Back on Track: the Reversal of *United States v. Olin* and the Continuation of Retroactive Interpretation of CERCLA

By Joel Surber

Introduction

Congress intended the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to apply retroactively.[1] Retroactive application of CERCLA's liability provisions facilitates the cleanup of hazardous active, inactive and abandoned waste sites, and although CERCLA is not expressly defined as retroactive, it may reach pre-enactment conduct.[2] Even without an express statement on retroactivity, courts interpreting CERCLA consistently find that a combination of the statute's purpose, structure and legislative history are sufficient evidence of congressional intent to overcome the traditional judicial presumption against retroactivity.[3]

This article address the effect of the recent reversal of *United States v. Olin* on CERCLA's retroactive application. Part I is a short summary of the decision in *United States v. Olin.*[4] Part II describes the traditional format of judicial analysis used to determine CERCLA's retroactivity and discusses how courts have used it to find that CERCLA may reach pre-enactment conduct. Part III addresses the Supreme Court's decision in *Landgraf v. USI Film Products,*[5] and applies the Court's analysis to CERCLA's liability provisions. Part IV synthesizes *Landgraf's* findings with *Olin's* denial that CERCLA's components were evidence of Congress' "clear intent" for the statute to have retroactive application. Part V outlines post-*Olin* interpretations of CERCLA's retroactive ability, specifically *USA v. Olin Corp.* and its grounds for reversing the *Olin* decision.

I. United States v. Olin

To date only *United States v. Olin,*[6] from the District Court for the Southern District of Alabama, has deviated from traditional acceptance of CERCLA as a retroactive statute. *Olin* held that the Supreme Court's decision in *Landgraf v. USI Film Products*[7] negated the foundation of previous courts' decisions holding CERCLA retroactive.[8]

In *Olin,* the government sought a cleanup order against the Olin corporation.[9] Additionally, the government sought reimbursement for response costs under CERCLA sections 106(a) and 107.[10] After negotiations with the government, Olin entered into a consent decree calling for the corporation to pay all costs involved to clean up the property in question.[11] The proposed consent decree would have ended Olin's liability for disposal actions before and after CERCLA's enactment.[12] The *Olin* court denied ap-

proval of the consent decree and issued a dismissal order concluding that CERCLA's liability scheme permitted the statute prospective effect only and that retroactive application was improper.[13] However, *Olin* was a short-lived victory for opponents of CERCLA's retroactivity; its reversal by the Eleventh Circuit Court of Appeals[14] renders the decision an isolated deviation judicial acceptance of CERCLA's retroactive effect. Post-*Olin* cases addressing CERCLA's retroactivity, including the reversal decision itself, rejected *Olin's* reasoning and, although the decision raised interesting questions, courts will apparently continue to apply CERCLA retroactively.[15]

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II. Analyzing CERCLA

Courts traditionally presume that statutes do not apply retroactively.[16] However, when the scheme of a statute makes it clear that Congress intended for the statute to apply to past conduct, congressional intent may override the traditional presumption in order to achieve the full intent of the legislation.[17]

Optimally, Congress clearly expresses the intended scope of a statute. Congress, however, did not specifically state that CERCLA's liability provisions applied retroactively.[18] Had CERCLA included an express statement denoting its retroactivity, there would have been no doubt that Congress overcame the traditional presumption against retroactivity.[19] Congress' failure to expressly state CERCLA's intended scope requires fact finders to examine the statute's components as a whole to decide if Congress intended CERCLA to apply retroactively.[20] Evidence of congressional intent for CERCLA's retroactive application is found in the statute's language tense, the structure of its liability provisions, the legislative history and within the goals Congress sought to achieve when it created the statute.[21] The totality of these components unequivocally persuaded courts, excluding *Olin*, that Congress intended CERCLA's liability provisions to reach pre-enactment conduct.[22]

To interpret a statute, analysis should begin with the plain language of the statute,[23] and thus, the proper starting point for review of CERCLA's retroactive capacity is the explicit language of the statute itself. CERCLA's language must be analyzed in context with the purposes Congress sought to serve.[24] CERCLA's language, evaluated within the statute as a whole, demonstrates Congressional intent that the statute apply retroactively.[25]

CERCLA section 107(a)(4)(B), for example, states that a "person" releasing hazardous waste into the environment is liable for "any other necessary costs of response incurred by any other person consistent with the National Contingency Plan."[26] The

past tense language suggests Congress intended CERCLA to apply retroactively in order to reimburse the response costs associated with hazardous waste removal.[27] Although the past tense language in CERCLA has not, by itself, persuaded courts that CERCLA should apply retroactively,[28] it is a viable component when attempting to discern the statute's retroactive effect.

Considering CERCLA was enacted to address the problems caused by hazardous inactive and abandoned waste sites and to provide for their cleanup, the only sites that Congress could have contemplated at enactment were the sites existing before December 11, 1980.

Another evidentiary component that can be used to determine CERCLA's scope is the statute's enactment date.[29] CERCLA's enactment date has been a source of considerable controversy but is additional evidence of Congress' intentions for the statute to reach disposals before its enactment.[30] Opponents of retroactivity argue that the enactment date is conclusive evidence that Congress intended CERCLA to only address sites created after the statutes enactment date.[31] However, CERCLA's enactment date does not preclude retroactive application of the statute.[32] In fact, the "effective date" merely marks the date when actions may commence and does not negate the statute's retroactive capability.[33] Considering CERCLA was enacted to address the problems caused by hazardous inactive and abandoned waste sites and to provide for their cleanup,[34] the only sites that Congress could have contemplated at enactment were the sites existing before December 11, 1980. If CERCLA's scope were prospective only, the problems remaining from past sites would go uncorrected and CERCLA's purpose would be wholly unfulfilled. This proposition is persuasive viewed in light of Congress' desire to supplement existing environmental statutes that were unable to reach inactive or abandoned hazardous waste sites.

Congress intended CERCLA to address the inadequacies of previous environmental laws.[35] Specifically, Congress designed CERCLA to close the loopholes left by its predecessor, the Resource Conservation and Recovery Act (RCRA).[36] Therefore, CERCLA must be considered not only in its autonomous form, but within the context of previous environmental legislation.[37] RCRA mandates cradle to grave tracking of hazardous waste and allows the government to regulate improper disposal.[38] However, RCRA's prospective scope does not address the problem of chemical wastes remaining from past actions.[39] Legislative statements made at CERCLA's enactment indicate congressional recognition of RCRA's shortcomings.[40] Since RCRA's prospective scope did not address the problems caused by the inactive and abandoned waste sites, Congress deemed it inadequate.[41] CERCLA remedies this shortcoming by providing for the cleanup of the existent sites that RCRA failed to reach.[42] In this way, CERCLA complements the inadequacies of previous environmental legislation and closes regulatory

gaps left by prospective statutes like RCRA.[43] As CERCLA is supplemental legislation designed to eliminate the shortcomings of existing environmental legislation, then it appears Congress unavoidably intended retroactive application.

CERCLA's goals favor retroactive application. CERCLA's objectives are remedial and thus imply that Congress designed CERCLA to apply retroactively. The Senate's report that accompanied CERCLA stated that Congress designed it, in part, to ensure that responsible parties bear the burdens of remedial actions and that the costs of unsafe disposals are internalized by their generators. CERCLA's goal of "ensuring that responsible parties bear the burden of remediation" indicates that Congress sought to hold parties responsible for the costs of remediating their own past actions.[44] CERCLA's strict liability design [45] shows Congress' intent to allocate the costs of remedial actions to the generator. In order to define "generator" equitably, CERCLA must reach all of the generators at a site, not just those who conveniently exist after enactment.

Perhaps the most convincing evidence that Congress intended that CERCLA apply retroactively is the affirmative limitation upon recovery of natural resource damages in section 107 (f)(1).[46] This section limits recovery for natural resource damages to those incurred after the statutes enactment. A logical explanation for this limitation is that Congress wanted to reach as many sites as possible and, since damages for natural resources do not facilitate additional cleanups, sought to maximize limited funds. Since Congress did not similarly restrict CERCLA sections 107(a)(4)(A) & (B),[47] proponents of retroactivity argue that Congress thus "implicitly authorize[d] retroactive application of their provisions."[48] In fact, this negative inference led courts to conclude that if Congress intended for CERCLA's liability provisions to be prospectively applied, then the express limitation in section 107(f)(1) was unnecessarily redundant.[49]

Courts addressing the issue before 1994 unanimously agreed that the combination of CERCLA's purpose, structure, and legislative history sufficiently showed that Congress intended to impose retroactive liability.[50] *United States v. Shell Oil Co.*[51] illustrates the use of this "total picture" approach and demonstrates the traditional analysis upon which CERCLA was found to be permissibly retroactive. The *Shell* court found that CERCLA's structure, legislative history and the context in which Congress created the statute sufficiently confirmed that Congress intended that CERCLA's liability provisions apply retroactively.[52]

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III. *Landgraf v. USI Film Products*

In contrast to previous judicial interpretation, *Olin* determined that CERCLA was not retroactive based in large part on the premise that the Supreme Court's decision in *Landgraf v. USI Film Products*[53] altered the way courts should determine CERCLA's retroactivity. *Landgraf* reinforced the presumption against retroactivity by enunciating the requirement of "clear legislative intent" in order to permit retroactive application in the absence of express language.[54] Although *Landgraf* acknowledged that retroactive operation of statutes is sometimes benign, the Court affirmed their distaste for disrupting settled expectations.[55] *Landgraf's* majority cautioned Congress that it was not the judiciary's responsibility to fill intentional gaps regarding the "temporal reach of statutes."[56] *Olin* interpreted this warning to preclude judicial interpretation of CERCLA as retroactive.[57]

Retroactive application of liability provisions, such as those contained in CERCLA, is often harsh and unfair. *Landgraf* correctly seeks to ensure that Congress thoroughly contemplates the effects of its actions and still deems it necessary to apply a proposed law retroactively.[58] Since courts traditionally apply statutes prospectively as a default, *Landgraf* guards against Congress easily bypassing the traditional presumption against retroactive application of laws. *Landgraf* accomplishes this safeguard by delineating when the traditional presumption applies and how a new law can overcome it:

> "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly proscribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the 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. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear Congressional intent favoring such a result."[59]

Landgraf's "safety net" is a legitimate precaution because retroactive application of a statute often upsets settled expectations and places new consequences upon wholly completed actions.[60] As parties disposing of hazardous waste before CERCLA's enactment had no opportunity to conform their conduct to the new law, imposition of new consequences under CERCLA may violate due process.[61] However, *Landgraf* does not preclude CERCLA's retroactivity on this basis because retroactive application is consistent with Constitutional guarantees.[62]

Congress may impose new legal consequences upon past actions, thereby upsetting settled expectations, when the purpose of the law comports with a legitimate gov-

ernmental objective and is obtained through rational means.[63] The Supreme Court held that environmental statutes balancing economic burdens and benefits should carry a strong presumption of constitutionality.[64] Extending the Supreme Court's analysis to CERCLA, fact finders need only find that CERCLA's application "have a rational purpose; be rationally related to a legitimate government objective; and not be arbitrary and capricious." [65]

CERCLA does not offend constitutional notions of due process. CERCLA facilitates the cleanup of dangerous toxic waste, a legitimate objective considering that the United States produces about 600 pounds of hazardous waste per capita each year.[66] Although some prior generators handled the disposal of their share of this waste properly, the enormous accumulation of improperly disposed of waste implores that cleanups proceed as quickly as possible. CERCLA's strict liability scheme rationally maximizes the number of sites that CERCLA can reach and reduces governmental subsidization.[67] CERCLA answers the all important question of "who picks up the tab" in the least arbitrary manner available by allocating costs to those who create the problem. As CERCLA's design protects the public health and the environment in the least arbitrary manner and by the most rational means available, CERCLA may apply retroactively without violating due process.

IV. Did *Olin* Correctly Interpret *Landgraf* To Deny CERCLA's Retroactivity?

The *Olin* court declined to find CERCLA retroactive due, in large part, to the conclusion that *Landgraf* "demolish[es] the interpretive premises on which prior cases . . . concluded CERCLA is retroactive."[68] According to *Olin*, CERCLA does not show clear evidence of congressional intent for retroactive application.[69]

Olin is easily distinguishable from its predecessors since it adopts the format of analysis employed by *Shell*[70] and since *Landgraf* does not announce any radical new interpretation of law. *Olin* differed only in its finding that the totality of CERCLA's components did not evince clear Congressional intent sufficient to overcome the traditional judicial presumption against retroactive application of a statute.[71]

Olin held that prior decisions finding CERCLA retroactive misapplied the presumption against retroactivity.[72] *Olin* declared that when, or if, previous courts applied the presumption against retroactivity they applied it backwards, giving CERCLA retroactive effect unless clear evidence existed that Congress did not intend to reach pre-enactment conduct.[73] To substantiate the conclusion, the *Olin* court first analyzed *Georgeoff*[74] and its progeny.[75] *Olin* noted that the *Georgeoff* court began correctly by "initially determin[ing] the standard to be applied in determining whether a statute should be applied retroactively."[76] *Olin* concluded that although *Georgeoff* initially noted the traditional presumption against retroactivity, the court erroneously applied the presumption in favor of retroactivity.[77] Under *Olin's* reasoning, as *Landgraf* eroded the premise for the *Georgeoff* decision, "*Georgeoff* and the cases which rely on its analysis, . . . and which do not do their own analysis . . . cannot be considered persuasive."[78]

The *Olin* decision attacked two other leading decisions holding CERCLA retroactive: *Shell*[79] and *United States v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO)*[80] Both cases agreed with *Georgeoff's* analysis of CERCLA.[81] *Olin* found fault with the courts' "insufficient regard" for the traditional presumption against retroactivity.[82] Specifically, *Olin* disagreed with *Shell's* characterization of CERCLA as "unavoidably retroactive"[83] due to its "general purpose and scheme"[84] and declared this conclusion unplausible under *Landgraf*.[85]

Olin concluded that the structure, language, purpose and legislative history of CERCLA did not evince the type of 'clear evidence' mandated by Landgraf to overcome the presumption against retroactivity.

After addressing previous courts' disregard for the traditional presumption, *Olin* focused attention upon the individual components of CERCLA. Noting *Landgraf's* requirement of "clear evidence" to overcome the traditional presumption, the *Olin* court found that Congress failed to sufficiently demonstrate its desire that CERCLA apply to pre-enactment conduct.[86] *Olin* reached its conclusion in the same way that previous cases reached the opposite one, by analysis of CERCLA's structure, language, legislative history and purpose.

Olin joined previous case law [87] noting that CERCLA lacks an express statement of congressional intent to impose retroactive liability for pre-enactment conduct.[88] *Olin* argued that as Congress had the ability to clearly express its intent,[89] failure to do so limited CERCLA to prospective application. *Olin* adopted the prevailing judicial sentiment that use of past tense language within CERCLA's liability provisions was not dispositive of Congressional intent.[90] Noting the lack of an express statement, and unconvinced by the tense of statutory language, *Olin* turned to CERCLA's legislative history.

Olin noted that CERCLA itself has almost no legislative history,[91] and in fact, Congress never addressed the precise issue of retroactivity within its debates on CERCLA.[92] *Olin* noted that the Senate floor was the sole forum for congressional debate on the retroactivity of CERCLA's liability provisions and the senator's partisan statements are unavailing of Congress' *collective* intent in enacting CERCLA.[93] *Olin* also points to the volatility of CERCLA's passage environment and notes the possibility that rather than providing clear evidence of their intent, Congress decided to "pass the buck" to the courts whom they would ask that interpret CERCLA's scope.[94] *Olin* indicated that Congress agreed to disagree on CERCLA's liability issues and compromised by leaving ambiguities for judicial resolution.[95] Under *Olin's* interpretation of *Landgraf*, Congress' failure to affirmatively discuss CERCLA's retroactivity would prohibit CERCLA's retroactivity even if the congressional majority covertly agreed that the statute should apply to pre-enactment conduct.[96] The *Olin* court concluded that be-

cause CERCLA's legislative history primarily consisted of rejected prior versions of the act, *Landgraf* dealt the statute's retroactive capability a "nearly fatal" blow.[97]

Olin discounted the statute's goals and purpose as clear evidence of congressional intent because CERCLA's goals could be achieved through a prospective only interpretation. This argument assumes that without retroactive application of CERCLA, parties would still be liable if their pre-enactment conduct was actionable under an existing state cause of action, or if their conduct spanned the pre-enactment and post-enactment eras.[98] *Olin* posited that previous decisions finding CERCLA retroactive ignored the prospective argument in an attempt to vindicate a perceived remedial vision of CERCLA more efficiently.[99] Disturbed by this proposition, *Olin* adopted *Landgraf's* caution that efficiency does not warrant a presumption of retroactivity since "[s]tatutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting [less efficient] means . . . ."[100]

Olin rejected that the negative inference drawn from the affirmative prospective limitation upon natural resource damages in § 107(f)(1) was indicative of congressional intent for the remaining liability sections to apply retroactively. Olin noted that *Landgraf* specifically disproved the type of negative inference drawn from the prospective limitation upon 107(1)[101] and used *Landgraf* to illustrate the point:

> "[G]iven the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in [the introductory] bill, it would be surprising for Congress to have chosen to resolve th[e retroactivity] question through negative inferences drawn from [] provisions of quite limited effect . . ." [102]

Under *Olin's* analysis, if the negative implication drawn from section 107(f)(1) evidences any congressional intent on CERCLA it is the intent that there was no clear congressional agreement on retroactive liability.

Olin concluded that the structure, language, purpose and legislative history of CERCLA did not evince the type of 'clear evidence' mandated by *Landgraf* to overcome the presumption against retroactivity. For that reason, the *Olin* court concluded that application of CERCLA's liability provisions to disposal actions taken before the statutes enactment were impermissibly retroactive. *Olin* provided a thoughtful, albeit harsh, view of what Congress must do under *Landgraf* to make a statute retroactive without express language. However, *Olin's* analysis did not enjoy popular regard in judicial circles and has been discarded in favor of the traditional acceptance of CERCLA as a retroactive statute.[103]

V. CERCLA's Retroactivity After *Olin*

Post-*Olin* cases qualified *Olin* as isolated and of no binding precedent to their decisions.[104] However, these courts did not forego analysis of CERCLA simply because *Olin* was not binding precedent. To the contrary, they conducted their own analysis in light of *Landgraf* and remained convinced that CERCLA applies retroactively.[105] Post-

Olin cases[106] conform with pre-*Olin* cases finding that, although CERCLA did not include an express statement of retroactivity, the language, legislative history and the support drawn from the negative inference on natural resource damages provide sufficient evidence that Congress intended the statute to have retroactive effect.[107]

In *USA v. Olin,* the Eleventh Circuit rejected the district court's decision that CERCLA's language provides no insight into congressional intent. The *USA v. Olin* court provided analysis of CERCLA section 103, illustrating that CERCLA's language has probative value.[108] CERCLA section 103 provides criminal sanctions for failure to notify the Administrator of hazardous sites within one hundred and eighty days of December 11, 1980.[109] This provision suggests a logical conclusion that pre-enactment sites are included within CERCLA's scope. Significantly, section103 shows Congress considered reaching pre-enactment sites important enough to impose criminal sanctions.[110] Under this rationale, if Congress was willing to impose criminal liability, then certainly Congress considered the monetary effect of retroactive application a worthy price to pay to fulfill CERCLA's goals. If *Landgraf*s chief concern is that Congress thoroughly contemplate the effect of retroactive application, this section is valuable evidence that CERCLA is permissibly retroactive.

USA v. Olin found CERCLA's components, when taken as a whole, were indicative of the "clear intent" Landgraf required to rebut the presumption against retroactivity and, for this reason, were sufficient to allow CERCLA's application to reach pre-enactment conduct.

USA v. Olin found that CERCLA's purpose is conclusive evidence of Congress' intent that CERCLA operate retroactively. The court concluded that CERCLA's dual goals of cleaning up inactive and abandoned hazardous waste sites and allocating the cost of cleanup to responsible parties could only be accomplished by reaching pre-enactment conduct.[111] Since CERCLA does not violate constitutional guarantees, *Landgraf* provides no reason to prevent CERCLA from reaching congressional goals.[112]

USA v. Olin disagreed that legislative history should be disregarded as suggested by *Olin*. The decision draws an important distinction respecting the status of CERCLA as a compromise bill. The court noted that the compromise did not involve retroactive liability, but rather provisions addressing joint and several liability and personal injury.[113] Thus, CERCLA's legislative history should not be viewed as empty minority rhetoric because if retroactivity was considered part of accepted congressional design for CERCLA then the statements regarding retroactivity could be characterized as "additional," not "dissenting."[114]

In response to *Olin's* contention that the *Landgraf* decision eliminated the negative inference from consideration of Congress' intent for CERCLA, *USA v. Olin* recog-

nized a distinction of considerable merit. The court noted that the provisions in *Landgraf* from which the negative inference was drawn, , were minor provisions that the Supreme Court could not justify basing an interpretation of a "long and complex statute" upon.[115] In contrast, the prospective limitation upon natural resource damages is a substantial component of the operative part of CERCLA, namely its liability scheme.[116] Without the ability to apportion liability and allocate costs, CERCLA is a toothless statute, incapable of fulfilling even a portion of Congress' intentions for the statute. Therefore, since section 107(f)(1) is crucial to CERCLA's liability scheme and a substantial inference can be drawn from the content of its provisions, it provides valuable insight into Congress' intention that CERCLA's remaining liability provisions operate retroactively.

USA v. Olin found CERCLA's components, when taken as a whole, were indicative of the "clear intent" *Landgraf* required to rebut the presumption against retroactivity and, for this reason, were sufficient to allow CERCLA's application to pre-enactment conduct. Because of this conclusion, the court reversed the holding of the district court in *Olin* and remanded the case for further consideration consistent with their findings.[117]

Conclusion

There are tenable reasons why the *Olin* court declined to follow the overwhelming previous case law that found CERCLA retroactive. One possibility is that *Olin* determined that *Landgraf* provided a new constitutional measuring stick for the retroactive application of statutes. However, their are also other believable inferences. One Post-*Olin* decision, *Nova Chemicals*, discussed the apparent tension between the *Olin* court and the Environmental Protection Agency as a possible reason for the anomalous decision in the case.[118] Regardless, *Olin* appears to have been an isolated disturbance in an otherwise continuous interpretation of CERCLA as capable of imposing monetary liability retroactively.

There is no indication that courts will deviate in the future from acceptance of CERCLA's purpose, structure and legislative history[119] as sufficient evidence to overcome the traditional presumption against retroactivity. *Olin's* reversal seems to reduce the lower court's decision to an isolated overreaction to the *Landgraf* decision. *Olin's* interpretation is clearly an overreaction, because *Landgraf* does not require a specific statement, but merely clear evidence of Congressional intent for retroactive application to overcome the presumption.[120] Congress intended CERCLA to reach the inactive and abandoned waste sites that exist due because of disposals before December 11,1980 and, as subsequent case law indicates, courts will continue to give CERCLA retroactive effect.

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Article Editor: Kaylee Newell

Notes

1 *See* USA v. Olin Corp., No.96-6645, 1997 WL 104161, at *1 (11th Cir. Mar. 25, 1997), *rev'g* United States v. Olin, 927 F. Supp. 1502 (S.D. Ala. 1996).

2 *See id.*

3 *See* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986); HRW Systems v. Washington Gas, 823 F. Supp. 318 (D. Md. 1993); City of Philadelphia v. Stepan Chem., 748 F. Supp. 283 (E.D. Pa. 1990); Kelly v. Solvent Co., 714 F. Supp. 1439 (W.D. Mich. 1989); O'Neil v. Picillo, 682 F. Supp. 706 (D.R.I. 1988); United States v. Hooker Chems. & Plastics, 680 F. Supp. 546 (W.D.N.Y. 1988); United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985); Town of Boontown v. Drew Chem., 621 F. Supp. 663 (D.N.J. 1985); United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985); United States v. Shell Oil, 605 F. Supp. 1064 (D. Colo. 1985); Jones v. Inmont, 584 F. Supp. 1425 (S.D. Ohio 1984); United States v South Carolina Recycling Disposal Co., 653 F. Supp. 984 (D.S.C. 1984); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo.1984); United States v. Price, 577 F. Supp. 1103 (D.N.J.1983); Ohio v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio. 1983); United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982); *Cf.* Aetna Gas & Sur. Co. v. Pintlar Corp., 948 F.2d. 1507 (9th Cir. 1991); O'Neil v. Picillo, 883 F.2d 186 (1st Cir. 1989); In the Matter of Penn Central, 944 F.2d 164 (3rd Cir. 1991); United States v. Kramer, 757 F. Supp. 397 (D.N.J. 1991).

4 927 F. Supp. 1502 (S. D. Ala. 1996).

5 114 S. Ct. 1483 (1994).

6 927 F. Supp. 1502 (S.D. Ala. 1996).

7 114 S. Ct. 1483 (1994)(holding in the absence of express language indicating that a statute is to be given retroactive effect, Congress must evince clear evidence of intent that the statute was intended to be retroactive in order to overcome the traditional judicial presumption against retroactivity).

8 *See Olin,* 927 F. Supp. at 1508.

9 *See USA v. Olin,* 1997 WL 104161 at *1.

10 *See id.*

11 *See id.*

12 *See id.*

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

14 *See* USA v. Olin Corp., No.96-6645, 1997 WL 104161, at *1 (11th Cir. Mar. 25, 1997).

15 *See* Gould Inc. v. A&M Battery & Tire Service, 933 F. Supp. 431 (M.D. Pa. 1996); Nova Chemicals v GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996); United States v. NL Industries, 936 F. Supp. 545 (S.D. Ill. 1996); Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651 (N.D. Ind. 1996).

16 *See* U.S. v. Security Industrial Bank, 459 U.S. 70,79 (1982),*quoted in* Union Pacific R. Co. v. Laramie Stockyards Co., 231 U.S. 190, 199 (1913)).

17 *See id.*

18 *See* U.S. v. Hooker, Chemical and Plastics Corp., 680 F. Supp. 546, 556 (W.D.N.Y. 1988).*See also,* Shell Oil Co., 605 F. Supp. 1064, 1069 (D. Colo. 1985)("As there is no explicit statement of Congressional intent to hold responsible parties liable for pre-CERCLA response costs. . .").

19 *See Landgraf,* 114 S. Ct. at 1505 (noting that when Congress has prescribed the proper reach of a statute, there is no need to resort to judicial default rules).

20 *See Shell,* 605 F. Supp. at 1079, *quoting* 2 A.J. Sutherland, STATUTES AND STATUTORY CONSTRUCTION § 46.05 (4thed.1984). "[A] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequentially, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to one section to be construed. The presumption is that a lawmaker has a definite purpose in every enactment and has adapted and formulated the subsidiary provisions in harmony with the pur pose... From this assumption proceeds the cardinal rule that the general purpose, intent or purport of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious."

21 *See e.g. Shell,* 605 F. Supp. 1079.

22 *See id.*

23 *See* American Tobacco Company v. Patterson, 456 U.S. 63, 68 (1982).

24 *See* Chapman v. Houston Welfare Rights Org. v. Young, 441 U.S. 600,608 (1979).

25 *See* 2 A J. Sutherland, STATUTES AND STATUTORY CONSTRUCTION § 46.05 (4th ed. 1984).

26 42 U.S.C. § 9607(a)(4)(B) (1982).

27 *See* United States v. NEPACCO, 810 F.2d 726, 732-33 (8th Cir. 1987).

28 *See Shell,* 606 F. Supp. at 1073 ("I find and conclude that congressional intent to either impose or withhold liability for response costs incurred before CERCLA['s] [enactment] cannot be devined from the verb tenses . . .").

29 CERCLA was enacted December 11, 1980.

30 42 U.S.C. § 9652(a)(1982) ("Unless otherwise provided, all provisions of this Act shall be effective on the date of enactment of this act [December 11, 1980].")

31 *See Shell,* 605 F. Supp. at 1074 (D. Colo. 1985).

32 *See id.* at 1075

33 *See id.*

34 Preamble to CERCLA, Pub.L.No. 95-510, 94 Stat. 2767; *See also* H.R. No. 96-1016(I) May 16, 1980 stating CERCLA's goals: To amend the Solid Waste Disposal Act to provide authorities to respond to releases of hazardous waste from inactive, hazardous waste sites which endanger public health and the environment, to establish a hazardous waste response fund to be funded by a system of fees, to establish prohibitions and requirements concerning inactive and hazardous waste sites, to provide for liability of persons responsible for releases of hazardous waste at such sites.

35 *See* H.R. REP. No. 96-1016, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

36 *See* 42 U.S.C §§ 6901-87 (1988).

37 *See Shell,* 605 F. Supp. at 1070 (citations omitted).

38 *See id.* at 1070, 71 (detailing RCRA's scope and shortcomings).

39 *See* H.R. REP. No. 96-1016, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6125.

40 "Now we have RCRA which provides for the remediation of hazardous waste sites that occur from this point forward, and of course CERCLA is the second part which goes back to cover the sites which RCRA cannot reach." Stmts. of Representative Florio.

41 *See* H.R. REP. No. 1016 at 17-18, 1980 U.S. Code Cong. &Ad. News at 6120.....House Report at 22, 1980 U.S. Code Cong. & Ad. News at 6125 ("(c) Deficiencies in RCRA have left important regulatory gaps. (1) The act is prospective and applies to past sites only to the extent that they are posing an imminent hazard. Even there the Act is of no help if a financially responsible owner of the site cannot be located.").

42 *See id.*

43 *See* H.R. REP. No. 96-1016, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

44 *See* State of Ohio ex. Rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983).

45 *See Monsanto,* 858 F.2d at 168.

46 42 U.S.C. § 4607(f)(defining natural resources liability; designation of public trustees of natural resources)

> (1) Natural Resources liability
>
> In the case of injury to, destruction of, or loss of natural resources under subparagraph (c) of subsection (a) of this section . . . There shall be no recovery under the authority of subparagraph (c) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

47 42 U.S.C. § 4607(a) quoting § 107(a): 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. . .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 contact, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility 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 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 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; and. . .

48 *See Shell,* 605 F. Supp. at 1076 ; *see also* Boontown v. Drew, 621 F. Supp. 663, 669 (D.N.J. 1985).

49 *See Shell,* 605 F. Supp. at 1076.

50 *See supra,* note 3.

51 *See Shell,* 605 F. Supp. at 1064.

52 *See id.*

53 *See Landgraf,* 114 S. Ct. 1483 (holding that provisions of the Civil Rights Act of 1991 creating right to recover compensatory and punitive damages for certain violations of Title VII, and providing for trial by jury if such damages are claimed, do not apply to Title VII case pending on appeal when statute was enacted).

54 *See Landgraf,* 114 S. Ct. at 1500.

55 *See id.* at 1497- 98.

56 *See id.* at 1500.

57 *See Olin,* 927 F. Supp. at 1515.

58 *See Landgraf,* 114 S. Ct. at 1500.

59 *See id.* at 1505.

60 *See Landgraf,* 114 S. Ct. at 1487 (holding that "[t]he presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly").

61 *See id.* at 1497.

62 *See id.* at 1498.

63 *See* Usery v. Turner Elkhorn, 428 U.S. 1, 15, 16 (1976).

64 *See* Duke Power Co. v. S. C. Recycling & Disposal, Inc., 438 U.S. 59, 83-84 (1978).

65 *See* United States. v. Conservation Chem. Co., 619 F. Supp. 162, 222 (W.D. Mo. 1985).

66 *See* Julie Mendel, Note, *CERCLA Section 107: An Examination of Causation*, 40 WASH. U. J. URB. & CONTEMP. L. 83, 87 n.17 (1991).

67 *See Shell*, 605 F. Supp. at 1070 (citing H.R. REP. No. 94-1491, at 4 (1976) *reprinted in* 1976 U.S. Code Cong. & Ad. News 6238, 6241-42, *noting* federal government spending on removal of pollutants)

68 *See Olin*, 927 F. Supp. at 1508 (holding in pertinent part that CERCLA liability provisions are not retroactive).

69 *See id.* at 1515.

70 *See Shell*, 605 F. Supp. at 1068-79.

71 *See Olin*, 927 F. Supp. at 1503.

72 *See id.* at 1509.

73 *See id.*

74 *See Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983).

75 *See e.g.* O'Neil V. Picillo, 682 F. Supp. at 729-30; Ohio Edison Co. v. Marstellar, 806 F. Supp. 663, 669 (N.D. Ohio 1992).

76 *See Georgeoff*, 562 F. Supp. at 1306.

77 *See Olin*, 927 F. Supp. at 1509.

78 *See id.*

79 605 F. Supp. 1064 (D. Colo. 1985).

80 810 F.2d 726 (8th Cir. 1986).

81 *See Shell*, 605 F. Supp. at 1072; *NEPACCO*, 810 F.2d at 733.

82 *See Olin*, 927 F. Supp. at 1509 (unlike Georgeoff, neither case explains how it is applying the presumption against retroactivity; but like Georgeoff, both cases demonstrate little regard for the presumption.)

83 *See Shell*, 605 F. Supp. at 1073.

84 *See id.*

85 *See Landgraf*, 114 S. Ct. at 1507-8 ("that retroactive application of a new statute would vindicate its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity.").

86 *See Olin*, 927 F. Supp. at 1509.

87 *See e.g. NEPACCO*, 810 F.2d 726, 732; Nevada v. United States, 925 F. Supp. 691, 698 (D. Nev. 1996); *Shell*, 605 F. Supp. 1064, 1069 (D. Colo. 1985); *Georgeoff*, 562 F. Supp. 1300, 1309 (N.D. Ohio 1983).

88 *See Olin*, 927 F. Supp. at 1512 ("CERCLA contains no language explicitly stating that it is retroactive"); *see also Georgeoff*, 562 F. Supp. at 1309 ("there are no unequivocal statements in the [CERCLA] statute indicating a Congressional intent to make it apply retroactively.").

89 *See Olin*, 927 F. Supp. at 1515, *quoting Georgeoff*, 562 F. Supp. at 1309. ("It would have been a simple matter for Congress to have included a provision within theAct providing that liability would be imposed retroactively. Given the undoubted Congressional awareness of an existing problem, this omission takes on special importance. There can be no question that Congress was aware that the issue of retroactivity would arise. Yet, Congress failed to make this statement.")

90 *See Olin*, 927 F. Supp. at 1513; *see also Shell*, 605 F. Supp. 1073 ("I find and conclude that congres-

sional intent to either impose or withhold liability for response costs incurred before CERCLA cannot be devined from the verb tenses in 107(a).");*see also e.g., Nevada*, 925 F. Supp. at 699-700; *Georgeoff*, 562 F. Supp. at 1309-10; *Shell*, 605 F. Supp. at 1073 (noting that if the past tense language employed in § 107 was considered, the existence of corresponding present tense language would negate all possible verb tense implications).

91*See Olin*, 927 F. Supp. at 1513, 1514 (*citing* Frank P. Grad, Treatise on Environmental Law Sec. 4A.02[2][a} at 4A-51 1994). Although Congress had worked on "Superfund" cleanup of toxic and hazardous waste bills, and on parallel oil spill bills for over three years, the actual bill which became Public Law No. 96-510 had virtually no legislative history at all, because the bill which became law was hurriedly put together by a bipartisan leadership group of Senators— with some assistance of their House counterparts— introduced and passed by the Senate in lieu of all pending measures on the subject. It was then placed before the House, in the form of a Senate amendment of the earlier House bill. It was considered on December 3, 1980, in the closing days of the lame-duck session of Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed no amendments. Faced with a complicated bill on a take-it-or-leave-it basis, the House took it, groaning all the way.

92 *See Georgeoff*, 562 F. Supp. at 1311.

93 *See* Alfred R. Light, CERCLA Law and Procedure Compendium at 1-1 (1992).

94 "[T]hat CERCLA passed at all is a minor wonder. Only the frailest, moment-to-moment coalition enabled it to be brought to the Senate floor . . . ." 126 Cong. Rec. at H11,772 (Daily ed. Dec. 3, 1980); *Landgraf*, 114 S. Ct. at 1494 ("Congress viewed the matter as an open issue to be resolved by the courts. Our precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance... ").

95 *See* 126 Cong. Rec. S14,964 (Daily ed. Nov. 24, 1980)(statement of Sen. Randolph).

96 *See Landgraf*, 114 S. Ct. at 1496 (*citing* INS v. Chadha, 462 U.S. 919, 946-951 (1983)).

97 *See Olin*, 927 F. Supp. at 1514 noting that in*Landgraf*: [T]he Supreme Court does consider a prior bill as part of its review of the legislative history. The Court places some weight on the fact that a bill vetoed in the previous year had explicitly provided for retroactivity. The legislative history considered in Landgraf comes not from committee reports, but from the language of the prior bill itself. The fact that the later enacted legislation had no such provision prompts the court to infer: "it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement not to include the kind of explicit retroactivity command found in the 1990 bill,".

98 *See* George Clemon Freeman, Jr.,*A Public Policy Essay: Superfund Retroactivity Revisited*, 50 Bus. Law. 663, 681 (1995).

99 *See Shell*, 605 F. Supp. at 1075-76;*see also* United States v. South Carolina Recycling & Disposal Inc., 653 F. Supp. 984, 996-98 (D.S.C. 1986).

100 *See* Landgraf, 114 S. Ct. at 1507-08.

101 *See Olin*, 927 F. Supp. at 1510.

102 *See id.* (quoting*Landgraf*, 114 S. Ct. at 1493-94).

103 *See e.g.*, Gould Inc. v. A & M Battery & Tire Service, 933 F. Supp. 431 (M.D. Pa. 1996); Nova Chem. V. GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996); Ninth Ave. Remedial Group v. Fiberbond, 946 F. Supp. 651 (N.D. Ind. 1996).

104 *See e.g. Gould*, 933 F. Supp. 431, 38 (1996)("... we are unpersuaded by a singleAlabama District Court case which is surrounded by a myriad of opinions that apply CERCLAretroactively, either directly or implicitly . . ."); *see also Nova*, 945 F. Supp. 1098,1100 (1996)("Obviously, this court is not constrained by *Olin*, which was rendered by a district court in the Eleventh Circuit.")

105 *See Nova*, 945 F. Supp. at 1098 (holding CERCLAmay be applied retroactively after analysis under *Olin* and *Landgraf*. "Because GAF's argument is based on Olin, the court will consider the retroactivity

of CERCLA in light of *Landgraf.* Accordingly, resolution of the retroactivity issue requires a general knowledge of CERCLA's purpose and liability provisions, as well as an understanding of *Landgraf* and *Olin.*").

106 *See e.g., USA v. Olin Corp.* at *7; *Fiberbond,* 946 F. Supp. 651 (N.D. Ind. 1996).

107 To distinguish the district court's holding in *Olin* the framework of analysis used to reverse the lower court by *USA v. Olin Corp.* will be employed in this paper.

108 *See* USA v. Olin Corp., No. 96-6645, 1997 WL 104161, at *1 (11th Cir. Mar. 25, 1997)(examining language from CERCLA § 107 as evidence that CERCLA's language indicates congressional intent to address sites before its enactment): 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 substances to be found there, and any known, suspected, or likely releases of such substances from such facility. 42 U.S.C. § 9603(c)(emphasis added).

109 *See* 42 USC § 9603 (c).

110 *See* 42 USC § 9603 (c)(noting "[a]ny person who knowingly fails to notify the Administrator [within 180 days after December 11, 1980] of the existence of any such [disposal] facility shall, upon conviction, be fined not more than $10,000, or be imprisoned for not more than one year, or both.").

111 *See USA v. Olin,* 1997 WL 104161 at *6.

112 *See Landgraf,* 114 S. Ct. at 1498.

113 *See USA v. Olin,* 1997 WL 104161 at *7.

114 *See* Legislative History at 426 (additional views of Senators Domenici, Bentsen and Baker).

115 *See Landgraf,* 114 S. Ct. at 1493 (noting that it could not base interpretation of retroactivity upon "two comparatively minor and narrow provisions in a long and complex statute.")

116 *See Nevada,* 925 F. Supp. at 701-02 (distinguishing the prospective provisions of the 1991 Civil Rights Act in *Landgraf* from those in CERCLA): Their impact on CERCLA as a whole stands in sharp contrast to the impact on the 1991 Act of one section which addresses a single disparate impact[Title VII] lawsuit' and another section which pertains only to overseas employers .... In contrast, [the CERCLA sections] imposing liability and limiting liability for natural resource damages] are at the very core of the statute's liability scheme. *Id.*; *see also Ninth Ave.,* 946 F. Supp. at 659: Unlike the prospective provisions in the 1991 Civil Rights Act discussed by the *Landgraf* court which were not connected to the specific provision that the plaintiff wanted to apply retroactively, liability for response costs, liability for natural resource damages, and the prospective limitation for natural resource damages are all a part of the same section in CERCLA. *Id.*

117 *See USA v. Olin,* 1997 WL 104161 at *7.

118 *See Nova,* 945 F. Supp. at 1103: The *Olin* Court may have reacted against the rigid nature of the EPA's proposed consent decree. After noting that the EPA denied Olin's request to proceed under the supervision of the Alabama Department of Environmental Management, the court stated: This is not an action in which anyone is trying to avoid a responsibility to the environment; Olin has agreed to perform the proposed remedial actions called for in the proposed consent decree. The fact that Olin, despite its reservations about the fairness and even legality of the proposed consent decree, originally went along with the EPA is a testament to the powerlessness felt by this citizen when forced to comply with various directives ordered by our administrative state.

119 Pending Congressional amendments to CERCLA have include proposed removal of retroactive liability under the act and strongly indicate that Congress still believes it created a retroactive statute in CERCLA.

120 *See Nevada,* 925 F. Supp. at 693 (clarifying the decision in Landgraf).