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Retrospective Application of the Recycling Equity Act: A Brave New World for the Recycling Industry

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I. INTRODUCTION

Two federal district courts—one in California and one in New Jersey—recently held that the Superfund Recycling Equity Act (“SREA” or the “Act”) applies to State or private party-initiated CERCLA actions in ongoing litigation. These decisions are a major victory for the recycling industry, as recycling company litigants now may argue that all ongoing CERCLA litigation against them is barred, provided the companies can establish that they satisfy the SREA’s exemption criteria. Recyclers who believe they satisfy the SREA’s criteria can now move, based on these decisions, for dismissal of all CERCLA claims asserted against them in State or private party-initiated actions.

Heeding the recycling industry’s mantra that “scrap is not waste,” President Clinton on November 29, 1999, signed into law the SREA, which exempts certain “generators” and “transporters” who recycle material in accordance with the Act from liability under CERCLA. This is only the third time in 20 years that Congress has significantly changed CERCLA.¹ The SREA is significant not only to the recycling industry, but to all other parties potentially liable under CERCLA for cleanup costs of contaminated sites. By exempting from CERCLA liability recyclers that satisfy the SREA’s criteria, the Act effectively imposes greater potential liability on other industry groups, such as manufacturers, mining and waste companies, that are not subject to any CERCLA liability exemption.² The latter industry groups now may be allocated a greater share of cleanup costs

in CERCLA actions, because there may be fewer principally responsible parties (“PRPs”) among which to spread costs.

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Prior to enactment of the SREA, many courts had ruled that arranging for recycling constitutes an "arrangement for disposal" under CERCLA.³ This interpretation of "arranger" liability has been criticized as creating a market distortion favoring virgin feedstock materials over recycled feedstock materials and as being contrary to the goals of waste minimization. Generators are less likely to recycle scrap materials if by doing so they open themselves up to future CERCLA claims by unknown end users.

II. OVERVIEW OF THE SUPERFUND RECYCLING EQUITY ACT

The stated goals of the SREA are to put recyclers on a level playing field with sellers of virgin feedstock materials, to promote the recycling of scrap material, and to remove the disincentives and impediments to recycling created as an unintended consequence of CERCLA. The recycling exemption, added as Section 127 of CERCLA, seeks to protect scrap generators and dealers from CERCLA liability by exempting individuals who arrange transactions with *bona fide* recycling facilities.

The recycling exemption covers a broad class of "recyclable

materials," which, with certain exceptions, are defined to include paper, plastic, glass, textiles, rubber (other than whole tires), scrap metal, spent lead-acid batteries, and spent nickel-cadmium batteries. The recycling exemption is available to anyone who "arranged for recycling" of recyclable materials. The definition of "arranged for recycling" differs based on the type of material, but in general applies to persons who can demonstrate by a preponderance of the evidence that they met the following criteria at the time of the transaction:

- the recyclable material met a commercial specification grade;
- a market existed for the recyclable material;
- a substantial portion of the recyclable material was made available for use as feedstock for the manufacture of a new saleable product;
- the recyclable material could have been a replacement or substitute for a virgin raw material, or the product to be made from the recyclable material could have been a replacement or substitute for a product made, in whole or in part, from a virgin raw material; and
- for transactions occurring 90 days or more after the SREA's date of enactment, the person exercised reasonable care to determine that the facility where the recyclable material was handled, processed, reclaimed, or otherwise managed by another person was in compliance with substantive (not procedural or administrative) provisions of any environmental laws or regulations.⁴

The recycling exemption is not available to anyone who had an "objectively reasonable basis to believe" at the time of the recycling transaction that the materials would either not be recycled, or that they would be burned as fuel, or for energy recovery or incineration. An "objectively reasonable basis" is determined by consideration of factors relating to the sophistication and/or resources of the person claiming the exemption, such as the size of its business, customary industry practices, the price paid in the recycling transaction, and the ability of the person to detect the nature of the consuming facility's operations.⁵

The exemption also is not available to anyone who had reason to believe that hazardous substances had been added to the recyclable material for purposes other than processing for recycling or if the person failed to exercise reasonable care with respect to the management and handling of the recyclable material.⁶

Notably, the recycling exemption departs significantly from the general prohibition against recovery of attorney's fees in CERCLA litigation. A party eligible for the exemption who is sued in a CERCLA contribution action may now recover all reasonable costs of defending the action, including reasonable attorney's fees and expert witness fees.⁷

The temporal reach of the exemption is covered under CERCLA Section 127(i), entitled "Effect on Pending or Concluded Actions." Section 127(i) provides that "[t]he exemptions

provided in this section shall not affect any concluded judicial or administrative action or any pending judicial action initiated by the United States prior to enactment of this section."

Under two recent federal district court rulings, the recycling exemption will have an immediate impact on pending CERCLA litigation. In *Department of Toxic Substances Control v. Interstate Non-Ferrous Corporation*,⁸ and *Morton International, Inc. v. A.E. Staley Manufacturing Company*,⁹ the district courts for the Eastern District of California and the District of New Jersey, respectively, held that the language, purpose and legislative history of Section 127 supported a determination that the Act applies to pending litigation initiated by a State or private party.¹⁰ The only litigation not impacted by the SREA are actions initiated by the United States before the SREA's enactment.¹¹

III. INTERSTATE NON-FERROUS

Interstate involves a contaminated 12 acre parcel of property located in Mojave, California, known as the Mobile Smelting site. From approximately 1961 to 1990, Mobile Smelting operated a metal smelting plant, and smelted or incinerated scrap material (primarily insulated wire) for the purpose of recovering copper and aluminum. These activities created ash, which was later found to contain heavy metals (including copper and lead) and dioxins/furans. The State of California ordered the facility shut down in 1990.

The Department of Toxic Substances Control ("DTSC"), an agency of the State of California, subsequently filed a CERCLA action in January 1997 against ten scrap metal dealers and the United States, a provider of scrap material, alleging that they were liable under CERCLA as persons who "arranged" for the treatment or disposal of hazardous substances at the site. Following the enactment of the SREA, the DTSC filed a motion contending that the Act did not apply to *Interstate*. The district court, in a 71-page opinion, held that the SREA applies retroactively to pending actions brought by a State, and thus applied to *Interstate*.

A. *Landgraf* and *Lindh*—Determining Whether a Statute Applies Retrospectively

In deciding whether CERCLA § 127 applies to the DTSC-filed action, the court applied the analysis outlined in *Landgraf v. USI Film Products*,¹² for determining the retroactivity of statutes.¹³ The Supreme Court in *Landgraf* outlined a two-part analysis to guide this inquiry. The first step is to examine the statutory text in order to "determine whether Congress has expressly prescribed the statute's proper reach."¹⁴ If it has, then the court will give effect to Congress' will, subject only to constitutional constraints. If the statute does not clearly specify its own temporal reach, the court must then determine "whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."¹⁵ If the statute does operate retroactively, "our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."¹⁶

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The *Interstate* court observed that *Landgraf* did not examine the rules for determining whether a statute contains an "express command" or "unambiguous directive."¹⁷ It noted, however, that in the subsequently decided case of *Lindh v. Murphy*,¹⁸ the Supreme Court stated that "in determining a statute's temporal reach generally, our normal rules of construction apply."¹⁹ Thus, the court opined that in construing CERCLA § 127's temporal reach, direct or implied evidence of legislative intent may be discerned from the statute's structure, legislative history, and the context in which the statute was passed. Citing *United States v. Olin Corp.*,²⁰ the court stressed that "even absent explicit statutory language mandating retroactivity, laws may be applied retroactively if courts are able to discern 'clear congressional intent favoring such a result.'"

B. The *Landgraf* Analysis Applied

1. Determination of Section 127's Temporal Reach

The district court concluded that CERCLA § 127 did not contain an "express command" or "unambiguous directive" as to its temporal reach. At the same time, the court rejected the DTSC's argument that for a new statute to apply to a pending case, it must affirmatively so state, noting that *Lindh* had expressly rejected this same argument.

Defendants argued that the language of Section 127(i) confirms that the statute applies to all actions pending at the time of enactment *except* those initiated by the United States. They reasoned that Congress had no reason to identify actions to which Section 127 does not apply unless it intended the SREA to apply to all other pending cases. The DTSC responded that this interpretation is analogous to the negative inference used by the *Lindh* court to infer that Congress did *not* intend to apply the subject act retrospectively. The court disagreed, but noted that in any event, *Landgraf* did not preclude all future use of a negative inference analysis in support of retroactive intent. Rather, the court concluded that defendants sought application of a "positive inference." That is, the absence of language specifying that Section 127 applies to pending actions means Congress intended it to apply. The court did not otherwise address the parties' "positive" and "negative" inference arguments, however, concluding that at bottom, "[t]he language of the Act alone does not contain an express command or unambiguous directive that the statute is to be applied retrospectively to pending judicial actions brought [by] a State."

Although the court found the statute did not expressly proscribe its reach, relying on *United States v. Olin*,²¹ it reasoned that laws nonetheless may be applied retrospectively if there is "clear congressional intent" favoring such a result. In examining whether such intent exists, the court employed traditional tools of statutory construction, looking to the structure of the statute and the legislative history.

With respect to the statute's structure, the court examined a number of factors: (1) the historical retrospectivity of CERCLA and the Superfund Amendments and Reauthorization Act

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("SARA"); (2) the statute's use of the past verb tense; (3) various statute headings indicating the law was intended as a "clarification" of CERCLA; (4) the Act's stated purpose of promoting recycling of scrap material, creating greater equity in the statutory treatment of recycled versus virgin materials, and removing the disincentives and impediments to recycling created as an unintended consequence of CERCLA; and (5) express prospective language concerning the different criteria recyclers must satisfy under the Act depending on when the recycling transaction occurred. The court found all of these factors "evidence of intent" that favors retrospectivity, and in particular it found that repeated use of the word "clarification" in the headings of Section 127 constituted "clear, unambiguous, and commanding evidence in favor of retrospectivity."

With respect to the statute's legislative history, the court noted the dearth of such history here: there was no pre-enactment committee, House or Senate floor debate of record, nor was there any committee report on the bill. The Conference Report included only the text of the Act, not any commentary about it. The only "legislative history" consisted of remarks introduced into the Congressional Record as legislative history by Senator Lott, the bill's primary sponsor. At the end of his remarks, Senator Lott requested "unanimous consent that the legislative history be inserted into the [Congressional] Record." It was.

Relying on *Federal Energy Administration v. Algonquin SNG, Inc.*,²² which directed that an explanation provided by the legislation's sponsors during floor debate "deserves to be accorded substantial weight in interpreting the statute," the court concluded that the statements of all of the statute's sponsors in the Senate should be considered, notwithstanding the absence of any floor debate. The court also cited *Mount Graham Red Squirrel v. Madigan*,²³ for the proposition that where other statutory interpretative tools are not determinative, "legislative statements can be helpful to determine statutory meaning and Congressional intent." Under the reasoning of these cases, the court determined that all legislative statements, including those by non-sponsors, should be considered. The court accordingly rejected the DTSC's contention that the remarks of sponsoring legislators (including Senator Lott) should be ignored or given little weight.

The court then proceeded to examine the cosponsor statements of Senators Lott, Lincoln and Daschle. Senators Lott and Lincoln both introduced remarks prior to the President signing the bill into law on November 29, 1999. Senator Lott's remarks explicitly provide for Section 127's retrospective application to judicial proceedings brought by private parties and to administrative actions brought by "any governmental agency," such as the DTSC. Although Lott's remarks did not address pending *judicial* actions brought by any governmental agency, the court found it "reasonable to infer" that retrospective treatment should be afforded to both pending administrative *and* judicial actions, since both types of proceedings implicate the same or similar liability considerations. Senator Lincoln's remarks explicitly stated that only those actions brought by the United States prior to enactment "will remain viable."

Senator Daschle did not comment on the bill until January

26, 2000, nearly two months *after* the bill became law. The court considered his remarks, but emphasized that such post-enactment legislative history "is generally considered to be of minimal assistance in interpreting a statute." Thus, although Senator Daschle apparently disagreed with Senator Lott's legislative history about the availability of relief in pending cases, he did not set forth any contrary interpretation, and the court concluded his statements were of "minimal assistance."

The court also rejected Senator Daschle's suggestion that an earlier bill from the 103d Congress be used as an interpretative tool, noting that *Landgraf* disavowed reliance on introduced bills or even bills passed by prior Congresses, but not enacted.²⁴ The court also noted that under pre-*Landgraf* Ninth Circuit law, only "clear" legislative histories of prior bills that are *identical* to the law being interpreted are entitled to "some weight."²⁵

Apart from Senator Daschle's "late comments," no other legislative history, sponsor statement, or other legislative comment suggested Section 127 is not retrospective. The court accordingly concluded that Senator Daschle's comments did not diminish the fact and substance of Section 127's pre-enactment "legislative history" favoring retrospectivity, nor the post-enactment statements of Senators Lott and Lincoln to the same effect.

Finally, while noting that the remarks of individual, *non-sponsor* legislators are not accorded "great weight," the court nonetheless found that such remarks "are relevant indicia as to unity, or lack of it, as to interpretation." (Citation omitted.) The court opined that in this case, the non-sponsor statements did not detract from the "retrospectivity-favoring legislative intent."²⁶ The court concluded that "on balance, the statements of all individual legislators weigh heavily in favor of retrospectivity."

Concluding the first part of the *Landgraf* analysis, the court held that together, the evidence of intent—statutory language and discernable legislative intent—indicate that Section 127 is retrospective, and that such evidence is interpretable as an "express command" as to its temporal reach.

2. Determination of Retroactive Effect

Although it found the first *Landgraf* inquiry satisfied, the district court nonetheless analyzed whether the statute has retroactive effect. The court concluded it does not, rejecting DTSC's argument that its "rights" would be impaired because the statute potentially eliminates a CERCLA claim that previously existed. The court reasoned that recyclers that satisfy the requirements of section 127 should not have been liable in the first place under pre-Section 127 law. Further, DTSC did not suggest that its liability for past conduct would be increased, or that it would be subject to new duties with respect to transactions already completed by retrospective application of Section 127.²⁷

C. Clarification v. Change Analysis

The court next embarked on an "analytical approach" "separate" from the *Landgraf* analysis for determining whether a new

statute can be applied to pending cases, premised on whether the statute is a clarification or a change of existing law. Citing *Piamba Cortes v. American Airlines, Inc.*,²⁸ as a leading example of this alternative approach, the court observed that a new statute that is a clarification "accurately restates the prior law" and, thus, there is no need for a *Landgraf* analysis because the statute has no retroactive effect.

In connection with the clarification versus change analysis, the court examined the SREA's statement of purpose (to remove the disincentives and impediments to recycling created as an unintended consequence of Superfund), various headings of the statute that use the term "clarification" (of which there are at least three), and the context in which the statute was enacted. With respect to the last factor, the court analyzed at length relevant case law construing "arranger" and "transporter" liability under CERCLA and various courts' attempts to construct a pre-Section 127 "recycling exemption." The court noted that pre-Section 127 case law addressing recycler liability is conflicting, and that the liability analysis is case specific and fact intensive. The court reasoned that CERCLA's "ambiguous" liability scheme as applied to recycling transactions corroborates a finding that Congress intended Section 127 "to clarify the criteria for and approach to liability" for such transactions. Finally, citing the remarks of Senators Lincoln and Lott, and noting the absence of any contrary remarks by Senator Daschle, the court found the legislative history likewise supports a finding that Section 127 is a clarification, rather than a change, of the law affecting recycler liability under CERCLA. The court accordingly concluded the statute is a clarification of existing law (CERCLA), and it therefore does not have a retroactive effect.

D. Analogy of Actions Brought by the United States to Those Brought by the States

Lastly, the court rejected DTSC's argument that the term "United States," as used in Section 127(i), should be construed to include enforcement actions brought by the States. The court stressed that a State and the United States are not functionally equivalent under CERCLA, nor was DTSC federally authorized under CERCLA § 104 to prosecute this enforcement action. As the court stated, "[t]his is not a federal-state partnership case"; indeed, DTSC sued the United States as a potentially responsible party. Additionally, the court observed that Congress knows how to refer to a State in CERCLA when it so intends. According to the court, Congress' failure to do so in Section 127(i)'s exceptions to retrospectivity "is clear evidence that Congress did not intend the exception to 127's recycler exemption to apply to pending State or state agency-initiated actions."

IV. MORTON INTERNATIONAL

Morton International,²⁹ involved a former mercury manufacturing plant located in Bergen County, New Jersey, known as the Ventron/Velsicol Superfund Site. The site, which covers some 40 acres, had been used for mercury processing operations for 50 years. Morton International, a successor in interest to the

prior owner of the site, was adjudged liable for the contamination and subsequently commenced this action, contending that defendants are liable under CERCLA because they "arranged" for the treatment and/or disposal of mercury or other hazardous substances at the site. Following the close of discovery, and entry of a Final Pretrial Order on November 17, 1999, Congress, as noted, enacted the SREA. Defendants then moved to amend their answers to add the recycling exemption as a defense.

In opposing defendants' motion to amend, plaintiffs argued that the proposed amendment was frivolous because the recycling exemption could not be applied retroactively to this pending litigation. In addressing this argument, the *Morton International* court, like the *Interstate* court, applied the analysis of *Landgraf* and *Lindh*, as adopted by the Third Circuit in *Mathews v. Kidder, Peabody & Co.*³⁰

A. The *Landgraf* Analysis Applied

1. Determination of Section 127's Temporal Reach

The court began its analysis by noting that when a question arises as to the temporal reach of a statute, courts wrestle with two contradictory principles. The first provides that "a court is to apply the law in effect at the time it renders its decision."³¹ The second provides that retroactivity is not favored in the law, in accordance with "'fundamental notions of justice' that have been recognized throughout history."³² There is no conflict between these two principles, however, when a statute unambiguously applies to conduct that occurred before the statute's enactment, since under either principle, where the congressional intent is clear, it governs.

The court then turned to the language of Section 127(i), which simply provides that it "shall not affect any . . . pending judicial action initiated by the United States prior to the enactment of this section." Given this language, the court reasoned that to find that Section 127 applies to pending actions commenced by a State or private party, "the court must infer that Congress intentionally omitted mention of pending cases to which Section 127 does apply, because it intended Section 127 to apply retrospectively in all such cases." This suggested, in the court's view, that Congress used a negative inference to express its intent. Citing *Interstate* and *United States v. Olin Corp.*,³³ the court noted that a negative inference may be considered during a retroactivity analysis of Section 127. The court further stated, however, that it could not find clear intent to apply a statute with retroactive effect "by using nothing more than a negative inference." The court accordingly turned to the legislative history for Congress' intent.

Plaintiffs, like the DTSC, pointed out the sparsity of legislative history for Section 127, noting that the legislation was enacted as a rider to the Omnibus Budget Appropriations Act of 1999. Plaintiffs also argued that the history that does exist is conflicting and does not support the argument that the Act should be applied retrospectively. Defendants countered that although the Act was enacted without legislative history,

congressional discussions and bill proposals with significant legislative history and committee reports that had been ongoing since 1994 supported retroactivity.

The court found merit in defendants' argument, reasoning that given the framework in place from predecessor bills and the fact that the Act was significantly similar to the 1994 bill, it was possible "that Congress concluded that additional new legislative history was not necessary when it finally enacted Section 127 in 1999." As the court opined, "[t]his is likely the reason why there were no conference or committee reports or hearing transcripts."³⁴ With respect to the "introduced" legislative history of the Act—consisting of statements by the bill's cosponsors, Senators Lott and Lincoln—the court noted that such statements provide evidence of Congress' intent when they are consistent with the statutory language and other legislative history. Senators Lott and Lincoln expressly stated that the recycling exemption should apply retroactively and prospectively to private parties. The court discounted the statement of Senator Daschle, finding that it was ambiguous. In addition, like *Interstate*, the court found that Senator Daschle's statement carried "less weight" because he did not make it until January 26, 2000, nearly two months after the enactment of the legislation. After considering all of the above, the court concluded that the legislative history did not express any intent of Congress to apply Section 127 only to new cases.

2. Determination of Retroactive Effect

The court then turned to the question of whether Section 127 has a retroactive effect. The court agreed with *Interstate's* conclusion that application of Section 127 to the action pending before it did not present a retroactivity problem, reasoning that plaintiffs' liability was not increased by Section 127. Similarly, no rights that plaintiffs possessed at the time they acted, i.e., their actions surrounding contamination of the site, were impaired by application of Section 127. The court also noted that any rights that plaintiffs and defendants had at the time they acted were addressed by CERCLA and the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). The court reasoned that because both CERCLA and SARA have been applied retrospectively, the recycling defense likewise should be available in pending actions. The court also emphasized that Section 127 does not automatically exempt defendants from CERCLA liability—defendants must show they satisfy the requirements of the Act. Thus, plaintiffs would not "automatically" lose a cause of action as a result of application of the recycling defense. Given the above, the court concluded that no rights have been impaired or new duties imposed, and no liability has been increased, "based on the imposition of the recycling exemption alone."³⁵

The court was concerned, however, that given the advanced stage of the litigation, plaintiffs might be penalized by the fee-shifting provision of Section 127(j). The court pointed out that creating a right to new damages, such as attorney's fees and costs, "can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced." The court also noted that pre-SREA case law did not clearly establish that

recyclers would *not* be liable under CERCLA, and plaintiffs therefore could not have relied on prior case law as a forewarning that recyclers would not be contribution candidates.³⁶ Thus, in the court's view, penalizing plaintiffs with the fee-shifting provision of Section 127(j) at this stage of the litigation would not be equitable. The court opined that "perhaps" the issue of recovery of attorney's fees was best resolved by interpreting Section 127(j) on a case-by-case basis. For example, where, as in this case, there was no notice to the plaintiffs of the fee-shifting provision before commencement of the action, the court could conclude that an award of fees is not "reasonable," as set forth in Section 127(j).

Given the cost recovery provision set forth in Section 127(j), the court concluded that Section 127 has a retroactive effect. Thus, under *Landgraf*, Congress must have provided a clear intent to apply the Act retrospectively. In assessing whether such intent exists, the court noted that it must look at the statute's text, purpose and legislative history. Emphasizing that it had already done this, the court concluded that the text, purpose and legislative history indicate that Section 127 should be applied to pending actions between private parties.

B. The Decision's Retrospective Application

Lastly, the court noted that while the general rule is that a controversy must be decided on the law as exists at the time the court considers the issue, there are exceptions to this general rule based on the notion that in some cases retrospective application of a new rule has unjust consequences. Thus, a *judicial decision* adopting a new rule will apply only prospectively if certain requisites, set forth by the Supreme Court in *Chevron Oil v. Huson*,³⁷ are satisfied. One of these requisites is that the holding must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. The court found that this requirement was not satisfied, as it concluded, like the *Interstate* court, that Section 127 simply clarifies CERCLA liability with respect to recyclers. Given this conclusion, as well as the court's belief that retrospective application of Section 127 would not produce substantially inequitable results, the court found that Section 127 should be applied retrospectively to the case before it. The court accordingly granted defendants' motion to amend their answers to assert CERCLA § 127 as a defense.

V. CONSTITUTIONAL CONSIDERATIONS

With regard to retroactive legislation, there are two lines of cases: statutory interpretation cases and constitutional due process cases. *Landgraf* represents the first category. Constitutional constraints on retroactive laws include the Ex Post Facto Clause, which prohibits retroactive penal legislation, the Takings Clause, which prevents the taking of vested property rights without just compensation, the Contracts Clause, which prevents state legislatures from passing laws that interfere with preexisting contractual obligations, and the prohibition against Bills of Attainder, which prevents Congress from singling out people and punishing them summarily for past conduct. The Due

Process Clause protects interests in fair notice and repose. Courts examining these constitutional grounds, however, have generally upheld retroactive laws that explicitly provide for retroactive effect. As the *Landgraf* court pointed out, a deferential standard of review applies such that the constitutional impediments to retroactive civil legislation "are now modest."³⁸ Thus, courts simply will inquire whether the retroactive application of the legislation in question is justified by a rational legislative purpose.³⁹ Absent a constitutional restriction, "the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope."⁴⁰

The DTSC did not argue that retrospective application of CERCLA § 127 would violate any constitutional provisions apart from the Federal Savings Clause. Nor did plaintiffs in *Morton International* make such an argument. In any event, such an avenue of attack is not likely to succeed given the Supreme Court's deference to the legislature where retroactive intent is apparent.⁴¹

VI. IMPLICATIONS

Interstate and *Morton International* are important victories for the recycling industry. In *Interstate*, the DTSC moved to certify the court's order for interlocutory appeal; the court denied the motion. Thus, barring settlement, the next stage of the case will be litigation of the merits of the recycling defense. *Interstate* accordingly may provide an early indication of the impact of Section 127 on the recycling industry.

Interstate and *Morton International* are not the end for recycling companies sued under CERCLA, however. Recyclers

claiming Section 127's exemption from liability still must demonstrate they satisfy the criteria set forth in the statute. Also, despite the *Interstate* and *Morton International* decisions, companies involved in the recycling business should still expect to be sued under the "arranging for treatment or disposal" prong of CERCLA's liability scheme, especially when the recycling process involves the use or generation of hazardous materials. The *Interstate* and *Morton International* rulings, however, now give recycling companies a powerful defense by allowing them to potentially preclude all pending CERCLA claims against them and to seek recovery of attorney's fees incurred in successfully defending a CERCLA contribution action. Remaining litigants will have to reassess their potential liabilities in light of the possible elimination of recycling companies from PRP classification.

Finally, with respect to contaminated sites in New York, the *Interstate* and *Morton International* decisions—if followed by New York federal courts—enable recycling companies to potentially eliminate all statutory liability claims, since New York's counterpoint to CERCLA—the New York Navigation law—applies to petroleum spills only. Also, the Second Circuit has determined that a potentially responsible party may not bring a cost recovery action under § 107(a) of CERCLA, but is limited to a contribution action under § 113(f)(1).⁴² As noted, private parties bringing such contribution actions are subject to the cost shifting provision of Section 127(j), and will now have to reassess whether to sue recycling companies and thereby risk having to pay the companies' attorney's fees incurred in defending the action.

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¹ Congress previously amended CERCLA by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), codified as amended at 42 U.S.C. § 9601 *et seq.*, and by the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, codified as amended at 42 U.S.C. § 9601(20)(A) and 9607(n).

² One of the few loopholes in CERCLA is the exclusion from CERCLA's reach of contamination by petroleum substances. See 42 U.S.C. § 9601(14).

³ See, e.g., *Catellus Development Corp. v. United States*, 34 F.3d 748 (9th

(Matthew Bender & Co., Inc.)

Cir. 1994) ("disposal" necessarily includes the concept of waste, and because spent batteries could be defined as waste, battery recycler could be held liable for arranging for their disposal); *Gould Inc. v. A&M Battery & Tire Service*, 933 F. Supp. 431 (M.D. Pa. 1996) (selling batteries to a battery recycling facility is an arrangement for disposal or treatment of a hazardous substance); *United States v. Summit Equipment & Supplies, Inc.* 805 F. Supp. 1422 (N.D. Ohio 1992) (persons who sold scrap material that eventually ended up at contaminated recycling facility were liable as "arrangers").

See Commentary by Lisa J. Morelli and William W. Funderburk, Jr.,

regarding the district court's decision in *Catellus Development*, 828 F. Supp. 764 (N.D. Cal. 1993), which the Ninth Circuit subsequently reversed, appearing in the October 1993 issue of the California Environmental Law Reporter (Matthew Bender).

See also *Courtaulds Aerospace, Inc. v. Huffman*, 826 F. Supp. 345 (E.D. Cal. 1993) (presided over by Judge Wanger, the same judge presiding over the *Interstate Non-Ferrous* litigation). The *Courtaulds* site was adjacent to and (generally) downwind from the Mobile Smelting site (discussed *infra*). The district court in *Courtaulds* refused to dismiss plaintiff's CERCLA claim against the scrap metal defendants based on their argument that they could not have arranged for the disposal of a hazardous substance by bringing recyclable materials to the Mobile Smelting site to recover the metals contained therein. The authors of this article represented the group of scrap metal defendants that filed the motion to dismiss.

⁴CERCLA § 127(c).

⁵CERCLA § 127(f)(2).

⁶CERCLA § 127(f)(1)(B), (C).

⁷CERCLA § 127(j).

⁸99 F. Supp. 2d 1123 (E.D. Cal. 2000).

⁹106 F. Supp. 2d 737 (D.N.J. 2000).

¹⁰The issue of whether CERCLA § 127 applies retrospectively to pending litigation also is before the Third Circuit in *Gould, Inc. v. A & M Battery & Tire Service*, App. No. 99-3294 (on appeal from the Middle District of Pennsylvania). The Third Circuit heard oral argument on this issue on July 19, 2000, but as of the date this article went to press, it has not rendered an opinion.

¹¹The only other published decision to date addressing the application of CERCLA § 127, *United States v. Atlas Lederer Co.*, 97 F. Supp. 2d 830 (S.D. Ohio 2000), involved a pending action by the United States. The court concluded that the action constituted, in its entirety, "a judicial action" commenced by the United States and, therefore, the recycling exemption did not apply. The court further concluded that a pending judicial action brought by the United States would encompass any later cross-claims and third-party contribution claims, reasoning that it would be inequitable to allow the United States to pursue a CERCLA action against some defendants, but preclude them from seeking contribution.

¹²511 U.S. 244 (1994).

¹³Both *Interstate* and *Morton International* noted that the term "retrospective" is used to describe statutes that apply to pending cases, but that not all laws applicable to pending cases are "retroactive." A statute is "retroactive," i.e., it has retroactive effect, if it attaches new legal consequences to prior acts so as to justify the presumption against retrospective application.

¹⁴511 U.S. at 280.

¹⁵*Id.*

¹⁶*Id.*

¹⁷Justice Scalia wrote separately to object to the Court's willingness "to let that clear statement [mandating retroactive application] be supplied, not by the text of the law in question, but by individual legislators who participated in the enactment of the law, and even legislators in an earlier Congress which tried and failed to enact a similar law." 511 U.S. at 287 (Scalia, J., concurring). Scalia's rejection of the use of legislative history in statutory interpretation cases is well known. See William Eskridge, Jr., *Textualism, the Unknown Ideal?* 96 Mich. L. Rev. 1509 (1998), discussing Scalia's judicial opinions and "the new textualism."

¹⁸521 U.S. 320 (1997).

¹⁹*Id.* at 327. In *Lindh*, the Supreme Court used a negative inference to infer that Congress did not intend to apply retrospectively certain parts of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See 521 U.S. at 330-334. Thus, the Supreme Court held that if a congressional intent to not apply a statute retrospectively can be discerned, then the courts are to follow that intent, without regard to whether the statute has "retroactive effect."

²⁰107 F.3d 1506, 1512-13 (11th Cir. 1997).

²¹107 F.3d 1506 (11th Cir. 1997).

²²426 U.S. 548, 564 (1976).

²³954 F.2d 1441, 1453-54 (9th Cir. 1992).

²⁴*Landgraf*, 511 U.S. at 263.

²⁵As discussed *infra*, the *Morton International* court, while it did not rely on past legislative history in determining Congress' intent, reasoned that such history may account for the sparsity of legislative history surrounding the passage of CERCLA § 127.

²⁶Two non-sponsoring legislators made remarks regarding Section 127: Representatives Obey and Oxley. The latter commented on Section 127(i) after the bill was enacted.

²⁷The court also rejected the DTSC's argument that retrospective application of Section 127 conflicts with the federal savings statute, 1 U.S.C. § 109. Under the federal savings statute, a repeal or amendment of any statute shall not have the effect of releasing or extinguishing any liability incurred under such statute, unless the repealing or amending act so expressly provides. The court reasoned that because Congress indicated that Section 127 is intended to apply to pending cases by everyone *except* the United States, the federal savings clause did not apply.

²⁸177 F.3d 1272 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 980 (2000).

²⁹106 F. Supp. 2d 737 (D.N.J. 2000).

³⁰161 F.3d 156, 161 (3rd Cir. 1998), *cert. denied*, 526 U.S. 1067 (1999).

³¹2000 U.S. Dist. LEXIS 10660 at *28, quoting *Landgraf*, 511 U.S. at 264.

³²*Id.*, quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998) (internal quotation omitted).

³³107 F.3d at 1513.

³⁴The court noted that it would be improper to enact significant new environmental legislation without a "thorough discussion" of the issues involved by lawmakers.

³⁵2000 U.S. Dist. LEXIS 10660 at *55 (emphasis added).

³⁶In this regard, the court disagreed with *Interstate's* conclusion that, based on pre-SREA case law, plaintiff DTSC could not have expected that the recycler defendants would be liable under CERCLA and, therefore, could not say that it relied on pre-SREA law.

³⁷404 U.S. 97, 106-107.

³⁸*Landgraf*, 511 U.S. at 272.

³⁹See, e.g., *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (upholding retroactive application of Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381, 1391, requiring that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan).

⁴⁰*Landgraf*, 511 U.S. at 267.

⁴¹As noted, *Interstate*, unlike *Morton International*, concluded that the statute has no retroactive effect, thus precluding any need for constitutional review.

See *United States v. Asarco Inc.*, 1999 U.S. Dist. LEXIS 18924 (D. Idaho 1999) (retroactive application of CERCLA to natural resource damage claims did not constitute a taking or violation of due process).

Notably, the *Asarco* court concluded that *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), in which a plurality of the Supreme Court held that the Coal Act was unconstitutional as applied to *Eastern Enterprises*, was not controlling authority and, moreover, was of "little precedential value" given the lack of a majority opinion. The court found that *Eastern's* holding was limited to its specific facts and result, and that the *Eastern* court did nothing more than apply "well-settled" principles of law regarding the takings clause and due process principles. Further, the *Asarco* court stressed that *Eastern* reiterated that the constitutionality of a particular statute is a case-by-case factual determination. 1999 U.S. Dist. LEXIS 18924 at *10-13. Challenges to CERCLA's liability scheme based on *Eastern Enterprises* thus are unlikely to succeed any more than

past efforts to challenge the constitutionality of retroactive application of CERCLA. *See, e.g.*, the post-*Landgraf* analyses in *United States v. Olin Corp.*, 107 F.3d 1506, 1513-1515 (11th Cir. 1997); *Nevada v. United States*, 925 F. Supp. 691 (D. Nev. 1996); and *Ninth Avenue Remedial Group v. Allis-Chalmers Corp.*, 946 F. Supp. 651, 657 (N.D. Ind. 1996).

See also United States v. Alcan Aluminum Corp., 49 F. Supp. 2d 96 (N.D.N.Y. 1999) (retroactive application of CERCLA does not constitute an unconstitutional taking, a denial of substantive Due Process, or a violation of the Ex Post Facto provisions of the United States Constitution).

⁴²*See Bedford Affiliates v. Sills*, 156 F.3d 416, 423-424 (2d Cir. 1998).