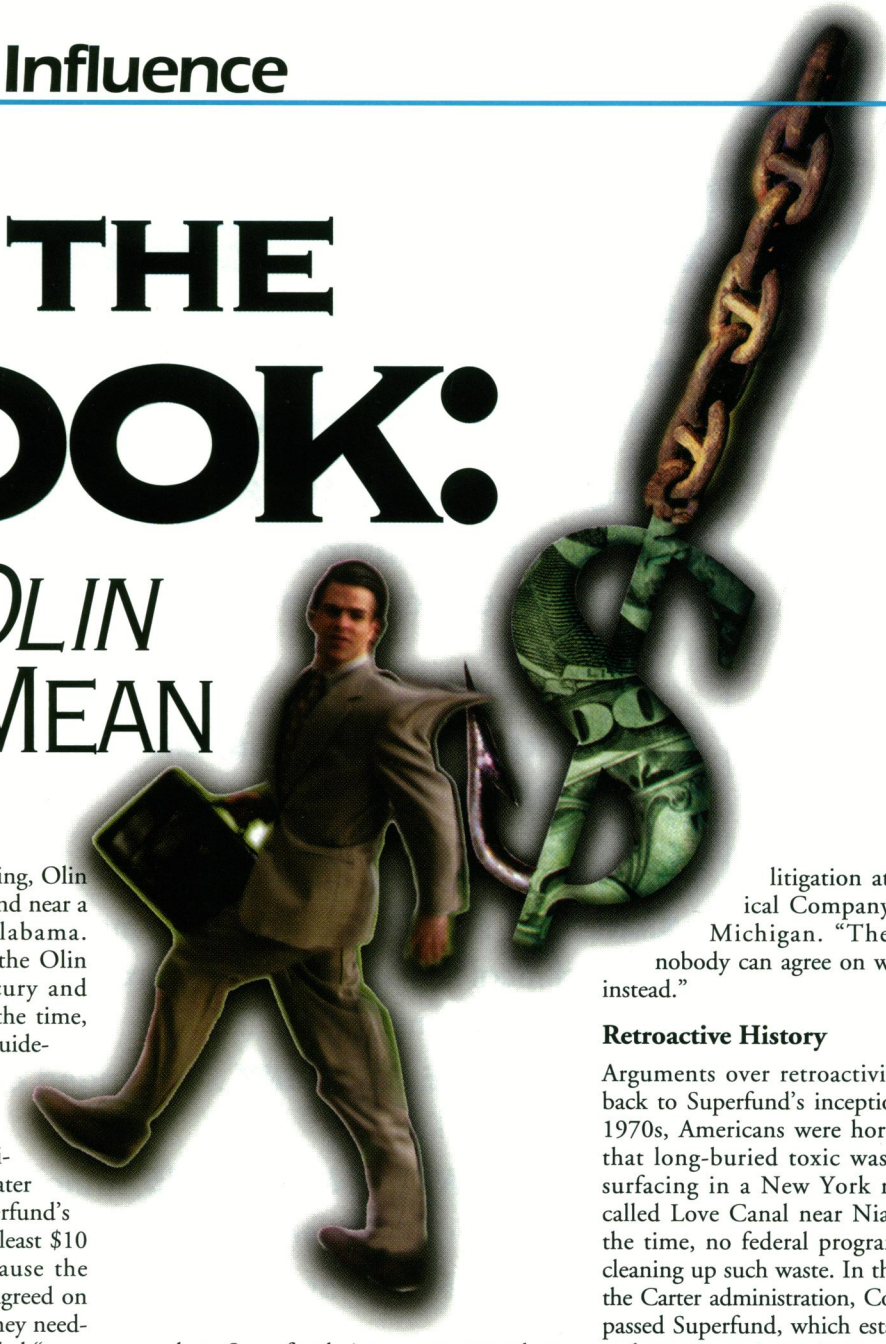
OFF THE HOOK: WHAT *OLIN* MIGHT MEAN



It started simply enough. Last spring, Olin Corporation agreed to clean up land near a former chemical plant in Alabama. Operating from 1952 to 1982, the Olin plant apparently released mercury and chloroform into wastewater. At the time, Olin's runoff met federal safety guidelines. But in 1984 the EPA placed the land on its Superfund list of toxic sites because of concerns that the wastewater contaminants had leached into groundwater and surface soil. And under Superfund's strict rules, Olin was liable for at least $10 million worth of cleanup. Because the Department of Justice and Olin agreed on the general terms of cleanup, all they needed was a judge to approve a so-called "consent decree" of the plan. Last May, the parties appeared before a court in the Southern District of Alabama to obtain such approval. That's when everything changed.

Rather than simply signing the consent decree, Judge W. Brevard Hand asked for more information, then he dismissed the *Olin* case entirely. Hand ruled that the 1980 Comprehensive Environmental Response Compensation and Liability Act (CERCLA)—commonly known as Superfund—could not be applied retroactively. Olin was free from Superfund-dictated cleanup because the company's pollution occurred before Superfund's effective date.

The Alabama ruling stunned the legal community. For 15 years, courts have required "responsible parties" (including companies, municipalities, and individuals) to clean Superfund sites no matter when they did the polluting. Judges, and generally lawyers, agree that a blanket "polluter pays" principle is the norm. "Most attorneys thought it was well settled that Superfund is retroactive," says Steven Tayber, an attorney with the Chicago law office of Ross & Hardies. "The *Olin* decision came from out of the blue."

The *Olin* decision—under appeal by the government at press time—exemplifies a legal, ethical, and economic debate over retroactive liability that goes to the very heart of Superfund. This emotional debate pits business lawyers against the EPA and public health groups, and often Republicans against Democrats. And it throws a cloud of uncertainty over hazardous waste law. "Everybody agrees they don't like Superfund the way it is now," says Mark D. Tucker, senior counsel and manager of environmental and insurance litigation at Dow Chemical Company in Midland, Michigan. "The problem is, nobody can agree on what they want instead."

Retroactive History

Arguments over retroactivity liability go back to Superfund's inception. In the late 1970s, Americans were horrified to learn that long-buried toxic waste had begun surfacing in a New York neighborhood called Love Canal near Niagara Falls. At the time, no federal programs existed for cleaning up such waste. In the final days of the Carter administration, Congress quickly passed Superfund, which established a federal system to investigate, prioritize, and clean the country's worst toxic waste sites and seek repayment for the costs from polluters.

Lawmakers based Superfund on the idea that the parties—usually companies—responsible for pollution should pay for cleanup. Under Superfund, those parties must pay even if they were not negligent when they polluted. Liable parties include anyone who owned or operated the now toxic site, anyone who generated hazardous waste at the site, and anyone who transported or arranged to transport waste to the site.

Amid the rush to pass Superfund before the upheaval of an incoming administration, lawmakers couldn't agree how to handle retroactive liability. A number of senators wanted to explicitly forbid it. As a compromise, lawmakers simply left the language out of the law. "It was a classic kind of agreement not to agree and just

leave it for the courts to decide," recalls George Clemon Freeman, Jr., an attorney with Hunton & Williams in Richmond, Virginia and a member of the original congressional advisory committee on Superfund.

The courts did decide—in favor of retroactive liability. Over the years, more than a dozen cases in district courts have ended with companies paying to clean up a Superfund site long after their operations ended. In one of the most frequently cited cases, *State of Ohio v. Georgeoff*, the court reasoned that because Congress intended a polluter to pay for cleaning a Superfund site, it must have intended for that payment no matter what the time frame. Two other cases ruled similarly. From then on other courts followed suit, until last spring.

In deciding the *Olin* case, Hand drew upon a recent U.S. Supreme Court decision (*Landgraf v. USI Film Products*) involving the Civil Rights Act of 1991. In that decision, the Supreme Court ruled that there must be a "clear statement" of congressional intent for judges to interpret any federal statute as applying new liability retroactively. In ruling against retroactive action, the Court states that such action "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." Some analysts say the ruling is a bit like providing "due process" rights for companies, just as individuals have in criminal cases.

In considering *Landgraf* and other relevant cases, Hand decided the government could not force a company to pay Superfund-dictated cleanup costs for pollution that occurred before 1980 when the law was passed.

Principle and Practicality

Business lawyers and analysts celebrated the *Olin* decision. "I think retroactive liability offends a sense of fairness," remarks H. Sterling Burnett, an environmental policy analyst at the National Center for Policy Analysis in Dallas, Texas. "If the activities that a company undertook were not against the law at the time, I don't believe it's constitutionally or morally just to hold them accountable later."

Freeman agrees, adding, "I think the issue is much broader than Superfund. The policy issue is whether or not law should ever be retroactive. If it is, then the whole purpose of giving people [laws] to avoid conduct that causes punishment would be undermined."

Environmental groups, however, are quick to disagree. Whether waste disposal was legal at the time is irrelevant, they say. The waste is currently causing a problem, and the generator—not the American people—ought to pay for the cleanup. "Is retroactive liability fair?" asks Karen Florini, a senior attorney with the Environmental Defense Fund. "It's much more fair than taxing everybody for the cost of cleanup. Or worse, simply failing to clean up the sites at all."

Many pragmatists argue that, fair or not, Superfund needs polluters to cover the cost of cleanup retroactively. According to the EPA, private parties currently pay to clean more than 75% of the toxic sites on Superfund's list. If courts were to follow *Olin*'s lead—freeing companies of retroactive liability—the government might have to come up with more than $1 billion annually to fill the financial void.

Retroactive liability is not a question of principle but of practicality, says Robert Sussman, former deputy administrator of the EPA and now an attorney at Latham and Watkins law office in Washington, DC. "If we had no Superfund law and were starting from scratch today, I think a strong argument could be made against retroactive liability," Sussman says. "Unfortunately, that's not the situation we're in. We've been operating on a basis of retroactive liability since 1980." Shifting all retroactive cleanup costs to the government, Sussman says, would slow the pace of toxic waste cleanup to a crawl.

Sterling agrees that "it would gut Superfund." Given economic pressure to keep Superfund intact, courts will likely uphold retroactive liability, Sterling says. Indeed, since *Olin*, at least two courts have decided waste remediation cases in favor of retroactivity.

Law experts hesitate to predict exactly what will happen in the courts. If Olin Corporation loses on appeal, the case could simply fade into the annals of law books. If, however, the Alabama appeals court upholds Olin's right to avoid retroactive liability, the government could ask the Supreme Court to review the case. Ironically, retroactive liability may sooner be decided in the Congress where all the ambiguity began in the first place.

Congressional Gridlock

While courts have, until *Olin*, simply accepted Superfund's retroactive liability, Congress hasn't. For the past several years, many congressional Republicans have introduced bills to reform Superfund, including the explicit repeal, or at least paring down, of retroactive liability. Every year they have locked horns with many Democrats who support today's retroactive slant on the "polluter pays" principle.

Last year was no different. In his State of the Union address last January, President Clinton described Superfund reform efforts saying, "Some say that the taxpayers should pick up the tab for toxic waste and let polluters who can afford to fix it off the hook. I challenge Congress to reexamine those policies and to reverse them."

Last spring, two bills sparked heated debate. Congressman Michael Oxley (R-Ohio) proposed a Superfund reauthorization bill (H.R. 2500) that would abolish liability for polluters who generated or transported waste prior to 1987. Meanwhile, Senators Robert Smith (R-New Hampshire) and John Chaffee (R-Rhode Island) sponsored a bill (S. 1285) that would basically repeal liability for waste disposed of before 1980 at multiparty sites, or those that received off-site waste.

Democrats shot down both bills and offered a counterproposal. In the end, the two parties couldn't agree. Even so, Jeffrey Merrifield, Senator Smith's counsel on Superfund issues, says Smith will reintroduce his bill this spring. "I think we'll come out with a bill that looks similar to the legislation [S. 1285] we had been considering in the last Congress," Merrifield says. "We may incorporate changes based on the [bipartisan] discussion, but I wouldn't expect anything dramatically different."

If that's the case, lawyers say, congressional gridlock on Superfund's retroactive liability could continue. "I think that the issue can be resolved, but I do think the Republicans need to show some flexibility and openness," Sussman says. "I have not seen proposals so far that would bridge the gap [between Republicans and Democrats]."

Analysts suggest the issue is not entirely a partisan one, and that the two parties do agree on some moderate reforms. Both sides, for example, might willingly exempt some small third parties—such as waste haulers or financial lenders—from retroactive liability at a given Superfund site. Moderate reform might also allow some discount in liability fines for pollution that occurred before 1980, or before 1986, when Superfund was first reauthorized.

Burnett says pressure—both public and corporate—to improve Superfund's efficiency will spur Congress to act on retroactivity this spring. "I said it last year, and I'm saying it again this year," he says. "Something's going to happen. The question is what."

How Clean is Clean

Numerous scientists, lawyers, and environmental regulators are calling for a new way to look at how clean a cleaned up Superfund or other abandoned hazardous waste site must be.

Over the past several years the notion of a permanently cleaned site—one with all the contamination removed—has been called into question. The new notion is one of so-called risk-based remediation in which the degree to which a site must be decontaminated is governed by the future use of the site. "If a contaminated site is to be cleaned up for industrial use instead of for homes, you do not need to have same level of cleanup, because kids won't be eating dirt in the yard," says David Graham, referring to the EPA standard that a residential site must be clean enough for a child who might possibly eat the soil to eat 200 mg daily without adverse health consequences. Graham is a Washington, DC lawyer who represents so-called responsible parties—companies who own sites requiring cleanup.

Risk-based remediation is a view that the EPA has begun to adopt as well. "We're in the business of protecting human health and the environment, and sometimes you can do that without returning everything to a pristine level," says Michael Shapiro, of the EPA's Office of Solid Waste.

But such cleanups have to focus on more than the site itself, argues Rena Steinzor, director of the Environmental Law Clinic at the University of Maryland. "When we get down to actually deciding how cleanups occur, we have to be concerned about whether we take into account the neighborhood; whether we look at all the pathways of exposure. We can't just take a very myopic look at the site use itself; we have to lift our heads and look around," she says. The vast majority of Superfund sites, Steinzor says, are in or near residential neighborhoods. According to the EPA, one of every four Americans lives within four miles of a Superfund site.

Superfund cleanup currently requires ensuring that the risk of cancer from exposure to carcinogens is one in a million from daily exposure for 70 years. (This risk may be adjusted by factoring in such considerations as cost, technical feasibility, and community views). For noncarcinogenic chemicals, the exposure level must be below what is considered a safe dose using the EPA's Integrated Risk Information System. These standards may not change with risk-based remediation, but measures like controlling access to the site would be part of the remediation procedure. For example, says Larry Reed, deputy director of the EPA Office of Emergency and Remedial Response, "You can limit the availability of the site to children."

Among the forces driving the movement toward risk-based cleanup is simple economics. Society has just so much money to spend, says Shapiro. Instead of cleaning one site to "an absolute pristine level," he says, we may be able to clean 10 to a level that protects human health and [the] environment, and yet leaves some contaminants in place."

Another factor to be considered is new research on bioavailability—the degree to which contaminants may be released to the environment. There have been studies that have found that some contaminants will become so strongly bound to soil that they may not pose an environmental or human health threat, or they are released so slowly that the exposure is minimal, says Toby Clark, president of Clean Sites, Inc., a nonprofit organization in Virginia that works to find better ways to clean contaminated sites.

In EPA-funded studies, researcher Mason Tomson of Rice University has found that chemicals such as PCBs, toluene, and benzo(*a*)pyrene can become permanently bound to sediments and soils. Tomson found that 5–10% of these chemicals become bound to the sediments and soil, while the remainder can be "easily removed." But, cleaning the fraction that remains, he argues, can be prohibitively expensive and unnecessary. "It will not release in a manner to disturb the environment or to be a human health hazard," he says. "Therefore it can be safely left alone and can cut cleanup costs."

Raymond Loehr, an environmental scientist at the University of Texas, has reached a similar conclusion, and advocated that "chemical availability should be a component of risk-based analyses used for regulatory decisions," in a 1996 study prepared for the Los Angeles-based Reason Foundation and the National Environmental Policy Institute (NEPI). While this approach may offer promise, there is still much to understand about its application. For example the nature of the soil must be well understood, says Clark. For example, contaminants bind much more strongly to clay soils than sandy ones, he notes.

Incorporating bioavailability into assessing the risk posed by a contaminated site is a "cutting edge issue," says Reed. "We try and make those decisions on a site-by-site basis. I don't think there's a lot of agreed-on information as far as bioavailability of different chemicals is concerned," he adds.

Nonetheless, bioavailability appears to play well into cleaning up thousands of brownfields—contaminated and abandoned sites that deform the urban landscape. The EPA and many states have embarked on programs that encourage such sites to be cleaned enough so that they can be returned to productive uses such as sites for factories, where contamination can remain on-site as long as it's isolated and does not pose a threat to human health or the environment. Techniques to trap contamination include embedding it in cement.

"It's still very hard to redevelop inner city neighborhoods," says Michael Greenberg, an environmental policy specialist at Rutgers University. "At least [risk-based remediation] would remove one barrier." Greenberg and others note approvingly that states have taken a major role in encouraging cleanups which focus on containing contamination instead of making the sites pristine. Ira Whitman, an environmental consultant and former head of Ohio's environmental agency, argues that well-funded state environmental agencies with strong political backing can generally do a better job than the EPA in regulating cleanups because of their familiarity with local conditions. Steinzor worries, however, that without the EPA providing oversight, cleanups may be inadequate.

Christopher Daggett, a former EPA regional administrator, advocates that "The EPA's role should be more to monitor, to make sure the states have adequate programs in place to assure the public there would be a proper cleanup on the site. On a regular basis, the EPA could take a representative sampling of the sites and conduct an overview of what the state has done." Daggett now heads a business involved in developing brownfields.

Donald Ritter, head of the NEPI, expects there to be no shortcuts in using risk-based remediation. "We might even need more knowledge [in this approach]," he said.

Harvey Black

A Haze of Uncertainty

Until courts or Congress decisively acts on retroactive liability, the environmental law community is left in a haze of uncertainty. Even within the business community, attorneys differ. "A company's gut instinct is to say, 'We don't like retroactive liability, period,' " says Tucker. "But you have to consider the consequences of a full-blown repeal."

Those consequences depend on how much a company already has paid in retroactive settlements and how much it currently pays in Superfund taxes. Superfund requires chemical manufacturers and companies that use large amounts of certain chemicals to both clean their own toxic sites and pay taxes that go into a trust for cleaning "orphan" sites—those without an identified polluter. If retroactive liability were abolished, analysts say, the government could simply raise companies' Superfund taxes to make up the difference.

Dow, for example, has already paid for most of its retroactive Superfund charges, Tucker says. So the company doesn't need courts or Congress to repeal retroactive liability—particularly if it means Dow's Superfund taxes will rise. On the other hand, insurance companies—which aren't required to pay Superfund taxes but which are often called on to reimburse responsible parties for cleanup costs—would love to repeal retroactive liability. Similarly, companies that still face old liability payments would like to repeal retroactivity.

No matter what company they represent, business lawyers aren't sure they should fight retroactive liability in court with just one case behind them, Tucker says. "It's a tough judgment call. There certainly aren't going to be many companies that, on the basis of one district court decision, say, 'We thumb our noses at the EPA.' Lawyers are not willing to stake big decisions on [*Olin*]." If other district courts choose to follow *Olin*'s lead, however, attorneys will feel compelled to argue against retroactive liability, Tucker says.

Like business lawyers, environmentalists are keenly watching the liability debate. "If Congress repealed retroactive liability, that would be of huge concern to us," remarks Michael Drescher, a spokesperson for the Citizens Clearinghouse for Hazardous Wastes, which tracks cleanup of Superfund waste sites. "We firmly believe that whoever did the dumping should be responsible for the cleanup."

Drescher stresses that no one should forget the most important group affected by the outcome of the retroactive liability debate and Superfund reform in general: people living near uncontrolled toxic waste sites. An estimated 70 million Americans live near a Superfund-designated toxic waste site. Some of the sites contain dioxin, linked to increased rates of adverse reproductive effects, or other chemicals linked to cancers. And all Superfund sites sit abandoned. Until cleaned up, these spots cannot support homes, playgrounds, or shopping centers. "It's the unfortunate fact," notes Florini, "that these sites exist at all."

Kathryn S. Brown

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