

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE SOUTHDOWN, INC. LITIGATION : Case No. C-3-93-270
: Judge Rice
: Magistrate Judge Men
:

RESPONSE OF SOUTHDOWN, INC. TO OBJECTIONS
OF DEFENDANT USX TO MAGISTRATE JUDGE'S
SUPPLEMENTAL REPORT AND RECOMMENDATIONS

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, Plaintiff Southdown, Inc. ("Southdown") hereby responds to USX Corporation's Objections to the Magistrate Judge's Supplemental Report and Recommendations.

On September 24, 1993, Southdown filed a complaint against USX in Case No. C-3-93-354. USX filed a motion to dismiss the complaint on November 12, 1993. On March 11, 1994, the Magistrate Judge filed a Report and Recommendations, which recommended that USX's motion to dismiss be denied in its entirety.

USX filed objections to the Magistrate Judge's Report and Recommendations to which Southdown responded. Judge Beckwith subsequently sent the matter back to the Magistrate Judge for reconsideration. On July 18, 1994, the Magistrate Judge issued a Supplemental Report and Recommendations, which again recommended that USX's motion to dismiss be denied.

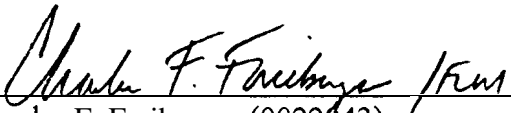
USX has now filed objections to the Magistrate Judge's Supplemental Report and Recommendations by incorporating its objections to the March 11, 1994 Report and Recommendations. In response, Southdown incorporates its Response to Objections of USX

Corporation to the Magistrate Judge's Report and Recommendations (hereinafter "Response") filed on April 8, 1994. A copy of this Response is attached hereto as Exhibit A.

As discussed in its Response and in its Memorandum Contra Defendant USX Corporation's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6), 42 U.S.C. §9601(14) unambiguously provides that a substance which is hazardous under any of subsections (A), (B), or (D) through (F) of that section is a hazardous substance for purposes of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*, even if it is exempted from subsection (C) because of the parenthetical phrase in that subsection. Further, since the language of the statute is unambiguous and there is no clearly expressed legislative intent that the statutory language be disregarded, it is inappropriate to look at the legislative history of CERCLA. The Magistrate Judge's recommendation on this issue is consistent with the interpretation of 42 U.S.C. §9601(14) which has been adopted by every court which has considered the question. Moreover, Southdown's Complaint sufficiently sets forth a claim for equitable indemnification. Therefore, Southdown respectfully requests that the Magistrate Judge's Supplemental Report and Recommendations be adopted by the Court and USX's Motion to Dismiss be denied in its entirety.

Respectfully submitted,

Dated: August 12, 1994



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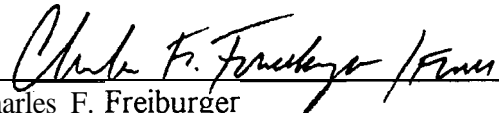
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing response of Southdown, Inc. to Objections of Defendant USX to Magistrate Judge's Supplemental Report and Recommendations was served by U. S. mail, postage prepaid, this 12 day of August, 1994, upon the following:

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
1993
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1994

SOUTHDOWN, INC.,	:	
	:	Case No. C-3-93 354
Plaintiff,	:	Judge Beckwith
	:	Magistrate Judge Merz
v.	:	
	:	
USX CORPORATION,	:	
	:	
Defendant.	:	

RESPONSE OF SOUTHDOWN, INC. TO OBJECTIONS
OF USX CORPORATION TO THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATIONS

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, Plaintiff Southdown, Inc. ("Southdown") hereby responds to Defendant USX Corporation's Objections to the Magistrate Judge's Report and Recommendations.

I. INTRODUCTION

Southdown filed a complaint in this matter on September 24, 1993. On November 12, 1993, Defendant filed a motion to dismiss, arguing that cement kiln dust ("CKD") is excepted from the definition of hazardous substance in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 et seq., by virtue of a parenthetical phrase in 42 U.S.C. § 9601(14) (C). Southdown responded to Defendant's motion to dismiss, explaining that the exception

contained in the parenthetical phrase applies only to subsection (C) of the definition of hazardous substance, and therefore, a substance which is also hazardous under any of the other subsections of 42 U.S.C. §9601(14) is a hazardous substance for purposes of CERCLA. Southdown pointed out that every court which has considered this question has held that the parenthetical phrase applies only to subsection (C) of 42 U.S.C. §9601(14). On March 11, 1994, the Magistrate Judge filed a Report and Recommendations, which recommended that Defendant's Motion to Dismiss be denied in its entirety.

Defendant objects to the Report and Recommendations on two grounds, maintaining that: (1) CKD is excluded from the definition of hazardous substance in CERCLA based on the legislative history of CERCLA; and (2) a state law claim for indemnity requires the allegation of -an express or implied contract and a completely innocent plaintiff. As will be discussed below, Defendant's objections are not well taken, and the Magistrate Judge's Report and Recommendations should be adopted by the Court.

II. ARGUMENT

A. When A Statute Is Clear On Its Face There Is No Need To Resort To The Legislative History

It is well established that when a statute is clear and unambiguous on its face, it is improper to resort to legislative history. In re Lucas, 924 F.2d 597, 600 (6th Cir. 1991), cert. denied, 111 S.Ct. 2275 (1991). "Except in 'rare and exceptional .

circumstances' ... such as where Congress 'expressly indicates' its intent that the plain meaning of the statutory language be avoided, ... unambiguous statutory language 'is to be regarded as conclusive'." Henry T. Patterson Trust by Reeves Banking v. United States, 729 F.2d 1089, 1095 (6th Cir. 1984). Accord, In re Lucas, supra; Bradley v. Austin, 841 F.2d 1288, 1293 (6th Cir. 1988); United States v. Premises Known as 8584 Old Brownsville Road, 736 F.2d 1129, 1130 (6th Cir. 1984); Bowman v. Stumbo, 735 F.2d 192, 197 (6th Cir. 1984). As the Sixth Circuit further observed, "' [t]he proper function of legislative history is to solve, and not create an ambiguity'." Bowman v. Stumbo, id. at 198.

Defendant, however, suggests that despite the clear and unambiguous language of 42 U.S.C. §9601(14), the definition of hazardous substance, the Court must look at the legislative history of CERCLA. In so doing, Defendant creates an ambiguity which does not exist in the statutory language.

As Southdown pointed out in its Memorandum Contra Defendant USX Corporation's Motion to Dismiss,' the legislative history of CERCLA is notoriously unreliable. See, e.g., Exxon Corp. v. Hunt, 475 U.S. 355, 373-4 (1986); Bulk Distribution Centers, Inc. v. Monsanto Co., 589 F.Supp. 1437, 1441 (S.D. Fla. 1984); United States v. Wade, 577 F.Supp. 1326, 1331 (E.D. Pa. 1983). Although the committee reports do contain the statements set out in

⁶See pages 24-25 of Plaintiff's Memorandum Contra Defendant USX Corporation's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) (hereinafter "Memorandum Contra").

Defendant's Objections, they also contain apparently conflicting statements, such as:

[EPA] regulations must be referred to to determine the hazardous wastes and their constituents which are hazardous substances Any material listed as a hazardous waste or a hazardous constituent is a hazardous substance for purposes of S. 1480 regardless of whether it is a waste.

S. Rep. No. 96-848, 96th Cong., 2d Sess. 28 (1980) (emphasis added). Even the statements set forth in Defendant's Objections are not free from ambiguity. For example, Representative Florio's statement that "[t]he term 'hazardous substance' includes hazardous wastes as defined by the Solid Waste Disposal Act but excludes wastes whose regulation has been suspended by act of Congress" could just as easily be interpreted as referring to those substances which are hazardous under 42 U.S.C. §9601(14) (C) only, and not to those substances which are hazardous pursuant to the other subsections of 42 U.S.C. §9601(14). Whatever interpretation is made of these statements, it is evident that there is no clearly expressed legislative intent that the plain meaning of the statutory language be avoided.

As the Magistrate Judge correctly concluded in his Report and Recommendations, the statutory language unambiguously leads to the conclusion that the parenthetical language contained in subsection (C) of 42 U.S.C. §9601(14) applies only to that subsection. Therefore, a substance such as CKD that is hazardous

under any of the other subsections of 42 U.S.C. §9601(14) is a hazardous substance for purposes of CERCLA.

In its Objections, Defendant once again simply ignores the fact that every court which has considered this issue has ruled in a manner consistent with the Magistrate Judge's Report and Recommendations.² Recently another district court agreed with the Louisiana-Pacific Corn. v. ASARCO, Inc., 6 F.3d 1332 (9th Cir. 1993), amended 13 F.3d 1378 (1994), and Easle-Picher Industries, Inc. v. United States Environmental Protection Agency, 759 F.2d 922 (D.C. Cir. 1985), courts that the exception. in 42 U.S.C. §9601(14) (C) applies only to that subsection. Jastram v. Phillips Petroleum Company, 1994 U.S. Dist. LEXIS 819, *8 (E.D. La. 1994) (attached as Exhibit A).

Since the courts considering arguments similar to Defendant's have unanimously rejected those arguments, there is clearly no ambiguity in the statute which would suggest a need to review the legislative history. As stated by the Supreme Court:

The best evidence of [Congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous -- that has a clearly accepted meaning in both legislative and judicial practice -- we do not permit it to be

²See, Louisiana-Pacific Corn. v. ASARCO, Inc., 6 F.3d 1332 (9th Cir. 1993), amended, 13 F.3d 1378 (1994); Easle-Picher Industries v. U.S. Environmental Protection Agency, 759 F.2d 922 (D.C. Cir. 1985); United States v. United Nuclear Corp., 814 F.Supp. 1552 (D.N.M. 1992); T & E Industries v. Safety Light Corp., 680 F.Supp. 696 (D.N.J. 1988); Idaho v. Hanna Mining Co., 699 F.Supp. 827 (D. Idaho, 1987), affd. on other grounds, 882 F.2d 392 (9th Cir. 1989); Idaho v. Bunker Hill Co., 635 F.Supp. 665 (D. Idaho, 1986); United States v. Conservation Chemical Company, 619 F.Supp. 162 (W.D. Mo. 1985); United States v. Metate Asbestos Corp., 524 F.Supp. 1143 (D. Ariz. 1984); United States v. Union Gas Co., 586 F.Supp. 1522 (E.D. Pa. 1984).