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Environmental Law

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ENVIRONMENTAL LAW

I. POLLUTION CONTROL ACT HELD NOT RETROACTIVE

Section 48-1-90 of the South Carolina Pollution Control Act[1] provides in pertinent part: "(a) It shall be unlawful for any person . . . to throw, drain, run, allow to seep or otherwise discharge into the environment . . . organic or inorganic matter, . . . except as in compliance with a permit issued by the Department [of Health and Environmental Control (DHEC)]."[2] In *Carolina Chemicals, Inc. v. South Carolina Department of Health & Environmental Control*[3] the South Carolina Court of Appeals construed section 48-1-90 as imposing liability on those persons who control or have a right to control the discharge of pollutants.[4] In addition, while ruling that the liability created in section 48-1-90 could not be imposed retroactively on a disposer of wastes, the court indicated that liability for the continuing effects of past conduct could be established on other legal theories or on different facts.[5]

In 1949 Carolina Chemicals moved to property on the perimeter of what is now the Columbia Metropolitan Airport (Airport). Carolina Chemicals blended chemicals purchased from other manufacturers to make agricultural pesticides. These chemicals were shipped to Carolina Chemicals in paper bags and drum containers which, after being emptied, were discarded until 1962.[6]

After a DHEC inspection of the Airport site in 1980, DHEC cited Carolina Chemicals and the Airport for violations of section 48-1-90.[7] Specifically, DHEC contended that the continuing

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1. Pollution Control Act, S.C. CODE ANN. § 48-1-10 to -350 (Law. Co-op. 1987).
2. S.C. CODE ANN. § 48-1-90 (Law. Co-op. 1987).
3. 290 S.C. 498, 351 S.E.2d 575 (Ct. App. 1986).
4. *Id.* at 506-07, 351 S.E.2d at 580.
5. *Id.* at 507, 351 S.E.2d at 580.
6. *Id.* at 500, 351 S.E.2d at 576-77. Since there was no regular waste disposal service in the area, Carolina Chemicals and the Airport entered into a contract which permitted Carolina Chemicals to dispose of its waste at a site on the Airport's property for a monthly fee of $25. The arrangement lasted until 1962, when Carolina Chemicals ceased all dumping at the Airport site. *Id.*
7. *Id.* at 500-01, 351 S.E.2d at 577; Record at 6-7.

seepage of pesticide chemical wastes at the Airport site constituted a present violation of section 48-1-90 and that Carolina Chemicals was responsible for the violation by "allowing" the chemicals to seep.[8]

The court of appeals rejected DHEC's interpretation of section 48-1-90, concluding that "[t]he wording of Section 48-1-90 implies that a person violating the statute is one who, directly or indirectly, controls or has a right to control the discharge."[9] The court found that because Carolina Chemicals plainly intended to abandon all interest in or control over the containers when it discarded its waste at the Airport site, and because it acquired no interest in the real property used for disposal, Carolina Chemicals did not control or have a right to control the discharged waste. Therefore, Carolina Chemicals was not presently violating section 48-1-90.[10]

Alternatively, DHEC maintained that section 48-1-90 should be applied retroactively because the conduct of Carolina Chemicals during the period from 1958 to 1962 constituted either a common-law nuisance or a violation of 1950 S.C. Acts 873.[11] Citing three reasons, the court of appeals refused to apply section 48-1-90 retroactively. First, DHEC had cited Carolina Chemicals for a violation of section 48-1-90, not for a common-law nuisance or violation of 1950 S.C. Acts 873.[12] Second, not only had Carolina Chemicals never been found liable for creating a common-law nuisance, but also DHEC's own hearing officer found that the company had never violated any statutes or regulations in force when it disposed of the containers.[13] Finally and probably most importantly, the court of appeals found that

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8. Brief of Secondary Appellant at 7.

9. 290 S.C. at 503, 351 S.E.2d at 578. The court stated that "[i]f we were to interpret the statute with the same literalmindedness as the Department, all the world would be violating the statute, since no one is taking affirmative steps to stop leaching from the containers." *Id.*

10. *Id.* The court found the Airport liable under § 48-1-90, however, since the Airport had "present ownership of the land and the present right of disposition and control over the discarded containers." *Id.* at 506, 351 S.E.2d at 580.

11. *Id.* at 504, 351 S.E.2d at 579. Act of May 4, 1950, 1950 S.C. Acts 873, which was in effect during the time Carolina Chemicals dumped its containers, provided in pertinent part: "It shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into any waters of this State . . . organic or inorganic matter that shall cause or tend to cause a condition of pollution in contravention of the standards adopted by the Authority." 1950 S.C. Acts 873, § 8.

12. 290 S.C. at 505, 351 S.E.2d at 579.

13. *Id.* at 504, 351 S.E.2d at 579; *see also* Record at 310.

section 48-1-90 created a substantive liability that did not exist in 1962 when Carolina Chemicals last disposed of its containers.[14] Without a clear mandate from the legislature, the court of appeals refused to hold Carolina Chemicals in violation of a statutory or regulatory duty which did not exist at the time the containers were discarded.[15]

Although the court of appeals refused to apply section 48-1-90 retroactively, the court emphasized that *Carolina Chemicals* "should not be read to suggest there can never be liability for the continuing effects of past conduct under other legal theories or on different facts."[16] Because the court of appeals did not further explain the meaning of this dictum, one is left to speculate about the available means of imposing liability on waste disposers or generators who complied with the then-existing pollution statutes and regulations, but whose past conduct would have violated modern waste disposal laws. The court could have meant that section 48-1-90 does not supplant previous statutory or common-law causes of action.[17] This interpretation can be inferred from the court's observation that Carolina Chemicals had never been found liable for creating a common-law nuisance or

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14. 290 S.C. at 505, 351 S.E.2d at 579. While the court seemed to assume that the strict liability of § 48-1-90 became effective on April 29, 1970, a comparison of Act of April 29, 1970, 1970 S.C. Acts 1157, §§ 1(7) & 13, with Act of July 9, 1973, 1973 S.C. Acts 446, § 1, shows that a finding of liability under the 1970 act was still dependent upon a showing that the discharge was in contravention of the standards of the Pollution Control Authority and thus was not strict liability. It was not until adoption of Act of June 4, 1975, 1975 S.C. Acts 203, § 6, that liability was established merely by showing that the discharge did not comply with the permitting requirements.

15. 290 S.C. at 507, 351 S.E.2d at 580. Even when there is clear legislative intent that a statute be given retroactive effect, many courts will not apply the statute retroactively when to do so would lead to unjust results. *See* American Fly Ash Co. v. County of Tazewell, 120 Ill. App. 3d 57, 457 N.E.2d 1069 (1983); Department of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983).

16. 290 S.C. at 507, 351 S.E.2d at 580. In fact, a federal district court jury later ordered Carolina Chemicals to pay for clean-up costs incurred at the Airport site. The court found Carolina Chemicals liable under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 (1982). The State, April 18, 1987, at B1, col. 5.

17. Common-law causes of action in South Carolina include negligence, nuisance, and injury to riparian rights. *See* Fisher & Gaston, *Pollution Control Practice in South Carolina—An Overview*, 23 S.C.L. REV. 723 (1971). For a discussion of other common-law causes of action, see Baurer, *Love Canal: Common Law Approaches to a Modern Tragedy*, 11 ENVTL. L. 133 (1980) and Note, *An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries*, 12 RUTGERS L.J. 117 (1980) (authored by Steven T. Singer).

of violating 1950 S.C. Acts 873.[18]

Alternatively, *Carolina Chemicals* may leave open the possibility of a retroactive application of section 48-1-90. If DHEC could show that the past conduct of a waste disposer would have constituted a violation of section 48-1-90 had the conduct occurred after April 29, 1970,[19] and that the waste disposer breached an affirmative duty at the time of the conduct,[20] an action might lie for violation of the statute. This interpretation would be advantageous to DHEC because it would allow DHEC to circumvent the statute of limitations defense—a defense which could preclude a suit by DHEC in cases such as *Carolina Chemicals* when the conduct took place in 1962. Additionally, this interpretation would allow selective retroactive application of section 48-1-90 while obviating the inequity of punishing waste disposers for conduct which was completely lawful at the time of its occurrence.[21]

Although the court of appeals never unequivocally stated that section 48-1-90 could never be applied to conduct predating April 29, 1970, the court did make clear that persons who control or have a right to control waste dump sites may be liable under section 48-1-90 regardless of whether they generated or disposed of the waste.[22]

David A. Raeker

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18. 290 S.C. at 504, 351 S.E.2d at 579. It seems unlikely that the court was merely pointing out that § 48-1-90 is not an exclusive remedy since the Pollution Control Act states that it does not abridge or alter rights of action or remedies existing in equity, the common law, or statutory law. S.C. CODE ANN. § 48-1-240 (Law. Co-op. 1987).

19. This date assumes that strict liability was created by Act of April 29, 1970, 1970 S.C. Acts 1157. *But see supra* note 14.

20. *See supra* note 17.

21. The court stated that "[w]here such 'no fault' liability is created after the fact, only the clearest mandate from the Legislature should lead us to apply the statute retroactively." 290 S.C. at 507, 351 S.E.2d at 580. The court was concerned about the inequity of holding "Carolina Chemicals in violation of a substantive liability which did not exist at the time the containers were discarded," *id.* at 505, 351 S.E.2d at 579, when DHEC's "own hearing officer determined Carolina Chemicals conformed to then existing statutes and regulations when it disposed of the containers." *Id.* at 504, 351 S.E.2d at 579; *see also supra* note 15.

22. Practitioners should note that *Carolina Chemicals* imposes liability on "one who, directly or indirectly, controls or has a right to control the discharge." 290 S.C. at 503, 351 S.E.2d at 578. This liability is in no way limited to landowners who allow wastes to be disposed on their property, as was the case with the Airport's liability in *Carolina Chemicals*. Rather, it is likely that § 48-1-90, as interpreted by the court of appeals, would impose liability on innocent subsequent purchasers, owners of waste disposal companies, or even tenants who have the right to exclude trespassing covert waste disposers.