QUESTIONING THE RETROACTIVITY OF CERCLA IN LIGHT OF *LANDGRAF V. USI FILM PRODUCTS*

INTRODUCTION

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA).[1] Proponents claimed that the RCRA would close the "last remaining loophole in environmental law."[2] A notable loophole of the RCRA, however, was its failure to address the problem of inactive sites in need of cleanup.[3] On December 11, 1980 Congress attempted to address this issue by enacting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[4] The purpose of CERCLA was to promote

1. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-992k (1994).

2. James A. Resila, Note, *The Retroactive Application of CERCLA: Pre-Enactment Response Costs*, 1 FORDHAM ENVTL. L. REP. 69, 72 (1989) (quoting H.R. REP. NO. 94-1491, at 4, (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241).

3. Resila, *supra* note 2, at 72 (citing H.R. REP. NO. 96-1016, pt. 1, at 17-18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. Environmental catastrophes such as Love Canal spurred Congress into action. Karin Oliva, Note, *Lender Liability Under CERCLA*, 68 S. CAL. L. REV. 1417, 1417 (1995). During the course of hearings, "Congress estimated that industry annually disposed of one hundred billion pounds of hazardous waste, the equivalent of six hundred pounds per person—ninety percent of it improperly." *Id.* (citing 126 CONG. REC. 26,342 (statement of Rep. Gore). For a more detailed discussion of congressional intent, see *infra* notes 47-50, 65-68 and accompanying text.

4. 42 U.S.C. §§ 9601-9675 (1994). The relevant section for this Recent Development is section 9607(a), which, in relevant parts, reads as follows:

the cleanup of hazardous waste sites at the expense of the polluter;[5] however, by not enacting a retroactivity provision that would hold polluters liable for their pre-enactment acts, Congress failed to

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Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal of treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

5. *See* Washington State Dep't of Transp. v. Washington Natural Gas Co., 51 F.3d 1489, (9th Cir. 1995) (noting Congress enacted CERCLA to "facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for hazardous wastes") (quoting United States v. R. W. Meyer, Inc., 889 F.2d 1497, 1500 (6th Cir. 1989); United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992) (stating that Congress designed CERCLA "to force polluters to pay for costs associated with remedying their pollution"); Redwing Carriers, Inc. v. Saraland Apartments, Ltd., 875 F. Supp. 1545, 1552 (S.D. Ala. 1995) (noting "the essential policy underlying CERCLA is to place the ultimate responsibility for cleaning up hazardous waste on those responsible for problems caused by the disposal of chemical poison") (international quotations omitted) (quoting United States v. Fleet Factors Corp., 901 F.2d 1550, 1553 (11th Cir. 1990)); United States v. Vermont American Corp., 871 F. Supp. 318, 323 (W.D. Mich. 1994) (stating that CERCLA's two overriding objectives are cleaning up hazardous waste and doing so at the expense of those who created the harmful condition) (citing Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991)). *See also* H.R. REP. NO. 99-253, pt. 3, at 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038 ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.").

manifest its intent of forcing polluters to clean up their hazardous waste.[6] Moreover, CERCLA's legislative history is not very insightful.[7] Yet a large majority of courts have agreed that CERCLA imposes liability on responsible parties for the commission of pre-enactment acts.[8]

With the Supreme Court's refinement of the retroactivity standard in *Landgraf v. USI Film Product*,[9] many began to question the retroactive application of CERCLA.[10] Applying *Landgraf*, an Alabama federal district court in *United States v. Olin Corp.*[11] was the first court to rule that CERCLA's liability provisions are not applicable to the cleanup of hazardous waste dumped before

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6. *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

> [Congress considered CERCLA] in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take it-or-leave it basis, the House took it, groaning all the way.

Id.

7. *See* Resila, *supra* note 2, at 69 (stating that CERCLA "was hastily written and supplied its readers with little legislative history"). *See also infra* notes 55-57 and accompanying text.

8. *See, e.g.*, Long Beach Unified Sch. Dist. v. Dorothy B. Goodwin California Living Trust, 32 F.3d 1364 (9th Cir. 1994); United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990); O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., Inc., 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); City of Philadelphia v. Stepan Chem. Co., 748 F. Supp. 283 (E.D. Pa. 1990); United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1988); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985).

9. 114 S. Ct. 1483 (1994).

10. *See, e.g.*, John R. Jacus & Jan G. Laitos, *May CERCLA Apply Retroactively?*, 25 COLO. LAW. 103, (Oct. 1996); Editorial, *Dump Superfund*, DET. NEWS, June 26, 1996, at A8.

11. 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (4th Cir. 1997). For a detailed discussion the district court's opinion, see Tenn, *Judge Rejects Olin, Finds CERCLA Retroactive, Not Unconstitutional*, 9 NO. 18 MEALEY'S LITIG. REP.: SUPERFUND 4, Dec. 16, 1996; Case Notes, *CERCLA*, 12 NO. 4 ENVTL. COMPLIANCE & LITIG. STRAT. 7, Sept. 1996; *U.S. District Judge: Pre-1980 Waste Not Subject to Sf [Superfund]; DOJ to Appeal*, AIR/WATER POLLUTION REPORT'S ENVT. WEEK, May 31, 1996, *available in* 1996 WL 7981479.

Congress enacted CERCLA.[12] On expedited appeal, the Eleventh Circuit reversed the district court's decision, holding that "clear Congressional intent" demonstrated CERCLA's retroactive application.[13] Between the two *Olin* decisions, five district courts also continued to retroactively apply CERCLA.[14]

Because the Eleventh Circuit is the first federal appellate court to apply *Landgraf* to CERCLA, this Recent Development closely examines *Olin* and the five district courts that similarly held that CERCLA should continue to be applied retroactively under *Landgraf*. Part I of this Recent Development provides a brief analysis of *Landgraf*. Part II scrutinizes the Eleventh Circuit's and the five district courts' decisions to apply CERLA retroactively under *Landgraf*. Part III proposes that Congress enact an express retroactivity provision to eliminate any doubt regarding CERCLA's retroactivity.

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12. *See Olin*, 927 F. Supp. at 1519.

13. *Olin*, 107 F.3d at 1512. For a more detailed discussion of the Eleventh Circuit's opinion, see *Superfund Ruling May Spur Compromise in Congress*, BEST'S INS. NEWS, Mar. 31, 1997, available in 1997 WL 7077611; Mark A. Hoffman, *Appeals Court Upholds Retroactive Liability: Olin Loses Superfund Case*, BUS. INS., Mar. 31, 1997; Richard M. Kuntz, *Appeals Court Puts Bite Back in CERCLA*, CHI. DAILY L. BULL., Mar. 31, 1997.

14. The five district court cases that have refused to follow *Olin* are: Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651 (N.D. Ind. 1996); Nova Chems., Inc. v. GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996); United States v. Alcan Aluminum Corp., Nos. 87-CV-1132, 1996 WL 637559 (N.D.N.Y. Oct. 28, 1996); Cooper Indus. v. Agway, Inc., No. 92-CV-0748, 1996 WL 550128 (N.D.N.Y. Sept. 23, 1996); Nevada *ex rel.* Department of Trans., 925 F. Supp. 691 (D. Nev. 1996) [hereinafter NDOT]. For a more detailed discussion of these five cases, see *Enforcement: Court Rules Contrary to Olin Decision, Says Congress Intended Retroactivity*, HAZARDOUS WASTE NEWS, Dec. 16, 1996, *available in* 1996 WL 13939522; *New York Judge Finds CERCLA Retroactive and Constitutional*, 9 No. 16 MEALEY'S LITIG. REP.: SUPERFUND 7, Nov. 18, 1996; *New York Judge Finds CERCLA Constitutional, Retroactively Applied*, 9 No. 13 MEALEY'S LITIG. REP.: SUPERFUND 3, Oct. 7, 1996.

I. A BRIEF HISTORY OF THE RETROACTIVITY PRINCIPLE AND *LANDGRAF*[15]

Justice Story stated that a law applies retroactively when it "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."[16] A century later, in *Union Pacific Railroad Co. v. Laramie Stock Yards Co.*[17] the Supreme Court formulated the presumptive rule against the retroactive application of statutes as follows:

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.[18]

Despite the apparent simplicity of the *Laramie* presumptive rule against retroactivity, the Supreme Court decided to clarify further the rule regarding the retroactive application of statutes in *Landgraf.*

In *Landgraf,* the Court grappled with the issue of whether the punitive damages remedy, the compensatory damages remedy, and the right to jury trial provisions adopted in the Civil Rights Act of

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15. For a more detailed analysis of *Landgraf,* see Nelson Lund, *Retroactivity, Institutional Incentives, and the Politics of Civil Rights*, 1995 PUB. INTEREST L. REV. 87; Linda B. Contino, Comment, *Retroactivity of the Civil Rights Act of 1991:* Landgraf v. USI Film Products and Rivers v. Roadway Express, Inc., 24 HOFSTRA L. REV. 541 (1995); Janine M. Weaver, Note, *Reconciling the Irreconcilable:* Landgraf v. USI Film Products, 28 CREIGHTON L. REV. 1061 (1995); Leonard Charles Presberg, Comment, *The Civil Rights Act of 1991, Retroactivity, and Continuing Violations:* The Effect of Landgraf v. USI Film Products and Rivers v. Roadway Express, 28 U. RICH. L. REV. 1363 (1994); Kelli D. Taylor, Comment, *The Civil Rights Act of 1991 and Retroactivity: Do* Landgraf v. USI Film Products *and* Rivers v. Roadway Express, Inc. *Signify a New Era of Restrictive Employment Discrimination Cases?*, 17 AM. J. TRIAL ADVOC. 773 (1994).

16. Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814).

17. 231 U.S. 190 (1913).

18. *Id.* at 199 (internal quotation omitted).

1991[19] were available in Title VII cases that were pending on appeal at the time Congress enacted the statute.[20] The Court held that none of the three provisions should be retroactively applied.[21] Writing for the majority, Justice Stevens first discussed the well-established principle that the retroactive application of statutes is disfavored.[22] Justice Stevens then noted that the cornerstones of the presumption against retroactivity are congressional intent to have laws retroactively applied and the paramount importance of protecting the rights of private parties.[23]

In light of the history and rationale of the presumption, Justice Stevens set forth the test to determine whether a statute should be retroactively applied.[24] Initially, a court should determine whether Congress expressly indicated its preference favoring or opposing

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19. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

20. *See Landgraf*, 114 S. Ct. at 1488. The statute at issue in *Landgraf* was 42 U.S.C. § 1981a (1994), which is entitled "Damages in cases of intentional discrimination in employment." Section 1981a, in relevant part, reads as follows:

> (a) Right of Recovery
> (1) Civil Rights
> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination . . . and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages . . . .
> (b) Compensatory and punitive damages
> (1) Determination of Punitive Damages
> A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual . . . .
> (c) Jury Trial
> If a complaining party seeks compensatory or punitive damages under this section
> (1) any party may demand a trial by jury . . . .

42 U.S.C. § 1981a.

21. *See Landgraf*, 114 S. Ct. at 1488.

22. *See id.* at 1497 (citing General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) and Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 842-44, 855-56 (1990) (Scalia, J., concurring)).

23. *See Landgraf*, 114 S. Ct. at 1501-05 (discussing the history of the presumption against statutory retroactivity).

24. *See id.*

retroactivity.[25] An express prescription of congressional intent ends the inquiry.[26] If Congress has not manifested its intent, the traditional presumption against attaching legal consequences to events that occurred before the statute's enactment governs, absent "clear congressional intent" demonstrating otherwise.[27]

Applying the test to the facts of *Landgraf*, the Court ruled that Congress did not provide an express retroactivity instruction. Therefore, the Court held that the punitive damages, compensatory damages, and right to jury trial provisions of section 1981a do not apply retroactively.[28] Moreover, the Court found that there was no clear congressional intent favoring retroactivity.[29] Furthermore, the statute's legislative history demonstrated that Congress and President Bush clashed over the enactment of a retroactivity provision.[30] The Court found that its omission was likely the result of compromise between Congress and President Bush.[31] Moreover, the punitive damages, compensatory damages, and right to jury trial provisions of section 1981a adversely affected the previous exercise of appellee's rights, demonstrating the retroactive effect of the statute without any indication that Congress intended such an effect.[32]

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25. *See id.* at 1505.

26. *See id.*

27. *See id.* Justice Stevens defined a statute as having retroactive effect when "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." *Id.*

28. *See id.* at 1506.

29. *See Landgraf*, 114 S. Ct. at 1495-96.

30. *See id.* at 1491-92. President Bush vetoed the 1990 version of the Civil Rights Act of 1991 citing the unfairness of a retroactivity provision as one of the reasons for his veto. *See id.* at 1492 n.9 (citing President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632-34 (Oct. 22, 1990)). *See also* Scott M. Pearson, *Canons, Presumptions and Manifest Injustice: Retroactivity of the Civil Rights of 1991*, 3 S. CAL. INTERDISCIPLINARY L.J. 461, 463 (1993).

31. *See Landgraf*, 114 S. Ct. at 1492.

32. *See id.* at 1505-08. For example, the punitive damages provision, which authorizes punitive damages in certain cases, is clearly subject to the presumption against retroactivity because of its criminal nature. *See id.* at 1505. Moreover, the Court implied that the punitive damages provision came close to violating the Ex Post Facto Clause. *See id.* (citing De Veau v. Braisted, 363 U.S. 144, 160 (1960) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts.")).

II. POST-*LANDGRAF* DECISIONS UPHOLDING THE RETROACTIVITY OF CERCLA

A. United States v. Olin

Olin Corporation operated two chemical plants between 1952 and 1982, which caused serious contamination of the company's property.[33] Therefore, a vast majority of the pollution caused by the Olin corporation occurred before Congress enacted CERCLA.[34] The Environmental Protection Agency (EPA) discovered and assessed the pollution and contamination caused by Olin in 1984.[35] After several years of negotiating, the Department of Justice and Olin agreed to a consent agreement holding Olin, its officers, directors, and all associated agents liable for the cost of compliance.[36] The parties submitted the consent agreement to the district court where Olin argued that, given the *Landgraf* decision, it should not be held liable under CERCLA.[37] Olin argued that CERCLA should not be retroactively applied pursuant to *Landgraf* even though Olin voluntarily consented to the agreement.[38] The district court agreed with Olin, ruling that CERCLA does not apply retroactively.[39]

On appeal the Eleventh Circuit noted that Congress twice reauthorized CERCLA, once with major changes, without commenting that courts have misconstrued the retroactivity of the statute.[40] Nonetheless, the *Olin* court's primary consideration was the application of the analytical framework set forth by the Supreme

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33. *See Olin*, 927 F. Supp. at 1504; *see also* Kathleen Hellevik & Christine Younger, *CERCLA Liability Not Retroactive, Alabama Judge Rules*, WEST'S LEGAL NEWS, June 19, 1996, at 5868 (*available in* 1996 WL 336054).

34. *See Olin*, 927 F. Supp. at 1504.

35. *See id.*

36. The EPA estimated Olin's compliance costs at $10,339,000. *See id.* at 1505.

37. *See id.*

38. *See id.* at 1505-06.

39. *See Olin*, 927 F. Supp. at 1502.

40. *See Olin*, 107 F.3d at 1512. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-49, 100 Stat. 1613 (1986).

Court in *Landgraf* to determine retroactivity.[41] Under *Landgraf,* the Eleventh Circuit sought "clear congressional intent" favoring retroactivity because CERCLA's liability does not contain an "express statutory command" regarding retroactivity.[42] To discern congressional intent, the Eleventh Circuit reviewed CERCLA's language, purpose, and legislative history.[43]

First, the Eleventh Circuit examined CERCLA's language. A plain reading of the statute creates liability on owners or operators of sites where hazardous waste had been deposited at the time of disposal without any reference to the date of deposit.[44] By failing to set a date when hazardous waste deposits do not fall under CERCLA's liability scheme strongly suggests that Congress intended not to exclude pre-enactment deposits.[45] Reading CERCLA *in pari materia,* the Eleventh Circuit cited CERCLA section 103,[46] the natural resources provision, as evidence that pre-enactment owners

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41. *See Olin,* 107 F.3d at 1512-14 (citing *Landgraf,* 114 S. Ct. at 1505). See *supra* Part I for a discussion of *Landgraf.*

42. *Olin,* 107 F.3d at 1512 (quoting *Landgraf,* 114 S. Ct. at 1501, 1505).

43. *See id.* at 1512-13. On the other hand, the district court broke down its analysis into three parts: (1) has Congress expressed its intent on CERCLA's retroactivity?; (2) does CERCLA have retroactive effect?; and (3) is the presumption against retroactivity applicable to CERCLA? *See Olin,* 927 F. Supp. at 1512-19.

44. *See Olin,* 107 F.3d at 1513 (citing 42 U.S.C. § 9607 (a)).

45. *See id.* The Eleventh Circuit's opinion diametrically opposed the district court's holding. The district court found that although CERCLA referred to actions and conditions in the past tense, it did not demonstrate the "imperative character" that would be dispositive of Congress' intent favoring retroactivity. *Olin,* 927 F. Supp. at 1513 (quoting Ohio *ex rel.* Brown v. Georgeoff, 563 F. Supp. 1300, 1310-11 (N.D. Ohio 1983) (noting that the word "accepted" in § 9607 (a)(4) may apply to pre-enactment conduct although CERCLA "does not require such an application")).

46. Section 103 provides that:

> Within one hundred and eighty days after December 11, 1980, any person who owns or operates or who at the time of disposal owned or operated . . . a facility at which hazardous substances . . . are or have been stored, treated, or disposed of shall . . . notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility.

42 U.S.C. § 9603(c). The provision further mandates that persons who were former owners and operators make the required notification regarding their pre-enactment conduct within six months, or forfeit "any defenses to liability set out in section [107] of this title." *See id.*

and operators would bear cleanup costs.[47] Congressional placement of an express retroactivity provision in the natural resources provision, which is located in the same section of CERCLA, follows *Landgraf's* rule favoring examination of other relevant provisions and disfavoring reliance on minor and narrow provisions in a long and complex statute like CERCLA.[48] Therefore, the Eleventh Circuit rejected Olin's argument that CERCLA only reaches "future former owners and operators," or in other words, pre-enactment polluters.[49]

Next, the Eleventh Circuit considered CERCLA's purpose. While all parties agreed that Congress designed CERCLA to deal with contamination that preceded the statute's enactment, the parties disagreed about who should pay the cleanup costs.[50] Contrary to Olin's argument that Congress intended for taxpayers in both industry and the general public to bear cleanup costs, the Eleventh Circuit held that an essential purpose of CERCLA places the ultimate responsibility on polluters.[51] The court also cited CERCLA's other essential purpose to clean up pre-enactment pollution.[52] Thus, the Eleventh Circuit concluded in order to carry out CERCLA's two essential purposes, it must be retroactively applied.[53] Moreover, the Eleventh Circuit repeated the *Landgraf* clear intent standard, requiring more than realizing that "retroactive application of a new statute would vindicate its purpose more fully" and held CERCLA's

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47. *See Olin*, 107 F.3d at 1513. The Eleventh Circuit interpreted the foregoing provision as an express mandate that CERCLA addresses pre-enactment conduct because it requires former owners and operators to notify the EPA of pre-enactment conduct or to forfeit defenses listed in § 9607. *See id.*

48. *See id.* at 1513 (citing *Landgraf*, 114 S. Ct. at 1493).

49. *Olin*, 107 F.3d at 1513.

50. *See Olin*, 107 F.3d at 1514.

51. *See id. See also supra* note 5.

52. *See Olin*, 107 F.3d at 1514.

53. *See id.* In contrast, the district court stated that its refusal to apply CERCLA retroactively would not completely halt the cleanup of pre-enactment pollution because Superfund provided alternate means to remove pollution. *See Olin*, 927 F. Supp. 1518-19. "*Landgraf* mentioned established means such as taxes and zoning regulations by which governments 'impose burdens on past conduct.' Such means, if not otherwise unconstitutional, allow legislators to 'remedy' past conduct." *Id.* (quoting *Landgraf*, 114 S. Ct. at 1499). Therefore, CERCLA would not by rendered ineffective; instead, it would be tailored to meet the environmental problems Congress intended to address. *See Olin*, 927 F. Supp. at 1519.

retroactive enforcement prevents frustration of its purposes.[54]

Finally, the Eleventh Circuit searched CERCLA's limited legislative history for clues regarding retroactivity.[55] Although CERCLA's predecessor bill, S. 1480, contained no express retroactivity provision, Congress agreed that it would apply retroactively, incorporated the cleanup liability provisions of S. 1480 into CERCLA, and made statements favoring retroactivity.[56] Moreover, no member of Congress complained about retroactivity during the argument over the final passage of CERCLA, demonstrating clear congressional preference for retroactivity.[57]

B. Five District Courts

Like *Olin*, the five cases that refused to follow *Olin*[58] involved property owners who sought to avoid paying cleanup costs for pre-enactment pollution.[59] But the five courts had fundamentally different

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54. *Olin*, 107 F.3d at 1514 (quoting *Landgraf*, 114 S. Ct. at 1507-08).

55. *See id.* The district court interpreted CERCLA's legislative history much differently. *See Olin*, 927 F. Supp. at 1513-16. The *Olin* court noted the reason for the lack of legislative history was due to "[t]he delicate nature of the compromise" which preceded the enactment of CERCLA. *Id.* at 1514 (quoting SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS., 1 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510 VII (Comm. Print 1983)). *See also supra* note 6. Specifically, the district court reasoned that Congress' hasty drafting and enacting of CERCLA, its awareness that the issue of retroactivity could arise, and its complete failure to address the issue, demonstrates congressional intent to allow courts and the EPA to decide the fate of CERCLA's retroactivity. *See Olin*, 927 F. Supp. at 1514-16. *See also supra* note 7.

56. *See Olin*, 107 F.3d at 1514 (quoting S. REP. NO. 96-848, at 2 (1980), *reprinted in* 1 LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980, at 344 (Committee Report) (noting that S. 1480 contained a subsection limiting "how claims for certain damages occurring before the date of enactment will be handled," but observing that "[c]osts of removal (cleanup and containment) are not affected by this provision"); at 405 ("The legislation proposed would establish liability for costs expended by the government to clean up past disposal practices that today are threatening public health and the environment, and it does so without reference to prior standards." (statement of Administrator Costle)).

57. *See Olin*, 107 F.3d at 1514 (citing Appellee's Brief at 24).

58. *See supra* note 14.

59. *See Ninth Ave.*, 946 F. Supp. at 653; *Nova Chems.*, 945 F. Supp. at 1099; *Alcan*, 1996 WL 637559, at *1; *Cooper Indus.*, 1996 WL 550128, at *2-*4; *NDOT*, 925 F. Supp. at 692.

rationales for their holdings. The five courts relied on a combination of congressional intent,[60] CERCLA's text,[61] and CERCLA's legislative history[62] to overcome the presumption disfavoring retroactivity.

When Congress enacted CERCLA its primary goal was to cure the problem of past pollution of hazardous wastes.[63] Direct evidence in the form of statements by members of Congress[64] and congressional inquiries into sites of past pollution in dire need of cleanup[65] demonstrated Congress' intent to cleanup pre-enactment pollution. In addition, Congress sought to build upon RCRA to improve environmental protection.[66]

The text of CERCLA provides several additional reasons why Congress clearly intended the retroactive application of CERCLA. First, Congress' use of the past tense in CERCLA's liability provisions must refer to pre-enactment acts.[67] Similarly, Congress declined to place a temporal limitation on CERCLA's scope, thus

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60. *See infra* notes 65-68 and accompanying text.

61. *See infra* notes 69-73 and accompanying text.

62. *See infra* notes 74-76 and accompanying text.

63. *See Ninth Ave.*, 946 F. Supp. at 662-63 (quoting SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS., 2 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUB. LAW 96-510 239 (Comm. Print 1983). "There are two major aspects to the problem [of hazardous waste]: First, the prospective dumping, that is, dumping that will occur in the future. Second, dumping that has already occurred in the past . . . . What we are addressing in this legislation is the dumping that occurred in the past." *Id.* at 661 (remarks by Rep. Gore); *Nova Chems.*, 945 F. Supp. at 1104 (citing United States v. R.W. Meyer, 889 F.2d 1497, 1500 (6th Cir. 1989).

64. *See supra* notes 5, 56.

65. *See Alcan*, 1996 WL 637599, at *4; *Cooper Indus.*, 1996 WL 550128, at *9. Both cases discussed Love Canal and that the fifty-three largest domestic chemical manufacturers dump 94% of their waste on their plant sites. *See* H.R. REP. NO. 96-1016, pt. 1, at 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6123. *See also supra* note 3.

66. *See Ninth Ave.*, 946 F. Supp. at 661 (stating that "[RCRA] . . . regulated the future dumping of waste, but the law did not provide authority to deal with existing dump sites where disposal had taken place before RCRA"). *See supra* notes 3, 5, 65.

67. *See Ninth Ave.*, 946 F. Supp. at 658; *Alcan*, 1996 WL 637559, at *4; *Cooper Indus.*, 1996 WL 550128, at *9; *NDOT*, 925 F. Supp. at 697-98 (citing United States v. Northeastern Pharm. & Chem. Co. Inc., 810 F.2d 726, 733 (8th Cir. 1986). The courts focused on the words "owned and operated" in § 9607(a)(2), "arranged" in § 9607(a)(3), and "accepted" in § 9607(a)(4).

indicating that it may apply to past conduct.[68] Another reason is a negative inference that can be drawn by comparing the Natural Resources Liability provision of CERCLA[69] and section 9607(a).[70] Congress expressly inserted a prospectivity clause in the natural resources provision but placed no temporal restriction in section 9607(a). Because Congress chose to limit some damages provisions, those provisions without any temporal limitation can be inferred to apply retroactivity and prospectively.[71] In addition, the courts agreed not to use an "effective date clause" analysis.[72] The Supreme Court rejected the effective date clause analysis in *Landgraf*.[73]

The courts relied on House Report 1016 to analyze the legislative history of CERCLA.[74] House Report 1016 expressly stated that the purpose of CERCLA was to cleanup "inactive hazardous waste sites."[75] The use of the word inactive necessarily meant that CERCLA dealt with sites where pollution had occurred in the past. Likewise, House Report 1016 noted that RCRA's inadequacy and growing public concern over existing environmental problems were the catalysts that spurred Congress to enact CERCLA.[76]

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68. *See Alcan*, 1996 WL 637559, at *4 (stating that CERCLA's "past tense language is without a temporal limitation as to its scope"); *Cooper Indus.*, 1996 WL 550128, at *9 (stating that CERCLA's language refers to time of disposal without a temporal limit on the language).

69. *See* 42 U.S.C. § 9607(f)(1) ("There shall be no recovery under . . . this section where such damages and the release of a hazardous substance from which such damages have resulted have occurred wholly before December 11, 1980.").

70. *See Nova Chems.*, 945 F. Supp. at 1101; *NDOT*, 925 F. Supp. at 701 (quoting *Shell Oil*, 605 F. Supp. at 1076 (stating that if Congress intended to apply CERCLA only prospectively, "the limiting provisions of [§ 9607(f)] would be mere surplusage")).

71. *See id.*

72. *See Ninth Ave.*, 946 F. Supp. at 657-58; *NDOT*, 925 F. Supp. at 695. In fact, the *Ninth Ave.* court cited cases demonstrating that other courts agree that an effective date clause neither proves nor disproves retroactivity. *See Ninth Ave.*, 946 F. Supp. at 657 (citing Moore v. Califano, 633 F.2d 727, 732-33 (6th Cir. 1980); Jensen v. Gulf Oil Ref. & Mktg. Co., 623 F.2d 406, 409 (5th Cir. 1980); Sikora v. American Can Co., 622 F.2d 1116, 1120 (3d Cir. 1980)).

73. *See Landgraf*, 114 S. Ct. at 1493.

74. H.R. REP. NO. 96-1016, pt. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119. *See Cooper Indus.*, 1996 WL 550128, at *9; *NDOT*, 925 F. Supp. at 703.

75. H.R. REP. NO. 96-1016, at 1. (stating that the purpose of CERCLA is "to establish prohibitions and requirements concerning inactive hazardous waste sites [and] to provide for liability of persons responsible for releases of hazardous waste at such sites").

76. *See* H.R. REP. NO. 96-1016, at 17-18. See also *supra* notes 3, 66 and accompanying text for a discussion of congressional intent to enact CERCLA to improve RCRA.

III. ENACTMENT OF AN EXPRESS RETROACTIVITY PROVISION

Congress could easily resolve this issue in the same manner it has addressed previous retroactivity issues—by enacting an express retroactivity provision. Congress should pursue a course similar to the one it followed when it approved the retroactive application of the Reorganization Act.[77]

The Reorganization Act of 1977[78] authorized the President to reorganize executive departments and agencies subject to a "legislative veto" by either the house of Congress.[79] One year later, President Carter submitted a plan to Congress to reorganize and expand the EEOC's functions, including transferring to the EEOC enforcement and administrative authority over the Age Discrimination in Employment Act (ADEA).[80] However, in *INS v. Chadha*[81] the Supreme Court held unconstitutional Congress' ratification of the reorganization plans under the Act.[82] Subsequently, the Second Circuit refused to permit the EEOC to enforce the ADEA; however, it stayed the judgment and granted Congress the opportunity to address the problem.[83]

Likewise, Congress should enact a retroactivity provision expressly stating that CERCLA should be retroactively applied. The retroactivity provision should read as follows: *Congress hereby declares that CERCLA section 107 applies to the dumping of hazardous waste before December 11, 1980; thereby holding liable*

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77. *See* Reorganization Act Amendments of 1984, Pub. L. No. 98-614, 98 Stat. 3192 (1984).

78. Pub. L. No. 95-17, 91 Stat. 29. *See* William Alan Shirley, Note, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions,* 85 COLUM. L. REV. 1808 (1985); Tracy Pool, Comment, *The Status of Statutes Containing Legislative Veto Provisions After* Chadha*—Does the EEOC Have the Authority to Enforce the Equal Pay Act and the Age Discrimination in Employment Act?,* 59 WASH. L. REV. 549 (1984); Martin K. Denis, *One-House Veto Legislation: EEOC's Authority to Enforce the Equal Pay and Age Discrimination in Employment Acts,* 66 CHI. B. REC. 98 (1984).

79. EEOC v. CBS, 743 F.2d 969, 970 (2d Cir. 1984).

80. *See id.* at 970-71 (citing Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807, 92 Stat. 3871, *reprinted in* 1978 U.S.C.C.A.N. 9795-9800.

81. 462 U.S. 919 (1983).

82. *See id.*

83. *See* 743 F.2d at 975-76.

all responsible parties irrespective of the date of dumping. Enactment of such a provision would ensure that CERCLA covers pre-enactment polluters and manifests congressional intent to promote the cleanup of hazardous waste sites at the expense of the polluter.[84]

IV. CONCLUSION

Although the Republican majority in the 104th Congress sought to enact a non-retroactivity provision, no such legislation was passed.[85] Now it is the responsibility of the 105th Congress to resolve the retroactivity issue once and for all.[86] In light of the key role CERCLA plays in environmental cleanup and the courts' interpretation of CERCLA is retroactive, Congress should enact an express retroactivity provision to ensure CERCLA continues to force polluters to clean up their respective messes.

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84. *See supra* note 5.

85. *See* Stephen L. Kass & Jean M. McCarroll, *Questioning Some CERCLA Principles,* N.Y.L.J., Aug. 25, 1995, at 3 (stating that Congress debated throughout the 104th Congress whether to amend CERCLA to eliminate the judicially created liability scheme of CERCLA)); News in Brief, *Alabama Getaway: Retro is Out,* 12 NO. 1 ENVTL. COMPLIANCE & LITIG. STRATEGY, June 1996, at 8.

86. *See* Mark A. Hofmann, *Election '96 Outcome: More Moderate Risk Reform Seen,* BUS. INS., Nov. 11, 1996, at 1.

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