

GOULD INC. v. A & M BATTERY & TIRE SERVICE, et al
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
2000 U.S. App. LEXIS 27299

July 19, 2000, Argued

October 31, 2000, Filed

PRIOR HISTORY: [*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA. (D.C. No. 91-cv-01714). District Judge: The Honorable Richard P. Conaboy.

JUDGES: BEFORE: SLOVITER, NYGAARD, and FUENTES, Circuit Judges.

OPINION: OPINION OF THE COURT

NYGAARD, Circuit Judge.

This case arises from a contribution action initiated by appellee, Gould, Inc., under § 113 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9613. Appellants, Alexandria Scrap Corporation, R&R Salvage Company, Lake [*2] Erie Recycling, and American Scrap Company, appeal from several District Court orders in favor of Gould. Although appellants denied liability on several bases below, the sole issue they raise on appeal is whether the post-judgment enactment of the Superfund Recycling Equity Act, Pub. L. No. 106-113, 113 Stat. 1536 (November 29, 1999), requires reversal of the judgments entered against them. We conclude that it does, and will, therefore, vacate the judgment of the District Court, and remand the cause for further proceedings.

I. Background Facts

From 1961 to 1980, the Marjol Battery and Equipment Company operated a battery breaking (i.e., recycling) facility in the Borough of Throop, Lackawana County, Pennsylvania. Appellants, all scrap metal dealers, each sold spent lead-acid batteries to Marjol during the 1960s and 1970s for recycling. One appellant, Alexandria Scrap Corporation, also sold non-battery, or "soft" lead to Marjol.

The lead-acid battery recycling process is referred to as "breaking" because it literally requires the recycler to break open the battery's outer casing and remove its lead and other recyclable components. Until the 1970s, the battery casings themselves, [*3] which were then made of hard rubber, were not recyclable. As a consequence, the casings were simply discarded, often contaminated with various amounts of residual lead and other toxic substances. Each of the appellants, like all of Marjol's suppliers at the time, sold spent lead-acid batteries to Marjol manufactured with hard rubber casings. The vast majority, if not all, of such casings were eventually dumped into old mine shafts located on Marjol's property, or otherwise buried on site.

Beginning in the late 1970s, battery manufacturers began producing lead-acid batteries with casings made of polypropylene plastic rather than rubber. Eventually, battery recyclers such as Marjol found ways to recycle the plastic casings as well as other components from spent batteries. While trying to develop processes for recycling the plastic casings, however, Marjol

simply stockpiled innumerable, broken, plastic casings on its property. Like their hard rubber predecessors, these plastic casings were contaminated with lead and other toxic substances, and Marjol made virtually no effort to keep those substances from migrating through the environment.

As early as the 1960s, the Pennsylvania Department [*4] of Environmental Resources ("DER") began receiving complaints about emissions from the Marjol site. There is no question that Marjol's operations contaminated both its own property and its neighbors'. At the time, however, environmental law was largely undeveloped, and enforcement was generally lax.

On March 7, 1967, the DER's Bureau of Air Pollution Control entered an order requiring Marjol to reduce emissions from its site to the point that no emissions would be detectable beyond its property line. Marjol repeatedly violated that order, first by failing to install the necessary equipment, and then by rendering it ineffective because it had slowed the speed of battery processing. Between 1975 and 1977, the DER issued a cease operations request that Marjol refused, and several remedial orders that it generally ignored.

In early 1980, Gould, Inc., of Ohio, agreed to acquire Marjol. When the DER learned of the planned acquisition, it conducted further investigations at the Marjol site and ultimately issued an "end of the line" order. That order essentially required Marjol to comply with the DER's remedial demands or cease operations. Gould, which was generally aware of Marjol's history [*5] with the DER, went ahead with the acquisition, and initiated measures to comply with the DER's remedial demands. Ultimately, however, Gould agreed to shut down the Marjol site.

Thereafter, the DER advised Gould that no further remediation of the Marjol site would be required, and no further enforcement actions taken, unless battery-breaking operations resumed. Gould performed various forms of maintenance and "housekeeping" at the Marjol site, but otherwise generally conducted no activities there. Later, the federal Environmental Protection Agency ("EPA") initiated investigations of the Marjol site, ultimately determining "that hazardous substances had been released, and that there was an 'imminent and substantial endangerment' to the public health, welfare, or the environment." Appellee's Br. at 5-6.

II. Procedural History

In April 1988, Gould entered into a Consent Agreement and Order with the EPA under § 106(a) of **CERCLA**, 42 U.S.C. § 9606. That agreement required Gould to conduct site stabilization activities relating to lead and other hazardous substances at and around the Marjol site. In May 1990, Gould entered into a second consent order, this time [*6] with both the EPA and the Pennsylvania DER. This second order under the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(h), required Gould to perform a Facility Investigation and Corrective Measure Study at the Marjol site.

In December 1991, Gould initiated a civil action seeking cost recovery from approximately 240 Potentially Responsible Parties ("PRP's") pursuant to § 107(a)(4)(B) of **CERCLA**, or, alternatively, contribution pursuant to § 113. The defendants moved for partial summary judgment, arguing that because Gould was a responsible party who had entered into a consent agreement resolving its liability to the government, it was limited to asserting a contribution

claim only. The District Court agreed, and granted partial summary judgment in favor of the defendants. See *Gould, Inc. v. A&M Battery & Tire Serv.*, 901 F. Supp. 906, 910 (M.D. Pa. 1995).

The District Court held a bench trial on the issue of allocating response costs among those defendants held liable to Gould for contribution and held "that Gould should bear 75% of the clean-up costs and that the Defendants should bear the remaining 25%" *Gould, Inc. v. A&M Battery & Tire Serv.*, 987 F. Supp. 353, 372 (M.D. Pa. 1997). [*7] The court then apportioned the defendants' 25% share according to the amount of waste each contributed to the Marjol site. See *id.*

With the exception of the four appellants, Gould eventually settled with all defendants. After appellants filed their notice of appeal, Congress passed, and the President signed, the Superfund Recycling Equity Act. Appellants are pursuing only their claim that this Act shields them from contribution liability to Gould. Gould counters that the Act does not apply to materials that contain non-recyclable components, that it does not apply retroactively to this case, and that if it does apply retroactively, it violates the Fifth Amendment's due process guarantee.

III. Background Law

Under **CERCLA**:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of [42 U.S.C. § 9607] --

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, [shall be liable for]

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian [*8] 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 [42 U.S.C. § 9604(i)].

42 U.S.C. § 9607(a).

After failing to pass several earlier versions, Congress passed, and on November 29, 1999, the

President signed into law, the Superfund Recycling Equity Act, Pub. L. No. 106-113, Div. B, § 1000(a)(9) [S. 1948, Title VII, 6001(b)(1)], 113 Stat. 1536 (November 29, 1999). The Act, intended to clarify liability under **CERCLA**, provides that a person who meets certain specified criteria, and "who arranged for recycling of a recyclable material shall not be liable under sections 9607(a)(3) and 9607(a)(4) of [42 U.S.C.] with respect to such material." 42 U.S.C. § 9627(a)(1). The Act defines a "recyclable material" [*9] to include, inter alia, "spent lead-acid, spent nickel-cadmium, and other spent batteries" Id. § 9627(b).

In transactions involving spent lead-acid batteries, the transaction:

shall be deemed to be arranging for recycling if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material) can demonstrate by a preponderance of the evidence that at the time of the transaction--

(1) the person met the criteria set forth in [§ 9627(c)] with respect to the spent lead-acid batteries; and

(2)(A) the person was in compliance with applicable Federal environmental regulations or standards, and any amendments thereto, regarding the storage, transport, management, or other activities associated with the recycling of spent lead-acid batteries[.]"

Id. § 9627(e)(1) & (2)(A).

Although the Act does contain several exclusions, see id. § 9627(f), only one is at issue here. More a limitation than an exclusion, § 9627(i) provides that the recycling exemptions established by the Act "shall not affect any concluded judicial or administrative action or any pending judicial action initiated [*10] by the United States prior to [November 29, 1999]." (emphasis added).

IV. Discussion

A. **Retroactivity**

By its express language, the Act has no effect on "any concluded judicial or administrative action or any pending judicial action initiated by the United States prior" to its enactment. 42 U.S.C. § 9627(i). This section exempts two categories of action from retroactive application of the Act. One category exempts all actions concluded as of November 29, 1999, whether administrative or judicial in nature. The second category exempts pending actions initiated by the United States prior to November 29, 1999, but only if they are judicial in nature. By implication or negative inference, then, Congress intended the Act to apply retroactively to all other types of actions. One District Court case, *Morton Int'l Inc. v. A.E. Staley Mfg. Co.*, 106 F. Supp. 2d 737, 2000 WL 1038176, at *9 (D. N.J. 2000) has held that the language of the Act reflects Congress' intent that the recycling exemption apply to pending private party actions, thus applying retroactively to, inter alia, judicial and administrative actions that were: (1) initiated prior to November 29,

1999; [*11] (2) initiated by a party other than the United States; and (3) still pending as of November 29, 1999. We agree. This case is a judicial action, initiated by a private party, and was pending on appeal as of November 29, 1999.

Gould argues that whenever a private party initiates a judicial action following a related federal administrative action, the causal link between the two requires the court to deem the judicial action to have been initiated by the United States. Gould's proffered construction of § 9627(i) is belied not only by the Act's plain language, but also by its legislative history. Beginning in 1994, legislators introduced, and the two houses of Congress considered, various versions of the Act before finally succeeding in passing it in November 1999. See, e.g., 145 Cong. Rec. S10391-01, S10433 (August 5, 1999) ("The language of this bill is the culmination of a process that we have been working on since the 103rd Congress."). Though broadly supported, congressional approval eluded the Act for several years because it was attached to larger, and far more controversial, attempts to reform **CERCLA** as a whole.

As a consequence of its protracted gestation, much of the Act's [*12] relevant legislative history was created in connection with its failed predecessors. Nevertheless, the history of prior bills is not entirely irrelevant to our interpretation of their enacted successors. In the case of the Superfund Recycling Equity Act, the history associated with prior versions is all the more relevant because the proposed statutory language, as well as the intent of its drafters, remained consistent throughout the protracted effort to pass it.

The 106th Congress passed the Act as part of an omnibus legislation package approved near the end of its 1999 Session. See Consolidated Appropriations Act, 2000, 106-113, 113 Stat. 1501, 1501A-598 (November 29, 1999). The version of the Act ultimately enacted was first introduced as a stand-alone bill in the Senate, see S. 1528, reprinted in 145 Cong. Rec. S10391-01, S10432 (August 5, 1999), which ultimately attached it to a larger bill pending before that legislative chamber. See S. 1948, as enacted at 113 Stat. 1501A-521. During discussions of that larger bill, Senator Lott obtained unanimous consent to insert the Act's legislative history into the record. See 145 Cong. Rec. S14986-03, S15048 (November 19, 1999). n1

-----Footnotes-----

n1 Although there might be some question about reliance on a History prepared by one senator and thereafter inserted with unanimous consent because it does not appear to have been approved in substance by either a Committee or a majority of the Senate, in this case we rely on Senator Lott's History because Gould has not objected.

-----End Footnotes----- [*13]

According to that history, the Act "provides for relief from liability for both retroactive and prospective transactions," *id.* at S15049, and "any pending judicial action, whether it was brought in a trial or appellate court, by a private party shall be subject to the grant of relief from liability." *Id.* at S15050. The same history further explains that "Congress intends that any third party action or joinder of defendants brought by a private party shall be considered a private party action, regardless of whether or not the original lawsuit was brought by the United States."

Id. (emphasis added).

If the Act applies retroactively even to private-party actions prompted by exempted federal judicial actions, it makes no sense to conclude that it does not apply retroactively to private actions prompted by non-exempt administrative actions. Thus, these expressions of congressional intent and others found throughout the Act's legislative history, even if not controlling, clearly support a common-sense construction of the Act that applies it retroactively to private judicial actions such as this.

B. Due Process

Gould argues that if the Act applies retroactively, then it violates the [*14] Fifth Amendment's due process guarantee because it lacks a rational basis. More specifically, Gould argues, the Act:

creates an arbitrary classification which rewards a recalcitrant PRP who forced the United States to expend effort and its resources to file suit, but penalizes a responsible PRP, like Gould, which agreed to clean up a battery-breaking site.

Appellee's Br. at 33.

To pass rational-basis review, however, the Act need only be justifiable on some rational basis. Moreover, it is not necessary that Congress have actually articulated a particular rational basis. Instead, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990, 1011 (3d Cir. 1993) (quoting *Heller v. Doe*, 509 U.S. 312, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993)). Here, the distinction between privately and federally initiated judicial actions is rationally related to preserving the public fisc. For instance, the distinction ensures that once the United States has expended public funds to initiate [*15] a judicial action, the Act does not render that expenditure wasted by exempting an otherwise covered person from liability. In affording such fiscal protection, the Act rationally distinguishes between the United States, a non-culpable party, and a party such as Gould who actually contributed to the contamination underlying its claim for contribution. That rationale is enough to pass constitutional muster. Thus, the Act can and does apply retroactively without violating due process.

C. The Act's Effect on The Summary Judgment

Having concluded that the Superfund Recycling Equity Act applies retroactively, the next issue is whether the Act exempts appellants from liability. Under the Act, a person who arranged for recycling of a recycling material is exempt from **CERCLA** liability with respect to that material. See 42 U.S.C. § 9627(a)(1). The Act defines a "recyclable material" to include, inter alia, spent lead-acid batteries. See id. § 9627(b). That definition is not limited to the lead contained in spent lead-acid batteries, nor to its casing, nor to any other individual or combination of individual components. The Act plainly and unambiguously defines the [*16] entire spent lead-acid battery as a "recyclable material." See id.

[A] transaction involving spent lead-acid batteries . . . shall be deemed to be arranging for recycling if the person who arranged for the transaction (by selling [the lead-acid batteries] or otherwise arranging the recycling of [the lead-acid batteries]) can demonstrate by a preponderance of the evidence that at the time of the transaction:

- (1) The [spent lead-acid battery] met a commercial specification grade.
- (2) A market existed for the [spent lead-acid battery].
- (3) A substantial portion of the [spent lead-acid battery] was made available for use as feedstock for the manufacture of a new saleable product.
- (4) The [spent lead-acid battery] could have been a replacement or substitute for a virgin raw material, or the product to be made from the [spent lead-acid battery] could have been a replacement or substitute for a product made, in whole or in part, from a virgin raw material.

Id. § 9627(c), incorporated by reference into § 9627(e)(1). n2

-----Footnotes-----

n2 The Act's additional requirements for exemption from liability are not at issue in this case. See 42 U.S.C. § 9627(c), incorporated by reference in § 9627(e)(1); id. § 9627(i)(e)(2)(A).

-----End Footnotes----- [*17]

The parties' primary disagreement on this issue concerns whether the spent lead-acid batteries in question could have been a replacement or substitute for a virgin raw material as the fourth element requires. Appellants argue that the requirement applies only to those portions of a spent lead-acid battery that are recyclable. Gould, on the other hand, argues that the "replacement or substitute provision" applies to the whole battery and that the Act does not apply unless every component of the spent lead-acid battery at issue is recyclable, and each component can be "a replacement or substitute for a virgin material." Appellee's Br. at 38-54.

Stated differently, Gould concedes the third element requires only that "a 'substantial portion' of the recyclable material was in fact made available for use as a feedstock in a manufacturing process." Appellee's Br. at 38 (emphasis added). But Gould argues that the fourth "element requires a purported recycler seeking the protection of the statute to show that all, not just a 'substantial portion' as in element 3, of the recyclable material 'could have been' either a direct or indirect replacement for a raw material." Id. (emphasis added). [*18] Thus, Gould concludes, appellants are not covered by the Act because they sold Marjol spent lead-acid batteries made with non-recyclable rubber casings.

Gould's argument, and therefore its conclusion, fail for several reasons. First, the language of the Act itself belies Gould's argument. As previously noted, the Act defines a recyclable material to

include the entire "spent lead-acid battery." It makes no distinction between spent lead-acid batteries that are wholly recyclable, and those that contain non-recyclable components. This lack of distinction is all the more significant when considered in light of the Act's purposes, and the context in which it was passed. For instance, one of the Act's purposes is "to remove the disincentives and impediments to recycling created as an unintended consequence of the 1980 Superfund liability provisions." S. 1948 § 6001(a)(3), as enacted at 113 Stat. 1501A-598-99. In other words, Congress intended the Act to overrule court decisions holding bona fide sellers of recyclable materials liable under **CERCLA**. See, e.g., 145 Cong. Rec. S10391-01, S10431 (August 5, 1999) (Statement of Senator Lott) (noting that the Act was intended to "remove[] [*19] an unintended consequence of the Superfund statute" including court decisions holding "that recyclables are materials that have been disposed of and are therefore subject to Superfund liability").

Second, it is clear from the Act's legislative history that Congress realized not all components of "recyclable materials," including spent lead-acid batteries, are recyclable. For instance, the legislative history placed on the record for S. 1528 explains that:

for a transaction to be deemed arranging for recycling, a substantial portion, but not all, of the recyclable material [e.g., a spent lead-acid battery] must have been sold with the intention that the material would be used as a raw material, in place of a virgin material, in the manufacture of a new product.

145 Cong. Rec. S14986-03, S15049 (November 19, 1999) (emphasis added).

Other unequivocal evidence that Congress did not intend to require that a "recyclable material" be 100% recyclable can be found throughout the Act's six-year legislative history. According to that history:

The first part of [the fourth element] acknowledges the fact that modern technology has developed to the point where some consuming [*20] facilities exclusively utilize recyclable materials as their raw material feedstock and manufacture a product that, had it been made at another facility, may have been manufactured using virgin materials. Thus, the fact that the recyclable material did not directly displace a virgin material as the raw material feedstock should not be evidence that the requirements of [§ 9627(c)] were not met.

Secondary feedstocks may compete both directly and indirectly with virgin or primary feedstocks. In some cases a secondary feedstock can directly substitute for a virgin material in the same manufacturing process. In other cases, however, a secondary feedstock used at a particular manufacturing plant may not be a direct substitute for a virgin feedstock, but the product of that plant competes with a product made elsewhere from virgin material. For example aluminum may be utilized at a given facility using either virgin or secondary feedstocks meeting certain specifications. In this case, the virgin and secondary feedstock materials compete directly. A particular steel mill, however, may only utilize scrap iron and steel as a feedstock because of the design

restrictions of the facility. If [*21] that mill makes a steel product that competes with the steel product of another mill, which utilizes a virgin feedstock, the conditions of this paragraph have been met. In this example, the two streams of feedstock materials do not directly compete, but the product made from them do. It is the intent of this paragraph that the person be able to demonstrate the general use for which the feedstock material was utilized. It is not the intent that the person show that a specific unit was incorporated into a new product

Id. Thus, the language of the fourth element is intended to explain when a recycling transaction is deemed to displace the use of virgin raw materials, not to restrict the Act's coverage to materials that are 100% recyclable.

V. Conclusions

In summary, we hold that Congress intended the Superfund Recycling Equity Act to apply retroactively to judicial actions initiated by private parties prior to November 29, 1999, if still pending on that date. Gould's contribution claims against Appellants meet those criteria. Thus, the Act applies to Gould's claims, and the District Court's order granting summary judgment to Gould on the issue of contribution liability, as [*22] well as its judgment allocating liability, will be vacated. We will remand the cause to the District Court for it to determine whether Appellants satisfy the Act's requirements for exemption from liability.