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## Xi. Miscellaneous

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Hardware policy, on the other hand, was a primary coverage policy with a clause restricting it to excess coverage in accidents involving nonowned automobiles. The court reasoned that because American Hardware was a primary insurer in most situations, the insured's claim must exhaust the American Hardware policy's limits before collecting under Allstate's excess coverage. Accordingly, the Fourth Circuit reversed the decision of the district court.

#### MISCELLANEOUS

In *Valtrol, Inc. v. General Connectors Corp.*, 884 F.2d 149 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit considered whether a supplier's going out of business constituted a breach of an exclusive distributorship agreement between a national supplier and local distributor of steam trap equipment. In *Valtrol* the Bestobell Steam division of General Connectors Corporation and Valtrol executed a contract in 1984, extending an exclusive distributorship agreement that had existed between them since 1979. Under the agreement, Valtrol acquired exclusive rights to distribute Bestobell products in Virginia, North Carolina, South Carolina, Georgia, and parts of Tennessee and Texas. The contract also required each of the parties to use commercially reasonable efforts to promote the Bestobell products. The contract was to be effective through June 30, 1986, with renewal occurring automatically each July 1 as long as both parties were performing their obligations. The contract required mutual consent and ninety days notice for termination and designated Texas law as governing the agreement.

The dispute in *Valtrol* centered around General Connectors' decision to discontinue participation in the steam trap market by divesting itself of its Bestobell products division. The Bestobell products division had been losing money since 1984. Accordingly, General Contractors notified all of its distributors, including Valtrol, that all contracts with General Connectors' Bestobell Steam division would terminate on June 30, 1986. Bestobell made its final shipment of equipment to Valtrol in August 1986. In November 1986 General Connectors sold the assets of its steam trap division to another company, making that company the exclusive United States distributor of Bestobell steam traps.

On February 17, 1987, Valtrol filed a diversity suit against General Connectors in the United States District Court for the District of South Carolina. Valtrol's complaint included claims for breach of express and implied warranties, breach of contract, and recoupment. Additionally, Valtrol's complaint sought consequential damages for the cost of cover and for lost profits. General Connectors counterclaimed against Valtrol alleging that Valtrol had refused to pay for certain steam equipment purchased from Bestobell. Valtrol answered General Connectors' counterclaim by contending that Valtrol was entitled to apply certain product discounts, allegedly given by General Connectors to help Valtrol establish Texas operations, to offset Valtrol's obligations to General Connectors on the steam equipment. The case went before a jury in June 1988.

During the trial, the district court directed verdicts for General Connectors on fourteen of Valtrol's sixteen claims, including Valtrol's claim for breach of express and implied warranties. The district court refused to direct a verdict on Valtrol's claims for breach of the distributorship contract and recoupment and, therefore, submitted the breach and recoupment claims to the jury along with General Connectors' counterclaim for payment of the price of the steam equipment allegedly purchased but not paid for by Valtrol.

On Valtrol's breach of contract claim the jury returned a verdict in favor of Valtrol in the amount of \$215,000. The jury also found for Valtrol on General Connectors' counterclaim. The district court, however, granted General Connectors' motion for judgment notwithstanding the verdict, or for a new trial in the alternative, agreeing with General Connectors' contention that General Connectors' discontinuing the operation of its Bestobell division did not constitute a breach of the distributorship agreement with Valtrol. Although the jury denied General Connectors' counterclaim, the trial court ordered the parties to retry General Connectors' counterclaim against Valtrol. The trial court reasoned that Valtrol had defended General Connectors' counterclaim for payment by arguing that General Connectors' breach of the distributorship agreement destroyed Valtrol's ability to pay. The district judge ruled that, because of the court's finding that General Connectors had not breached the distributorship agreement with Valtrol, the court should set aside the jury's verdict on the counterclaim and order a retrial of the counterclaim. Valtrol appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit in *Valtrol* agreed with the district court's conclusion that Bestobell's cessation of business did not constitute a breach of the distributorship contract. The Fourth Circuit explained that contracts generally provide stability for business relationships by allocating between the parties the risks of changing economic conditions. The Fourth Circuit further explained that if parties to a contract fail to allocate risks of a changing economy, as did Valtrol and General Connectors, the parties will stand or fall together in the success or failure of their joint enterprise. Because Valtrol and General Connectors failed to allocate the risks of either party's going out of business, the Fourth Circuit concluded that General Connectors had not breached the distributorship agreement when General Connectors ceased doing business in the steam trap equipment market.

In determining whether Valtrol and General Connectors had allocated between themselves the economic risks of the distributorship relationship or whether the parties would stand or fall together in the distribution enterprise, the Fourth Circuit looked to the language of the distributorship agreement. In *Valtrol* the Fourth Circuit relied on Texas law in interpreting the distributorship agreement between Valtrol and General Connectors. The *Valtrol* court noted that the distributorship agreement between General Connectors and Valtrol did not expressly require General Connectors to stay in the steam trap equipment business. Additionally, the Fourth Circuit observed that the contract did not establish the consequences of General

Connectors' failure to remain in the steam trap equipment business. The Fourth Circuit also determined that Valtrol had failed to establish the existence of an implied covenant between the parties to remain in business. The *Valtrol* court reasoned that an inference of an implied covenant to remain in business was not required to carry out the intent of the parties and noted that the law generally disfavors implied covenants.

The Fourth Circuit also denied Valtrol's contention that a plain reading of the contract showed a long-term agreement between the parties to deal with one another. The *Valtrol* court likened the distributorship agreement to an output or requirements contract. Such contracts, the *Valtrol* court noted, are not promises to buy or sell a specific amount of goods and do not contain implied promises that the parties will continue to operate their businesses under all circumstances. Because the contract between Valtrol and General Connectors demonstrated no contrary intent, the Fourth Circuit held that each party bore the risk that the other party would go out of business.

In *Valtrol* the Fourth Circuit stressed that the court was not holding that economic difficulties generally will relieve contractual obligations. Instead, the Fourth Circuit held that a supplier is not liable to a distributor for going out of business in the absence of contractual intent to the contrary. The *Valtrol* court held that the contractual agreement between Valtrol and General Connectors to use commercially reasonable efforts to promote sales of steam trap equipment did not constitute a contractual duty to stay in business. Accordingly, because General Connectors did not breach the distributorship contract, the Fourth Circuit ruled that Valtrol could not recover consequential damages for cover and lost profits.

The Fourth Circuit next considered Valtrol's contention that Valtrol was entitled to a new trial on its claim for recoupment damages. The court described the function of the recoupment doctrine as providing a remedy if a supplier requires a distributor to make a substantial investment to establish the distributorship and then terminates the relationship without just cause, leaving the distributor with heavy unrecouped expenditures. The *Valtrol* court, however, noted that the recoupment remedy is unavailable if a party terminates a distributorship agreement with just cause. Based on the earlier ruling that General Connectors was under no duty to continue to operate its Bestobell division, the Fourth Circuit held that Valtrol could not use the recoupment doctrine to alter the allocation of risks to which the parties had agreed and denied Valtrol a new trial on Valtrol's recoupment claim.

Having rejected Valtrol's breach of contract claim, the Fourth Circuit next considered Valtrol's claim that the trial court erred in limiting Valtrol's damages for breach of warranty to repair and replacement costs. The distributorship agreement expressly limited warranty damages to repair and replacement and conspicuously and specifically disclaimed all implied warranties of fitness and merchantability. Despite the express limitations in the distributorship agreement, Valtrol contended that subsequent dealings of the parties had modified or overridden the agreement and that the Uniform Commercial Code's implied warranties of quality became a part of the new

contract by operation of law. The Fourth Circuit rejected Valtrol's argument and held that the express limitation of warranty contained in the distributorship agreement controlled the transactions in question and, therefore, precluded Valtrol's claim for incidental and consequential damages. The *Valtrol* Court rejected Valtrol's argument that subsequent dealings between Valtrol and General Connectors had modified the terms of the distributorship agreement because Valtrol's argument would have sanctioned Valtrol's unilateral imposition of contract terms that contradicted express warranty provisions in Valtrol's agreement with General Connectors.

Finally, the Fourth Circuit considered General Connectors' counterclaim against Valtrol. The counterclaim alleged that Valtrol had purchased steam equipment from the Bestobell division of General Connectors and had refused to pay for the equipment. Valtrol argued that the price of the equipment did not constitute a debt but rather reflected an incentive that General Connectors provided to Valtrol for the development of new sales territories. The Fourth Circuit court noted that General Connectors had not requested a new trial on the counterclaim in General Connectors' post-trial motion. Moreover, the *Valtrol* court observed that, although a district court has the power to order a new trial on the court's own initiative, the district court must give notice and an opportunity to be heard to the interested parties. Because the district court failed to give Valtrol the opportunity to address the sufficiency of the jury's verdict, the Fourth Circuit reversed the district court's grant of a new trial and reinstated the jury's verdict in favor of Valtrol on the counterclaim.

Accordingly, in *Valtrol* the Fourth Circuit affirmed the district court's grant of General Connectors' motion for judgment notwithstanding the verdict on Valtrol's breach of contract claim and reversed the district court's grant of a new trial on General Connectors' counterclaim. The Fourth Circuit also denied Valtrol's bid for a new trial on Valtrol's recoupment claim and affirmed the district court's directed verdict against Valtrol's claim for incidental and consequential damages resulting from General Connectors' alleged breach of warranty.

In *Jones v. General Motors Corp.*, 856 F.2d 22 (4th Cir. 1988), the Fourth Circuit considered whether Virginia Code section 8.01-35.1 (1984), which preserves a plaintiff's right to sue joint tortfeasors even after the plaintiff has released one or more of the joint tortfeasors from liability, requires that a release from liability be written. The plaintiff in *Jones*, Jones, was injured in an automobile accident with Pamela Brown on May 3, 1983. In April 1985 Jones settled his claim with Brown's insurance company. Jones then orally agreed to release Brown from any further liability arising out of the accident.

Jones subsequently filed suit in state court against General Motors, Potomac Leasing, and Moore Cadillac, alleging breach of warranty and negligence. Jones claimed that the collapse of the front seat of the Cadillac he was driving at the time of the accident worsened his injuries. Potomac Leasing and Moore Cadillac settled with Jones; General Motors removed

the case to federal court and named Brown as a third party defendant. In September 1987 Jones executed a written release absolving Brown of all liability. This release expressly reserved Jones's right to sue General Motors. The release also purported to fall under section 8.01-35.1 of the Virginia Code.

General Motors and Brown moved for summary judgment before the United States District Court for the Eastern District of Virginia. General Motors argued that the 1987 written release was ineffective because Jones's 1985 oral release of Brown operated under the common law to release all joint tortfeasors from further liability to Jones. The court denied the motions, but upon General Motors' and Brown's motions for reconsideration, the court held that Jones's 1985 oral promise had released all joint tortfeasors from liability because Jones did not execute the release in accordance with section 8.01-35.1 of the Virginia Code. Jones appealed from the order granting General Motors' and Brown's motions for summary judgment.

To resolve the issue, the Fourth Circuit first examined the legislature's intent in enacting section 8.01-35.1. Specifically, the court considered whether an agreement must be in writing to fall under section 8.01-35.1. Because the section effectively displaced the common law, the *Jones* court adhered to the principle of strict statutory construction. Analyzing the plain language of the statute, the court found that section 8.01-35.1, which provides that releases and covenants not to sue must be executed, requires a written agreement. The court listed several other examples of language in the statute that evince a writing requirement: "unless its terms so provide;" "any amount stipulated by the covenant or the release;" and releases "shall not be admitted into evidence, [though they] shall be considered by the court." The court held that strict construction, as well as the plain language of section 8.01-35.1, requires that a release be in writing for the section to apply to the release.

The *Jones* court listed several benefits of a written, as opposed to an oral, agreement: 1) ensuring that all parties understand who the agreement releases from liability and what the party paid as consideration for the release; 2) notifying those tortfeasors whom the injured party still might sue; 3) eliminating the need to litigate the validity and effect of the release; and 4) minimizing the possibility of confusion or collusion as to the terms of an earlier agreement.

Applying its interpretation of section 8.01-35.1 to the *Jones* facts, the Fourth Circuit held that Jones's 1985 oral release of Brown operated under the common law to release all other joint tortfeasors, including General Motors, from liability. The court rejected Jones's argument that, pursuant to section 8.01-35.1, the subsequent written release of Brown preserved Jones's right to sue General Motors. Section 8.01-35.1 provides that a person must execute a release in good faith. The court found that Jones did not execute his 1987 written release in good faith because he executed the release after the statute of limitations had run on his cause of action against Brown and after Jones had filed suit against General Motors. The

court implied that Jones wrote the release to comply with section 8.01-35.1 in hopes of preserving a cause of action against General Motors. The Fourth Circuit, therefore, affirmed the district court's judgment that granted General Motors' and Brown's motions for summary judgment against Jones.

In *Thompson v. Commissioner*, 866 F.2d 709 (4th Cir. 1989), the Fourth Circuit decided whether the Internal Revenue Service (IRS) may consider judicial awards of back pay and liquidated damages as income for tax purposes. Dorothy Thompson contended that the IRS should not tax back pay as income. The IRS asserted that the statutory definition of income includes both back pay and liquidated damages.

In 1973 Thompson sued her employer asserting sex discrimination claims under the Equal Pay Act of 1963, 29 U.S.C.A. section 206(d) (West 1978) and title VII of the Civil Rights Act of 1964, 42 U.S.C.A. sections 2000e-2000e-17 (West 1981). The United States District Court for the District of Columbia held for Thompson and awarded Thompson \$66,795.19 in back pay under the Equal Pay Act and title VII, and \$66,135.27 in liquidated damages under the Equal Pay Act. *Thompson v. Boyle*, 499 F. Supp. 1147 (D.D.C. 1979), *aff'd in part and remanded in part sub nom. Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982).

On Thompson's 1982 federal income tax return, Thompson reported the back pay award but not the liquidated damages award as income. The IRS audited Thompson, determined that the liquidated damages award was income, and assessed a deficiency. Thompson petitioned the tax court for a redetermination of the deficiency and sought a refund, claiming that the back pay award was excludable from her income. The tax court ruled that the back pay award, but not the liquidated damages award, was includable in income. The IRS appealed from the tax court's decision, arguing that the liquidated damages award constituted income. Thompson cross-appealed and claimed that an award of back pay was not includable in her income.

The Fourth Circuit initially considered the definition of income under the Internal Revenue Code (the Code). Section 61(a) of the Code, 26 U.S.C.A. section 61(a) (West 1988), provides that gross income includes "all income from whatever source derived." The Thompson court found, however, that code section 104(a)(2), 26 U.S.C.A. section 104(a)(2) (West 1988), provides an exception to the general definition of income for "the amount of any damages received on account of personal injuries or sickness." Treasury Regulation 1.104-1(c), 26 C.F.R. section 1.104-1(c) (1988), defines "damages received" as "an amount received through prosecution of a legal suit or action based upon tort or tort-type rights." The *Thompson* court noted that, although the Code fails to define "personal injuries," many courts have held that "personal injuries" are not strictly limited to physical injury. The *Thompson* court also stated that courts have distinguished between personal and nonpersonal injuries. The Fourth Circuit, thus, considered whether Thompson's awards of back pay and liquidated damages were awards for personal injuries.

The Fourth Circuit initially found that the right to be free from unreasonable gender discrimination is a personal right and, therefore, that

damages awarded for violation of that right are damages for personal injuries. The Fourth Circuit, however, determined that the award of back pay was not a payment for a tort-type right. The *Thompson* court reasoned that back pay is similar to reimbursement for a contract violation. The court found that Thompson simply received pay for services performed, not compensation for the tortious actions of a defendant.

The Fourth Circuit then held that Thompson's liquidated damages award was not earned income because such an award constitutes compensation received through a tort-type of action. As well as compensating Thompson for the discriminatory acts of Thompson's employer, the *Thompson* court asserted that the award of liquidated damages served to ensure future compliance with the Equal Pay Act. The Fourth Circuit, therefore, ruled that an award of back pay is not income because such an award essentially arises out of a contract claim for accrued wages. The Fourth Circuit further ruled that an award of liquidated damages is not income because that award results from a tort-type claim for personal injury. The Fourth Circuit, consequently, reversed the tax court's decision on both issues.

In *United States v. Wagstaff*, 865 F.2d 626 (4th Cir.), cert. denied, 110 S. Ct. 518 (1989), the Fourth Circuit considered whether evidence in a bank robbery case under 18 U.S.C. section 2113(a) (1982) was sufficient to show a taking by intimidation. In *Wagstaff* the defendant, Raymond Wagstaff, was arrested and charged with the robbery of the Baltimore City Irvington Federal Savings and Loan Association (the S & L). According to the court, the evidence at trial showed that the defendant entered the S & L, put on a ski mask and sunglasses, and began taking money from a teller's open cash drawer. The court stated that the defendant did not have a weapon, said nothing, presented no written note, and made no overtly threatening gestures. A teller testified that she was afraid.

After trial in the United States District Court for the District of Maryland, a jury found the defendant guilty of bank robbery in violation of 18 U.S.C. section 2113(a) (1982), bank larceny in violation of 18 U.S.C. section 2113(b) (1982), and entry into a bank with intent to steal in violation of 18 U.S.C. section 2113(a) (1982). The defendant appealed, arguing that the evidence presented was insufficient to show a taking by intimidation as required to prove bank robbery and, therefore, that the district court should have granted the defendant's motion for a judgment of acquittal on the bank robbery charge.

To resolve the issue, the Fourth Circuit determined that intimidation occurs if the defendant's conduct is reasonably calculated to produce fear. The court explained that intimidation requires that an ordinary, reasonable person must be able to infer a threat of bodily harm from the defendant's actions. In reaching its decision, the court rejected a Tenth Circuit opinion that found sufficient evidence of intimidation from the defendant's forceful and purposeful acts alone, in the absence of any explicit threat of harm or implicit threat of a weapon. The Fourth Circuit argued that the Tenth Circuit's reasoning substituted a set of assumptions about the behavior of any person taking money from a bank. The Fourth Circuit rejected any



presumption of intimidation whenever a bank robbery occurs, as such a presumption would in effect eliminate the requirement that the government prove intimidation as a separate element of the crime of bank robbery.

Applying the Fourth Circuit's definition of intimidation to the *Wagstaff* case, the court found that, as a matter of law, the evidence presented was insufficient to show a taking by intimidation because Wagstaff did not explicitly threaten harm or have a weapon. The court held that the district court erred in denying the defendant's motion for a judgment of acquittal on the bank robbery charge and reversed Wagstaff's conviction on that count. The court, however, affirmed without discussion the defendant's convictions on bank larceny and entry into a bank with intent to steal. The United States Supreme Court denied the defendant's petition for certiorari.

In *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989), the Fourth Circuit considered whether, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. sections 9601-9657 (1982) (CERCLA), the United States and the State of South Carolina retroactively could hold site owners of a hazardous waste disposal facility and generators of hazardous waste disposed at that facility jointly and severally liable for costs accrued for the partial removal of hazardous waste from the disposal facility. The defendants, Seidenburg and Hutchinson (the site owners), leased to Columbia Organic Chemical Corporation (COCC) a four-acre tract of land in Columbia, South Carolina. In the mid-1970s, after expanding its business, COCC incorporated South Carolina Recycling and Disposal, Inc. (SCRDI) for the purpose of assuming COCC's waste handling business. Thereafter, the site owners received lease payments from SCRDI. SCRDI contracted with numerous off-site waste producers, including Allied Corporation, Monsanto Company, and EM Industries, Inc. (collectively, the generator defendants), for the transport, recycling, and disposal of chemical and other waste. Between 1976 and 1980, SCRDI deposited on the Columbia site large amounts of hazardous substances from the generator defendants. The waste, contained in drums and other containers, leaked and seeped into the ground. Subsequently, the site owners became aware that the generator defendants were disposing hazardous waste at the Columbia site.

In 1980 the Environmental Protection Agency (EPA) investigated the site and concluded that the site posed a major fire hazard. Subsequently, the United States filed suit for injunctive relief under section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. section 6973 (1982) (RCRA), against COCC, SCRDI, and Seidenberg. Thereafter, the state of South Carolina intervened as a plaintiff and together with the United States government (the governments) notified the generator defendants, other off-site waste disposers, and the site owners that they potentially were responsible under section 107(a) of CERCLA, 42 U.S.C. section 9607(a) (1982), for the costs of cleanup at the waste disposal site. Several of the defendants elected to settle with the governments, but the generator defendants and the site owners did not settle.

After notifying the parties of potential CERCLA liability, the governments contracted with a private corporation to clean up the Columbia site. After the first phase of the cleanup was completed, the EPA inspected the site and determined that the site contained various hazardous substances of the same type that the generator defendants were known to have shipped to the site, and that drums and containers labelled with the insignia of the generator defendants remained at the site. Thereafter, the governments completed the site cleanup using federal funds from the Hazardous Substances Response Trust Fund (Superfund) and state money from the South Carolina Hazardous Waste Contingency Fund, as well as state matching funds.

To obtain reimbursement for cleanup expenses, in 1982 the governments filed suit under section 107(a) of CERCLA in the United States District Court for the District of South Carolina. The governments alleged that the generator defendants and the site owners jointly and severally were liable under section 107(a) of CERCLA for the costs the governments expended completing the surface cleanup of the Columbia site. The site owners contended that, because they were absentee landlords, they were unaware of the waste disposal activities on their land and that their lease with COCC did not allow COCC or SCRDI to store chemical waste at their site. The site owners admitted that since 1977 they knew of the waste disposal activities and that they continued to accept lease payments until 1980. The generator defendants claimed that none of their specific waste materials contributed to the hazardous conditions at the Columbia site and that retroactive imposition of CERCLA liability was unconstitutional. In addition, the generator defendants asserted an affirmative defense under section 107(b)(3) of CERCLA by showing that unrelated third parties solely caused the harm at the site.

In considering the defendants' claims, the district court rejected the site owners' innocent landowner defense and concluded that ownership of the property at the time hazardous substances were stored on the property was sufficient to hold the site owners liable. Further, the district court both concluded that the governments did not have to prove that the generator defendants' specific waste contributed to the harm at the site and rejected the generator defendants' constitutional arguments. Thus, the district court held that the environmental harm at the Columbia site was indivisible and that the site owners and the generator defendants jointly and severally were liable under CERCLA for cleanup costs. Accordingly, the district court granted the governments' motion for summary judgment and ordered the generator defendants and the site owners to pay the full amount of the cleanup costs. However, the district court denied the governments' request to add prejudgment interest to the amount owed.

The generator defendants and site owners appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit. The generator defendants, arguing that because the governments failed to establish a nexus between the generator defendants' specific waste and the harm at the site, claimed that the district court improperly imposed liability under

CERCLA. The site owners argued that they were innocent landowners under section 107(b)(3) of CERCLA and, therefore, that the district court wrongly precluded them from presenting evidence of the innocent landowner defense.

In considering the site owners' claims, the Fourth Circuit first noted that section 107(a)(2) of CERCLA imposes strict liability on owners of waste disposal facilities, regardless of the owners' degree of participation in the subsequent disposal of hazardous waste. Further, the Fourth Circuit stated that to establish the affirmative defense under section 107(b) of CERCLA, the site owners must establish the absence of a direct or indirect contractual relationship with persons solely responsible for the release or threatened release of hazardous substances at the Columbia site, as well as demonstrate that the site owners took precautionary action against the foreseeable consequences of the waste disposal actions of the generator defendants. The Fourth Circuit found that, because the site owners had entered a lease agreement with COCC and had accepted rent from both COCC and SCRDI, the site owners had maintained a contractual relationship with persons responsible for the release or threatened release of hazardous substances at the Columbia site. Accordingly, the Fourth Circuit held that the site owners failed to meet the first prong of the affirmative defense because the site owners could not establish the absence of a direct or indirect contractual relationship with persons solely responsible for the release or threatened release of hazardous substances at the Columbia site.

Similarly, the Fourth Circuit found that the site owners had wilfully and negligently ignored the waste disposal conduct of COCC and SCRDI on the site owners' property. The Fourth Circuit concluded that the site owners failed to meet the second prong of the affirmative defense because the site owners failed to present evidence that they took precautionary action against the foreseeable conduct of COCC and SCRDI. Thus, the Fourth Circuit held that, because the site owners owned the Columbia facility and because hazardous wastes were released from the facility during the site owners' period of ownership, the site owners were liable under CERCLA. Accordingly, the Fourth Circuit affirmed the district court's grant of summary judgment against the site owners.

In considering the generator defendants' liability, the Fourth Circuit addressed the generator defendants' argument that section 107(a)(3) of CERCLA requires the governments to prove a nexus between the waste the generator defendants sent to the site and resulting environmental harm. The Fourth Circuit reasoned that the phrase "such hazardous substances" in section 107(a)(3) denotes hazardous substances alike or similar to those found in the generator defendants' waste, or substances that the mixture of the generator defendants' waste and other waste from the site could have produced. Furthermore, the Fourth Circuit reasoned that, because Congress realized the technological infeasibility of tracing each chemical to its source, requiring the governments to trace the ownership of each generic chemical found at the site would be adverse to Congress's intent to facilitate prompt correction of hazardous waste disposal. Accordingly, the Fourth Circuit agreed with the district court's determination that proof that the government

found hazardous substances at the disposal site "like" those contained in the generator defendants' waste is sufficient to assess liability under CERCLA.

In considering the defendants' challenge to the district court's imposition of joint and several liability, the Fourth Circuit stated that federal common law allows for the imposition of joint and several liability in cases of indivisible harm. The Fourth Circuit stated that the defendants have the burden of establishing a reasonable basis for apportioning the harm between the responsible parties. The Fourth Circuit added, however, that the defendants failed to meet their burden because the defendants failed to submit either evidence showing a relationship between waste volume, the release of hazardous substances, and harm at the site, or evidence disclosing the individual and interactive qualities of the substances deposited there. Accordingly, the Fourth Circuit held that the district court properly imposed joint and several liability on the defendants.

In considering the defendants' constitutional claim, the Fourth Circuit considered whether retroactive application of CERCLA survives the Supreme Court's test for due process validity. The Fourth Circuit noted that the Supreme Court previously rejected an analogous due process challenge to the retroactive application of the Black Lung Benefits Act of 1972, on the grounds that the retroactive provisions of the Black Lung Benefits Act rationally were related to the valid legislative purpose of spreading the costs of employees' disabilities. The Fourth Circuit reasoned that the retroactive CERCLA provisions similarly were related to the valid legislative purpose of spreading the costs of environmental damage to those persons who profited from the inexpensive waste disposal methods that caused the environmental damage. Thus, the Fourth Circuit concluded that CERCLA's retroactive liability provisions were valid under the due process clause. Further, in response to the defendants' claim that CERCLA unconstitutionally acted as an *ex post facto* law, the Fourth Circuit noted that CERCLA does not impose punishment, but rather imposes a reimbursement obligation. Thus, the Fourth Circuit concluded that, because constitutional prohibitions against *ex post facto* laws were limited to those laws that impose punishment, CERCLA was not an unconstitutional *ex post facto* law. Accordingly, the Fourth Circuit affirmed the district court's grant of summary judgment against the generator defendants.

In response to the governments' cross-appeal claim that the district court erred in denying prejudgment interest on the response costs the generator defendants and site owners owe to the governments, the Fourth Circuit noted that, subsequent to the district court's decision, Congress had amended section 107(a) to allow the imposition of prejudgment interest. Accordingly, the Fourth Circuit remanded the case to the district court to determine whether prejudgment interest may be awarded in the instant case.