before and after the 1970-1977 time period in question in this case when the government directed Alcan to send the emulsion to the PAS facility for incineration. Alcan Br. at 3-4. The government apparently knew that PAS (unbeknownst to Alcan) was having difficulties properly storing and processing the wastes from Alcan and scores of other entities. *Id*. at 3; A-502-04. After several leaks and spills from the PAS facility due to runoff from heavy rains and snow melts in the mid-1970s, PAS abandoned the site in 1977.

EPA and New York undertook remediation and cleanup measures from 1977 to 1987, and then sued Alcan and 82 other potentially responsible parties (PRPs) under CERCLA for reimbursement of response costs. The government settled with all parties except Alcan.[2] The district court originally found Alcan jointly and severally liable for the response costs on summary judgment motions.

---

[2] The other PRPs settled with the government for approximately 75% of the cleanup costs. By settling, they were protected by CERCLA from any contribution actions that Alcan could file against them if Alcan were found to be jointly and severally liable. Both the trial court and this Court have unfairly characterized Alcan as the "lone holdout" in describing the settlement proceedings. 49 F. Supp. 2d at 97; 990 F.2d at 717. All too often in CERCLA cases, companies, especially small businesses, restaurants, civic clubs, municipalities, nursing homes, and the like, are unfairly forced to settle Superfund claims for exorbitant response costs under the harsh threat of joint and several liability when liability is unwarranted, excessive, or both. In many cases, even settling unfair claims, with the associated litigation expenses, leads to insolvency. That Alcan has chosen to have an Article III court independently determine its liability under CERCLA, rather than capitulate to unreasonable government demands, surely deserves respect.

United States v. Alcan Aluminum Corp., 755 F. Supp. 531 (N.D.N.Y. 1991).

In the first appeal, this Court acknowledged Alcan's and its amici's argument that the literal definition of "hazardous substance," without any requirement of quantity, concentration, or toxicity, would apparently cover any substance listed by the EPA, however benign, including breakfast cereal, garden soil, and other life-supporting substances. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 716 (2d Cir. 1993). In addition, this Court noted that because of CERCLA's apparent strict liability application by the courts, an entity could be held jointly and severally liable for the cleanup costs without the government having to prove that the defendant's waste caused either the release or the response costs. *Id.* at 721.[3]

Despite CERCLA's broad coverage, this Court relied on cases reviewing CERCLA's legislative history indicating that Congress, having rejected adding a provision to CERLCA that would have mandated a finding of joint and several liability in all cases, instead intended to allow the courts to develop and apply federal common law on a case-by-case basis to limit liability. *Id.* at 721-22. *See,*

---

[3] *But see United States v. Dico*, 136 F.3d 572, 578 (8th Cir. 1998) (government has burden to "establish a causal nexus between that release and the incurrence of response costs.").

e.g., United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).[4] A majority of courts have thus used Restatement (Second) on Torts § 433A on divisible harm to determine whether response costs can be reasonably apportioned. Under § 433A, a defendant, after being found liable, can limit or apportion damages among other joint tortfeasors where there is (a) a distinct harm caused by each, *or* (b) a single harm for which there is a reasonable basis for division according to the contribution of each to the harm. *Id.* at 722.

While the Court admitted that it was allowing causation to come into play in a CERCLA case "through the back door [of divisibility], after being denied entry at the frontdoor [of strict liability]," this Court emphasized that a defendant such as Alcan

> [can] *escape payment* where its pollutants did not contribute more than background contamination and also cannot concentrate. To state this standard in other words, we adopt a special exception to the usual absence of a causation requirement, but the exception is applicable only to claims, like Alcan's, where background levels are not exceeded. And, we recognize this limited exception only in the absence of any EPA thresholds.
>
> Contrary to the government's position, *commingling is not synonymous* with indivisible harm, and Alcan should have the opportunity to show that the harm caused to PAS was capable of reasonable apportionment. It may present evidence relevant to establishing

---

[4] Similarly, the Supreme Court has relied on the common law, in determining the scope of CERCLA liability, to define who is an "owner or operator." *United States v. Bestfoods*, 524 U.S. 51 (1998).

> divisibility of harm, such as proof disclosing the relative toxicity, migratory potential, degree of migration, and synergistic capacities of the hazardous substances at the site.

Id. (emphasis added.). Because copper, zinc, cadmium, lead and chromium compounds in Alcan's used emulsion were below background and could not concentrate, Alcan qualifies for the exception to liability under this Court's ruling.[5]

On remand, however, the case took a radically different turn. The government no longer focused on the below-background metal compounds stipulated to be in Alcan's used emulsion. Rather, the government's new strategy was to claim there were other hazardous substances in the emulsion that (1) were above-background levels, and/or (2) were below-background level in the emulsion, but above-background at the disposal site, and then place the burden on Alcan to prove that the below-background substance in its emulsion could not

---

[5] While the parties dispute whether the trace metals were added to the emulsion from the aluminum ingots as the government contends, or whether they came from air contact with dust particles containing higher concentrations of these trace metals as Alcan contends, the issue appears to be legally irrelevant, although fraught with enormous liability implications. The legal question the district court was directed to decide on remand was whether the metal constituents, regardless of their source, were below background and could not concentrate; if so, Alcan would be relieved of joint and several liability altogether. In other words, a defendant like Alcan could technically be found strictly liable, yet limit its damages to zero. *See also United States v. Township of Brighton*, 153 F.3d 307, 319 & n.14 (6th Cir. 1998) (defendants who can show that harm is divisible and they are not responsible for any of the harm "have effectively fixed their own share of the damages at zero. No causation means no liability, despite § 9607(a)'s strict liability scheme.").

concentrate with the above-background substance at the site. The government tried to do both. For the first time in this lengthy litigation, the government contended that Alcan's emulsion contained below background nickel, and the court agreed, even though some 19 tests did not find detectable nickel in the emulsion. *United States v. Alcan Aluminum Corp.*, 97 F. Supp.2d 248, 261 (N.D.N.Y. 2000); Alcan Br. at 28. Further, above-background levels of nickel were detected at the sites. Because Alcan could not prove the negative, namely, that this undetectable nickel could not concentrate, it would be assumed that it could. In doing so, the court confused concepts of quantity, concentration, and toxicity.

The government further claimed, and the trial court agreed, that the emulsion contained traces of PCBs, again based on speculative evidence. 97 F. Supp.2d at 264.[6] Because the district court stated that PCBs were not "naturally occurring substances that have `background levels,'" the district court erroneously assumed that any presence of PCBs, even a harmless trace or molecule, would automatically trigger CERCLA liability. *Id.* at 268. In fact, as

---

[6] While amici agree with Alcan's arguments that the findings of nickel and PCBs in Alcan's emulsion were unscientific and clearly erroneous as a matter of law and fact under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), *see* Alcan Br. at 25-51, amici's brief addresses other legal issues that assume the court's erroneous findings.

Alcan's brief accurately noted, PCBs are ubiquitous, have background levels, and are even permitted by EPA to be present in food packaging and other consumer goods in much higher concentrations than allegedly in the emulsion. Alcan Br. at 50-51.[7] This Court did not and should not limit or qualify the "background level" standard in its opinion to only natural substances.

But even armed with these dubious "factual" findings of hazardous substances in Alcan's emulsion, the court candidly imposed joint and several liability not because of any of the nickel or PCBs in the emulsion, but primarily because of Alcan's "emulsion as a whole," that is, the emulsion acted like rainwater or homogenized milk in moving other hazardous waste around at the site. Thus, the nickel and PCB findings were simply bootstraps on which to attach liability.

In the final analysis, the trial court essentially ruled that "commingling" of Alcan's emulsion with other wastes was synonymous with indivisibility, and hence, joint and several liability would be imposed. The trial court also rejected Alcan's challenges to CERCLA's retroactive imposition of liability.

---

[7] *See also Washington Post*, May 17, 2001 at A17 (PCBs travel naturally in "ocean currents, or in the winds, falling in places where they have never been used. . . . More than 6 tons of PCBs reach the Arctic each year this way."). Thus, while PCBs are synthetic, they have a "natural" background level. Under the district court's ruling, a person disposing of pure water that contains trace amounts of PCBs due to air contact, would be disposing a "hazardous substance" subject to CERCLA's strict, joint, and several liability.

SUMMARY OF ARGUMENT

The district court erred as a matter of law by ruling that Alcan was jointly and severally liable for the cleanup costs because Alcan's emulsion, no matter how benign, commingled with and moved the other hazardous wastes at the site.[8] In doing so, the district court violated the intent of the Congress that enacted CERCLA that "polluters pay" for the remediation costs and erroneously concluded that commingling of wastes such as Alcan's necessarily constitutes an indivisible harm. The district court erroneously applied § 433A of the Restatement (Second) of Torts on divisible harm and paid only lip service to the other factors that this Court required the district court to consider for apportioning response costs, such as relative toxicity.

In addition, the decision below is contrary to sound public policy. Unless overturned, the decision would discourage companies from incurring expenses and developing technology to reduce the level of hazardous substances in their wastes before disposal. If a company is going to be held strictly, jointly, and severally liable for the cleanup costs of the wastes of others regardless of the relative toxicity of its own wastes, the company would have little or no incentive

---

[8] The divisibility determination is a question of law subject to *de novo* review. *See In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 902 (5th Cir. 1993); *United States v. Hercules, Inc.*, 2001 U.S. App. LEXIS 6084 at *24 (8th Cir. Apr. 10, 2001).

to develop methods and technology to "clean" its wastes before disposal.[9] CERCLA liability in cases such as this are patently unfair, unpredictable, and uninsurable. Alternatively, such arbitrary imposition of liability may even force companies to relocate facilities abroad or in nearby Canada or Mexico.

Similarly, local governments and municipalities which provide waste collection and disposal services for their citizens are exposed to joint and several liability for any cleanup costs at a disposal site since all trash, food remains, paper, and even leaves and lawn clippings would be considered "hazardous substances."

Amici also submit that CERCLA, as applied to Alcan, is unconstitutional because Congress did not express a "clear intent" to have CERLCA applied retroactively in the factual context of this case, and even if it did, such a construction would run afoul of the Due Process or the Takings Clauses.

---

[9] For example, a company adding 99 gallons of clear waste water containing trace levels of PCBs to one gallon of concentrated PCBs disposed of by another, could be liable for up to 100 percent of any clean up costs, while the real polluter could be found liable for as little as one percent of the costs.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED THE DIVISIBILITY RULE AS A MATTER OF LAW AND ERRONEOUSLY IMPOSED STRICT, JOINT, AND SEVERAL LIABILITY UNDER CERCLA FOR BENIGN SUBSTANCES

In order to understand the full import of the district court's error, amici believe it would be helpful to briefly review CERCLA's liability provisions, and how this and other courts have interpreted them.

A. CERLCA Overview

CERLCA's provisions and its legislative history are well known to this Court and will only be briefly summarized here. CERLCA was enacted by Congress in 1980 to address the harm to the environment posed by hazardous wastes from abandoned waste sites, such as Love Canal, as well as those from active sites. A lame-duck 96th Congress quickly rushed CERCLA through the legislative process as one of that body's last actions, producing what many courts and commentators have agreed is an incomprehensible statute with an equally enigmatic legislative history.[10]

---

[10] *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 204 (W.D. Mo. 1985) (CERCLA is "a hastily assembled bill and a fragmented legislative history adds to the usual difficulty of discerning the full meaning of the law."); *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321 (2d Cir. 2000) ("We are called upon in this case to resolve yet another ambiguity within CERCLA's miasmatic provisions."); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 257, n.5 (CERCLA "riddled with inconsistencies and redundancies"); Martin A.

In brief, CERCLA established a mechanism that employs a combination of public funds to clean up abandoned sites and a liability scheme to make "polluters pay" for the harm they caused to the environment with their toxic wastes. While the statute is silent on the issue, CERCLA has been interpreted to impose strict, joint and several liability, upon "responsible parties" defined as persons who own or operate a facility at which hazardous substances were disposed of, and those who generate, transport, store, or dispose of "hazardous substances." Thus, before liability of any kind can be established, the initial question is what constitutes a hazardous substance.

1. Hazardous Substances

As noted, this Court held in the first appeal that the definition of hazardous substance under CERCLA included "`any' hazardous substance, and it does not impose quantitative requirements," and that "Congress planned for the `hazardous substance' definition to include even minimal amounts of pollution." 990 F.2d at 770. With all due respect, amici submit that Congress did not intend that almost everything in the universe would be a "hazardous" substance. "There is nothing to suggest that Congress intended to impose far-reaching liability on

---

McCrory, *Who's on First: CERLCA Cost Recovery, Contribution, and Protection*, 37 Am. Bus. L.J. 3 (1999).

every party who is responsible for only trace levels of waste. Several courts. . . have rejected the notion that CERCLA liability `attaches upon release of *any* quantity of a hazardous substance.'" *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 78 (1st Cir. 1999) (citations omitted).

To hold Alcan liable in this case would essentially mean that all substances such as water, milk, gardening soil, and almost everything else that life depends upon are "hazardous substances." A basic canon of statutory interpretation is that courts should interpret statutes to avoid absurd results. *See, e.g., Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Commonwealth of Massachusetts v. Blackstone Valley Electric Co.*, 67 F.3d 981 (1st Cir. 1995) (court rejected broad definition of "cyanide" as hazardous substance since it would include everyday substances such as vitamin B-12 and lead to "nonsensical results").[11]

While amici realize that this Court has adopted the expansive definition of hazardous substance, we urge the Court to reconsider this issue, or at least consider the ramifications of such a broad definition in determining the liability

---

[11] *See* Cathleen Clark, *Should the Butcher, the Baker and the Candlestick Maker Be Held Responsible for Hazardous Waste*, 1994 Utah L. Rev. 871, 916 (1994), the title of which refers to the phrase this Court used in its first *Alcan* opinion to characterize the breadth of CERCLA liability. 990 F.2d at 716.

and divisibility issues in this case.

2. CERCLA'S Liability Provisions

There are essentially two statutory methods by which a "responsible party" may be found liable under CERCLA: (1) cost recovery suits under 42 U.S.C. § 9607, such as this one, which are generally filed by the United States and/or State or local governments against responsible parties for reimbursement of cleanup costs incurred by the governmental entity, and (2) suits for contribution under 42 U.S.C. § 9613(f) between responsible parties where the court may allocate response costs using such "equitable factors as the court determines are appropriate." *Id*. The equitable factors that often have been used by the courts in apportioning liability under § 9613(f) are known as "Gore factors."[12] Because

---

[12] They are so named after then-Representative Albert Gore, Jr., one of the sponsors of CERCLA, who successfully had them passed on September 23, 1980 by the House of Representatives in order to soften the modern common law approach to joint and several liability, "particularly when applied to a defendant who contributed a relatively small percentage to the waste site." *United States v. A & F Materials Company, Inc*., 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). The six factors are: (1) the ability of the parties to demonstrate that their contribution to a release. . .of a hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment." *Id*. at 1256. *See United States v. Township of Brighton*, 153 F.3d 307, 319 n.16 (6th Cir. 1998) ("Some of the Gore factors (1, 2, and 3) are compatible with causation analysis; others (5 and 6) reflect fairness concerns; at

this Court's decision referred not only to the Restatement in apportioning liability, but also to other factors that mirror some of the Gore factors, such as relative toxicity, amici submit that § 9613(f) cases can be instructive in deciding § 9607 cases.

B. The District Court Erred As a Matter of Law on the Divisibility Issue

The district court took a crabbed view of the divisibility concept in order to avoid this Court's admonition that "commingling does not mean indivisibility." The error of the court can be found by analyzing its faulty reasoning from the following key passages in the district court's opinion:

> The Second Circuit adopted the Restatement (Second) of Torts definition of divisibility, which states that harm is divisible where "joint tortfeasors act independently and cause a *distinct* harm, for which there is a reasonable basis of division according to the contribution of each." Prosser and Keeton explain that where two or more causes combine to produce a single indivisible result, liability cannot be apportioned. See Prosser & Keeton on Torts, § 52, p. 347 (5th Ed. 1984).

97 F. Supp.2d at 271 (emphasis added). Unfortunately, the district court was only half right. Its quotation of the Restatement omitted a key passage, as a cursory look at § 433A reveals:

> **§ 433A. Apportionment of Harm to Causes**

---

least one (4) does both"). Amici submit that all the Gore factors should be applied in § 9607 actions.

> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, *or*
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

Id. (emphasis added). Thus, the Restatement allows for divisibility under *two* circumstances (1) where there are *distinct harms*, *or* (2) there is a reasonable basis for determining the contribution of each cause to *a single harm.*" (emphasis added). The district court unaccountably dropped this Court's crucial "or single harm" phrase.[13]

The district court next cited to Prosser and Keeton for the undisputed truism that where there is a "*single* indivisible result," liability cannot be apportioned. However, by making this statement immediately following the previous inaccurate one citing only to "*distinct* harms," it appears that the district court may have been setting up, inadvertently or not, a false major premise that only "distinct harms" may be divisible, and that "single" harms are not. Indeed, the district court's next sentence provides selective examples from Prosser and

---

[13] The Restatement provides an example of two tortfeasors causing *distinct* harms where two persons simultaneously shoot and wound the plaintiff, one shooting him in the arm, and the other in the leg. § 433A, cmt. on subsec.(1)(b). In that case, the wounded plaintiff would receive common medical "response costs" such as hospitalization, pain medication, and the like. While it "may be difficult in the apportionment of some elements of damages. . . . *[i]t is possible to make a rough estimate which will fairly apportion*" such common damages. *Id.* (emphasis added).

Keeton as its minor premise:

> Further, the conduct of multiple tortfeasors need not be simultaneous to cause an indivisible harm, `[o]ne defendant may create a situation upon which the other may act later to cause damage." [Prosser] at 348. For example, `[i]f two defendants, struggling for a single gun, succeed in shooting the plaintiff; there is no reasonable basis for dividing the liability." Id. at 345. Moreover, if two defendants shoot the plaintiff `independently, with separate guns, and the plaintiff dies from the effect of both wounds, there can still be no division."

97 F. Supp.2d at 271. The district court has selectively chosen indivisible harm hypotheticals and recited the facts surrounding them to falsely suggest the inverse, namely, that if the accompanying fact settings are present, then the result or harm must be an indivisible one.

These hypotheticals are also distinguishable from this case. The single gun example is inapposite since there are multiple sources of the pollution or harm in this case. The separate guns example fails because there was only one result from the shooting: death. As the Restatement notes, "[c]ertain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division. Death is that kind of harm, since it is impossible. . . to say that one man has caused half of it and another the rest." Restatement § 433A, cmt. on subsec.(2)(i).

The district court need not have searched so far afield to find inapposite

hypotheticals because the Restatement is replete with pollution scenarios. Indeed, as the Restatement notes, "apportionment is *commonly made* in cases of private nuisance, whether the pollution of a stream, or flooding, or smoke or dust or noise, from different sources, has interfered with the plaintiff's use or enjoyment of his land." § 433A, cmt. d. (emphasis added).[14] Generally, the Restatement illustrations state that where a stream is polluted from multiple sources, one basis for divisibility is the volume from each, assuming the same degree of toxicity from the various sources. The result is a single harm from pollutants that have been mixed together, but which damages can be apportioned.

Finally, based on the district court's faulty major and minor premises, the Court leaps to a wholly unsound conclusion:

> *Thus*, where two independent causes combine to cause an aggregate harm which exceeds the sum of the individual harms such that the harm attributable to each PRP becomes *indistinguishable*, the harm is not divisible. Such is the case at PAS where Alcan's emulsion provided a mode of transport for other waste that may not have carried by rain or surface run off such that the [non-hazardous components of the] emulsion [e.g. water] contributed significantly to PAS's overall contamination.

Id. (emphasis added).

---

[14] *See also United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269, n. 27 (3d Cir. 1992) ("the drafters of the Restatement found that joint pollution of water is typically subject to the divisibility rule.").

Nothing in the Restatement suggests that divisibility cannot be made simply because the aggregate harm (assuming that to be the case) may exceed the sum of the individual harms. Nor is divisibility defeated because the harm "attributable to each PRP is indistinguishable." The court stumbled because it ignored or gave short shrift to the single harm divisibility argument. Divisibility does not require the court to "distinguish" or "match" each harm to a particular PRP in order for the harm to be divisible.

For example, consider the following hypothetical:

> A, B and C, each separately operating adjoining smelter plants in a farming community, send out fumes of equal concentration that unite and denude the grass upon the land of a nearby landowner. The fumes sent out by A would alone do no substantial harm to the land. A is subject to liability to the landowner for the proportion of the total harm that his proportion of the fumes bears to the total amount of fumes.

Restatement (Second) of Torts, § 881, illus.2.

In this example, there is a commingling of pollutants that "concentrate" in the sense that the combined effect of the pollutants in the aggregate causes a qualitatively different degree of harm than the individual harms separately. Yet even then, tort liability does not hold A jointly liable with B and C, but only for "the portion of the total harm that he himself caused." *Id.* at § 881. The hypothetical suggests that each would be responsible for one-third of the damage

or response costs. By implication, if the fumes from one of the polluters was substantially "lower in concentration" than the other polluters, then the liability should be proportionally lower as well.

In the instant case, there is no question that what "drove" the remediation was the presence of numerous and distinct chemicals, most of which were not in Alcan's emulsion. Nevertheless, the court maintained that "even taking Alcan's proposition that its waste contained only oil, water, and background metals as true [that is, assuming that the emulsion is non-hazardous], the Court cannot conclude that the emulsion did not contribute to the release and clean-up costs at PAS." 97 F. Supp.2d at 271, n.30. The court based its conclusion on Alcan's water emulsion "as a whole" and its ability to interact with "other wastes at the site." Thus, under the court's reasoning, disposing of pure water containing trace metals due to air contact subjects a person to strict, joint, and several liability merely because the water can "move" other hazardous wastes.

The lower court plainly erred on this point. Even assuming the worst-case scenario, that this was exclusively a PCB site, the court should have considered relative toxicity in apportioning response costs. For example, in *Allied Signal v. Amcast International Corp.*, 2001 U.S. Dist. LEXIS 5469 (S.D. Ohio Jan. 12, 2001), the court apportioned clean up costs under § 9613(f) using a relative

toxicity analysis.[15] In that case, the court found that both the plaintiff and defendant had dumped PAHs, a hazardous substance, at the site in question, and had produced a single harm necessitating response costs. The evidence showed that the plaintiff was responsible for 72% of the total waste at the site, and that the defendant was responsible for 28%. Apropos to this case, the court noted that the defendant's waste was "overwhelmingly composed of inorganic sand" [compare to Alcan's water and mineral oil] and thus "largely non-toxic." Accordingly, the court rejected the volumetric ratio and relied on testimony showing that the relative amount of the PAHs in the defendant's waste -- since it was the presence of PAHs that drove the remediation -- to be only in the 2-3% range. The court agreed with the plaintiff that since the wastes were mixed, it was impossible to determine whose PAH actually contaminated the groundwater; nevertheless, the court was able to make a fair apportionment of the costs based on the evidence.

Accepting the district court's dubious finding that Alcan's emulsion contained PCBs (for purposes of argument), Alcan's contribution of PCBs would

---

[15] While the apportionment in *Allied Signal* was done in the context of a § 9613(f) contribution action applying the Gore factors, the relative toxicity factor is essentially identical to the toxicity factor that this Court indicated is available to a defendant in a cost recovery suit under § 9607 to eliminate or limit its liability.

have been only .01% of the PCBs from all other known sources. Alcan Br. at 51. Accordingly, its share of the approximately $20 million site remediation cost at most would be $2,000. But since PCBs constituted less than 2 percent of the waste at the site, Alcan's proportional share would be approximately $32.00, or essentially zero. *Id*.

II. CERCLA CANNOT CONSTITUTIONALLY BE APPLIED RETROACTIVELY TO ALCAN IN THIS CASE

Alcan filed two separate but related motions below regarding the retroactivity of CERLCA. Alcan first argued that based on the Supreme Court's intervening decision in *Landgraf v. USI Film Prods*., 511 U.S. 244 (1994), CERCLA liability could not be applied retroactively absent clear congressional intent. Alcan then filed a related motion following the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), that CERCLA, as applied retroactively, is unconstitutional. The district court denied both motions in separate opinions. *United States v. Alcan Aluminum Corp*., 1996 U.S. Dist. LEXIS 16358; *United States v. Alcan Aluminum Corp*., 49 F. Supp.2d 96 (N.D.N.Y. 1999). But as one commentator noted, the "lack of an explicit textual commitment to retroactivity, the weakness of textual inferences, and CERCLA's conflicting and vague legislative history, coupled with its inherent injustice,

suggest that the [Supreme] Court would not support the Act's continued retroactive application." Jennifer R. Yelin, Note, *Retroactivity Revisited: A Critical Appraisal of CERCLA's Retroactive Liability Scheme In Light of* Landgraf v. USI Film Products *and* Eastern Enterprises v. Apfel," 8 N.Y.U. Envtl. L.J. 94, 119 (1999).

A. Congress Did Not Express a Clear Intent to Have CERCLA Applied Retroactively Against Companies Such As Alcan That Disposed of Their Wastes at Approved Facilities.

Legislation which imposes liability for conduct occurring before the law was enacted violates fundamental notions of fairness and due process embodied in our common law heritage and constitutional form of government. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). The *Landgraf* Court re-emphasized the constitutional underpinnings of the presumption against the retroactive operation of statutes. *Id.* at 266 (referring, *inter alia*, to the Due Process and Takings Clauses). *Landgraf* held that no statute, regardless of its remedial purpose (whether it be the Civil Rights Act of 1991 or CERCLA), may be applied retroactively "absent clear congressional intent favoring such a result." *Id.* at 280. It is insufficient to find the garden variety kind of "congressional intent" that courts often use to interpret statutory language; rather, a finding of "*clear*

congressional intent" is required to evidence Congress's considered judgment to impose retroactive liability implicating serious due process concerns.

The court below properly recognized "that the Congress did not expressly state that the [CERCLA] Act was retroactive." 1996 U.S. Dist. LEXIS 16358 at *9. Indeed, a previous version of the bill contained a provision which expressly created retroactive liability but was not included in the final version.[16] The court cursorily noted other language in CERLCA where the liability provisions of § 9607 were phrased in the past tense, and then came to the facile conclusion that "Congress intended CERCLA liability to be applied retroactively." *Id.* at *12. For example, the court noted that § 9607(a)(2) imposes liability on "`any person who *at the time of disposal of any hazardous substance* owned and (sic) operated' a facility where dumping occurred. . . ." *Id.* at *11. The court concluded from this (and the use of other past-tense verbs in § 9607) that such persons are liable for disposal that occurred at any time in history.

Amici submit, however, that this "owned *or* operated" language has a simple, but different meaning: if, after the effective date of CERCLA, (December 11, 1980), a release occurred, any person who owned the facility from the time that any post-1980 disposals were made at the facility would be

---

[16] *See* § 3072, H.R. 7020, 96th Cong., 2d Sess. (Apr. 2, 1980)

liable. Thus, owners or operators could not continue to accept hazardous waste for disposal after 1980, sell the facility in 1985, and then escape liability if a release occurred in 1990.[17] But more importantly, this past tense language, even if dispositive, refers to *owners and operators* of dump sites who profit from and control the wastes, rather than companies like Alcan who were directed to send their waste to certified disposal facilities at great expense to them. Nothing prevents Congress from intending to have only certain provisions of a statute apply retroactively and not others.

The district court next looked at the legislative history that prompted the passage of CERCLA, such as the Love Canal waste site, and concluded that "Congress intended" for CERCLA to have retroactive effect; otherwise, "a contrary finding would frustrate a primary purpose of the Act." *Id*. at *14. First, the district court erred as a matter of law by merely concluding that "Congress intended" to make the liability provisions retroactive; *Landgraf* demands a stricter "clear congressional intent" finding. Second, amici agree that CERCLA was intended to address Love Canal and other long abandoned pre-1980 sites.

---

[17] Other courts have concluded that the verb tense arguments "in effect [] cancel each other." *United States v. Shell Oil*, 605 F. Supp. 1064, 1073 (D. Colo. 1985), and that "the better view is to ignore verb tenses within CERCLA's test for purposes of discerning congressional intent." *Nevada Department of Transportation v. United States*, 925 F. Supp. 691 at 702 (D. Nev. 1996).

That is why Congress authorized $1.6 billion to be available through a Trust Fund to clean up a few dozen of these waste sites.

More importantly, the use of legislative history as a means of divining Congressional intent is itself a "hazardous matter" in the ordinary case, *see United States v. O'Brien*, 391 U.S. 367, 383-84 (1968), and even more so with respect to CERCLA, which leaves most questions about legislative intent unanswered. Not unlike the statute in *Landgraf*, the enactment of CERLCA was accomplished with much last minute deal-making and compromise.

In short, it cannot be said that Congress "clearly intended" that CERCLA's liability provisions were to apply retroactively.

B. Retroactively Imposing Substantial, Strict, Joint and Several CERLCA Liability on Alcan In This Case Is Unconstitutional

Coupled with the lack of clear congressional intent that CERCLA apply retroactively, the imposition of substantial, strict, joint and several liability of approximately $13 million on Alcan for properly and legally disposing of its benign emulsion at the disposal facilities directed by the government is unconstitutional. Clearly, Alcan could not have anticipated that it would be subjected to CERCLA's strict, joint, and several liability for disposing its benign emulsion more than a decade before the law was enacted, or that the

government-approved waste facilities would malfunction. Nor can it be said that Alcan "profited" in any way by properly disposing its emulsion at the facilities. On the contrary, Alcan paid a premium to dispose of its benign emulsion since it had been spray irrigating the emulsion safely and cheaply before being required by the government to send it to the PAS facility.

As Justice O'Connor noted in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998),"[o]ur decisions. . . have left open the possibility that legislation might be unconstitutional *if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience*." 524 U.S. at 528-29 (emphasis added).[18] There is no doubt that Alcan falls within this category. The liability is severe, could not have been anticipated, and is altogether disproportionate to Alcan's experience. Under traditional notions of tort law and nuisance law, Alcan never would have been found liable for the spills that occurred, let alone strictly, jointly and severally. While owners or operators of waste disposal facilities could certainly foresee that they could be liable for the

---

[18] While it is true that *Eastern* was a plurality decision based on the Takings Clause, *every* Justice in *Eastern Enterprises* agreed with the core proposition that "an unfair retroactive assessment of liability upsets settled expectations, and . . . thereby undermines a basic objective of law itself." *Id*. at 558 (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting).

harm caused by the negligent or accidental release of hazardous wastes that it stores and treats could be liable for harm caused by the releases of hazardous wastes, Alcan was not in that category.

In rejecting Alcan's as applied due process argument, the district court relied primarily on *Usery v. Turner Elkhorn Mining*, 428 U.S. 1 (1976), and its application in the CERCLA context in *United States v. Northeastern Pharmaceutical and Chemical Co*., 810 F.2d 726 (8th Cir. 1986). *See* 49 F. Supp. 2d at 100-01. But both of those decisions merely upheld the Coal Act and CERCLA against a *facial* due process challenge. The key rationale in both decisions is that retroactive liability is not unfair because companies could foresee that their activities could cause injuries requiring "response costs," and more importantly, that they "profited" from the activity in question. *Turner Elkhorn*, 428 U.S. at 31; *Northeastern*, 810 F.2d at 734.

But even if *Northeastern* were an "as applied" challenge, that case is clearly distinguishable from the facts here. In *Northeastern*, indisputably hazardous and toxic chemicals were poured into 55-gallon drums, and then dumped and covered up in trenches on a nearby farm. 810 F.2d at 730. The company both profited from this cheap disposal method and could have easily foreseen that environmental damage would result from leaking drums. By sharp

contrast, Alcan's emulsion was benign and disposed of at great cost in an environmentally responsible manner as directed by the government.

Based on the record here, the *Turner Elkhorn* and *Eastern Enterprises* Courts would find an as-applied constitutional violation if CERCLA were construed to impose retroactive liability on Alcan.

This Court can and should avoid addressing these serious constitutional questions by interpreting and applying CERCLA in the manner suggested by Alcan and amici regarding divisibility. *See United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

CONCLUSION

For the foregoing reasons, and those presented in Alcan's brief, the judgment of the district court should be reversed.

Respectfully submitted,

_____
Daniel J. Popeo

_____
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036

(202) 588-0302

Counsel for Amici Curiae

Date: May 29, 2001