

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 7
Issue 3 1999-2000

Article 3

2000

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Recommended Citation

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CASENOTE

DOES A PRP LETTER TRIGGER A SELLER'S DUTY TO INDEMNIFY?

*Datron, Inc. v. CRA Holdings, Inc.*¹

I. INTRODUCTION

Under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),² the Environmental Protection Agency ("EPA") has the authority to identify hazardous waste sites in the United States and send letters to the owners informing them that they are potentially responsible parties ("PRPs") liable for site remediation.³ Most often, this scenario plays out in the context of the insurance industry: the insured receives a PRP letter and notifies its insurer of impending action by the EPA. A number of courts have ruled that such PRP letters constitute "suits," thereby triggering an insurer's duty to defend, while others have declined to recognize PRP letters as suits.⁴ *Datron, Inc. v. CRA Holdings, Inc.* presented the court with a novel question: Does a PRP letter trigger a seller's duty to indemnify the buyer under a stock purchase agreement that includes a real estate transaction? This casenote will focus on the court's analysis of and answer to the above question, as well as the extent to which a parent corporation may be held liable as an operator under CERCLA.

II. FACTS AND HOLDING

Datron, Inc. ("Datron") sued CRA Holdings, Inc. ("CRA") in federal district court to recover damages for the alleged contamination of five pieces of real property it purchased from CRA.⁵ CRA is the corporate successor of International Controls Corporation ("ICC").⁶ Datron and ICC entered into a Stock Purchase Agreement ("Agreement") in May 1988.⁷ Under the Agreement, ICC sold all outstanding shares of its two subsidiaries, All American Industries, Inc. ("AAI") and Datron Systems, Inc. ("DSI"), to Datron.⁸ As part of the Agreement, Datron acquired five properties located in various parts of the country.⁹ The deal closed on May 20, 1988.¹⁰

Section 21 of the Agreement provided that it would be "governed and interpreted" according to the laws of New York.¹¹ Under section 5.32, "ICC made certain representations and warranties with respect to the environmental conditions at the properties Datron purchased."¹² Further, in an indemnification provision contained within the Agreement, "ICC agreed to hold Datron harmless at all times from and after the Closing Date against '[a]ny and all damages, losses, liabilities...costs and expenses resulting from any misrepresentation, breach of warranty or nonfulfillment of any covenant or agreement on the part of [ICC] under [the] Agreement.'¹³ ICC's duty to indemnify

¹ 42 F. Supp. 2d 736 (W.D. Mich. 1999).

² 42 U.S.C. §§ 9601-75 (1995).

³ Steven J. Shaw, *Environmental Law: Does a "PRP" Letter Trigger an Insurer's Duty to Defend in South Carolina?*, 48 S.C. L. REV. 139 (1996).

⁴ See, e.g., *Michigan Millers Mutual Insurance Co. v. Bronson Plating Co.*, 519 N.W.2d 864 (Mich. 1994) and *Avondale Industries, Inc. v. Travelers indemnity Co.*, 887 F.2d 1200 (2d Cir. 1989) (holding that PRP letters constituted suits, thereby triggering the insurers' duty to defend). But see *Technicon Electronics Corp. v. American Home Assurance Co.*, 141 A.D.2d 124 (N.Y. App. Div. 1988) and *Detrex Chemical Industries, Inc. v. Employers Insurance of Wausau*, 681 F. Supp. 438 (N.D. Ohio 1987), the courts ruled there was no duty to defend.

⁵ *Datron*, 42 F. Supp. 2d at 738.

⁶ *Id.* at 739. CRA is a Delaware corporation with its principal place of business in Kalamazoo, Michigan. Datron is also a Delaware corporation with its principal place of business in Windsor, Connecticut.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* n.5. The five properties are owned by several subsidiaries: Anchor Metals, Inc., a subsidiary of AAI, owns property in Anniston, Alabama, and Hurst, Texas; IMCO, another AAI subsidiary, owns the Intercontinental Manufacturing Co. property in Garland, Texas; DSI owns the EEMCO property in Los Angeles, California; and DSI's subsidiary, Tech Systems, Inc., owns the property in Thomaston, Connecticut.

¹⁰ *Id.*

¹¹ *Id.* at 739-40.

¹² *Id.* at 739.

¹³ *Id.*

remained in effect for a five-year period following the Closing Date, until May 20, 1993.¹⁴ However, an exception to the five-year indemnification period under section 14(d) of the Agreement provided that ICC's duty to indemnify extended to "proceedings" initiated within the five-year window, but not yet completed.¹⁵

Sometime after the stock purchase transaction, Datron received letters from the EPA advising that it was a PRP due to contamination on certain pieces of property.¹⁶ Thereafter, Datron notified CRA within the five-year period.¹⁷

Datron sued CRA as corporate successor to ICC, alleging that CRA failed to warn that each of the properties had environmental conditions that needed to be addressed.¹⁸ Specifically, Datron claimed CRA was liable for clean-up costs pursuant to (1) the indemnification provision contained in the Agreement; and (2) § 107 of CERCLA.¹⁹ Datron sought indemnification and a declaratory judgment that CRA had to pay all costs associated with indemnifiable items under the Agreement.²⁰ CRA also sought declaratory judgment, claiming it had no duty to indemnify Datron for any costs incurred after May 20, 1993.²¹

In court, Datron claimed that the Agreement was unambiguous and that the PRP letters constituted "proceedings" under section 14(d), thereby extending CRA's liability past the five-year period and triggering its duty to indemnify.²² The Agreement did not define the term "proceeding."²³ Given this fact, Datron put forth two major arguments.²⁴ First, Datron argued that "proceeding" should be broadly construed because it lacked modifying words such as "legal" or "judicial," and offered in support of its claim the *Webster's Third New International Dictionary* definition of "proceeding" as "an action or a particular course of action."²⁵

Secondly, and in the alternative, Datron argued that the PRP letters constituted a "proceeding" because they signified the commencement of negotiations and an EPA investigation, whereby the EPA would try to hold Datron responsible for the expenses incurred in cleaning up the properties.²⁶ Here, Datron asserted that, within the insurance context, courts had construed PRP letters as "suits," reasoning that "if the term 'suit' could be interpreted to include EPA PRP letters, the term 'proceedings' should be even more capable of such an interpretation" because "'suit' more strongly indicated a legal action than the term 'proceedings.'"²⁷ Datron also argued that liability arose during the five-year period with regard to the PRP letters and environmental violations, despite the fact that it paid no actual costs.²⁸ It asserted that the Agreement ensured "that liability remained with ICC provided that the matter arose or was discovered prior to the end of the five-year period."²⁹

¹⁴ *Id.*

¹⁵ *Id.* at 739, 741. Section 14(d) provides that the environmental liabilities of the Seller shall survive:

until the relevant statutes of limitations with respect of such matters have run (and for such additional time, in the event that any proceeding with respect to any such environmental matter has been initiated prior to the end of the relevant limitation period set forth in this subparagraph (d), the representations and warranties made by Seller herein with respect to such matter shall survive until the conclusion of such proceeding).

¹⁶ *Id.* at 740 n.11. Datron claimed the contamination sites included: (1) Anniston Property: Metal soils contamination; (2) Hurst Property: Chlorinated solvent and ground water contamination; (3) IMCO Property: Underground storage tank removal and soil remediation: soil contamination; (4) EEMCO Property: Superfund site; soil and groundwater contamination: asbestos; and (5) Tech Systems Property: Post Closure groundwater monitoring and maintenance of hazardous waste lagoons; removal of underground storage tanks: Superfund site. *Id.*

¹⁷ *Id.* at 741.

¹⁸ *Id.*

¹⁹ *Id.* at 738.

²⁰ *Id.* at 740.

²¹ *Id.*

²² *Id.* at 740-41.

²³ *Id.* at 741.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* (Quoting Datron's Supplemental Authority Re: Proceedings at 3. (Dkt # 54). Datron rested its argument regarding PRP letters on one case: *Michigan Millers Insurance Co. v. Bronson Plating Co.*, 519 N.W.2d 864 (Mich. 1994) (holding that a PRP letter constituted a "suit," thereby triggering an insurer's duty to defend).

²⁸ *Id.* at 743.

²⁹ *Id.* Datron relied on section 12.1 of the Agreement, which provides that ICC's indemnification covers:

(a) Any and all damages, losses, liabilities, taxes and deficiencies and penalties and interest thereon and costs and expenses resulting from [sic] any misrepresentation, breach of warranty or nonfulfillment of any covenant or agreement on the part of the Seller under this Agreement...

Under CERCLA, Datron argued that CRA, as corporate successor to ICC, was liable as an "operator" for each of the five pieces of property.³⁰ Essentially, it claimed that CRA had managed and directed the operations with respect to environmental matters at each of the properties.³¹ Allegedly, CRA had known of, and in effect sanctioned, any environmental violations.³²

CRA disputed Datron's claims.³³ It also contended that the Agreement was unambiguous, but that "the ordinary meaning of 'proceeding' is one of actions before judicial tribunals," and invoked the definition of "proceeding" found in *Black's Law Dictionary*.³⁴ CRA also argued that its indemnification obligation was limited to (1) a loss paid by Datron; or (2) a liability paid or judicially determined in a final judgment, order or decree within the five-year period.³⁵ CRA likewise argued that it was not liable as an operator under CERCLA because "each subsidiary was operated as an independent business," and "hazardous waste decisions were made by personnel employed at that facility."³⁶

Both parties moved for summary judgment: Datron on the claim for indemnification under the Agreement, and CRA on the claims for indemnification and liability under CERCLA.³⁷ The court ruled in favor of CRA, holding that (1) Datron's analogy to PRP letters as "suits" within the insurance context, and as "proceedings" under the indemnification provision, was unavailing because the principles underlying the construction of an indemnification provision were different from those underlying the duty to defend in an insurance contract;³⁸ (2) in accordance with common parlance, under the indemnification provision the term "proceeding" had a legal connotation, which limited it to actions before judicial and quasi-judicial tribunals;³⁹ (3) CRA had no duty to indemnify because Datron failed to pay a loss or liability during the five-year period, or obtain a judicially determined liability in a final judgment, order or decree;⁴⁰ and (4) CRA was not liable as an operator under CERCLA because its involvement with the facilities fell well within the parameters of normal oversight by a parent corporation over its subsidiaries.⁴¹

III. LEGAL BACKGROUND

A. CERCLA

Congress enacted CERCLA in 1980 in order to deal with mounting public concern over hazardous waste sites across the United States.⁴² Its objectives in creating CERCLA were four-fold: (1) to encourage care and responsibility in the handling of hazardous waste; (2) to provide for a fast and efficient response to environmental emergencies; (3) to

³⁰ *Id.* at 747.

³¹ *Id.* Datron argued that CRA's actions fell within the standard put forth by *United States v. Bestfoods*, 524 U.S. 51, 66 (1998) ("under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility...an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste...").

³² *Id.*

³³ *Id.* at 743-44 and 747-48.

³⁴ *Id.* at 743. *Black's Law Dictionary* defines "proceeding" as "[i]n a general sense, the form and manner of conducting juridical business before a court or judicial officer." *BLACK'S LAW DICTIONARY* 1204 (6th ed. 1990).

³⁵ *Id.* at 744. In support of its proposition, CRA relied on section 12.7 of the Agreement, which provides:

At the time that the Indemnified Party shall suffer a loss because of a breach of warranty, representation or covenant by the Indemnitor or at the time the amount of any liability on the part of the Indemnitor under this section is determined (which in the case of payments to third person shall be the earlier of (I) the date of such payments or (ii) the date that a court of competent jurisdiction shall enter a final judgment, order or decree...) the Indemnitor shall forthwith, upon notice from the Indemnified Party, pay to the Indemnified Party the amount of the indemnity claim.

Id.

³⁶ *Id.* at 747.

³⁷ *Id.* at 738-39.

³⁸ *Id.* at 742.

³⁹ *Id.* at 743.

⁴⁰ *Id.* at 744.

⁴¹ *Id.* at 748.

⁴² Steven J. Shaw, *Environmental Law: Does a "PRP" Letter Trigger an Insurer's Duty to Defend in South Carolina?*, 48 S.C. L. REV. 139, 139 (1996).

promote voluntary clean-up of hazardous waste spills; and (4) to make sure that parties responsible for hazardous waste spills bear the costs of response and damage to the environment.⁴³

CERCLA empowers the EPA Administrator ("Administrator") to identify sites where there is an actual or threatened release of hazardous waste and to direct clean-up on the part of PRPs.⁴⁴ PRPs may include: (1) present owners and operators of a site; (2) past owners and operators of a site; (3) generators of hazardous waste who arranged for its disposal at a particular site; and (4) those who transported hazardous waste to a site.⁴⁵ When sufficient preliminary evidence exists that a party is responsible for environmental violations at a site, the Administrator sends out notices of potential liability or PRP letters.⁴⁶ PRP letters "serve to inform parties about their potential liability for CERCLA response costs, define the scope of potential liability, explain why they have been identified as PRPs, begin the exchange of information, and facilitate negotiation of settlement agreements."⁴⁷

Once PRP letters are sent, clean-up of hazardous waste sites may take one of three forms: (1) PRPs may voluntarily elect to clean-up the site; (2) the EPA may choose to clean-up the site using federal funds from Superfund, and then go after the parties for reimbursement; or (3) the EPA may seek injunctive relief by issuing an administrative order requiring the PRPs to clean-up the site.⁴⁸ If the Administrator issues an administrative order requiring a PRP to clean up the site and the PRP fails to do so, it may be subject to fines of up to \$25,000 per day and/or treble damages.⁴⁹ In this respect, PRP letters may be said to carry "immediate and severe implications."⁵⁰

Regardless of actual fault, parties identified as PRPs under CERCLA are strictly liable.⁵¹ Because of this, "PRPs should actively pursue their few available defenses as soon as possible," and "can only avoid liability if the release of threatened release of hazardous substances is caused by '(1) an act of God; (2) an act of war; (or) (3) an act or omission of a third party other than an employee or agent of the defendant.'"⁵²

B. *The Contract Claim under the Stock Purchase Agreement*

1. *General Principles of Contract Interpretation*

As a cardinal rule, when a trial court reviews a written contract, its main objective is to give effect to the intent of the parties as revealed by the language they chose to use in the agreement.⁵³ Moreover, in order to determine the parties' intent, "the contract must be read as a whole, and all its clauses must be considered together to determine if and to what extent one may modify, explain or limit another."⁵⁴ In order to aid construction of the contract, a court ought to consider the situation of the parties, their attendant circumstances, and the goals they sought to achieve in the agreement.⁵⁵ But clear and unambiguous terms should be given their "ordinary and natural"⁵⁶ meaning and courts should not rewrite unambiguous agreements.⁵⁷ If, however, an agreement contains ambiguous language, then a court should construe such language against the interest of the party that drafted it.⁵⁸

⁴³ Sidney S. Liebesman, *Triggering an Obligation: Receipt of an EPA PRP Letter and an Insurer's Duty to Defend*, 5 VILL. ENVTL. L.J. 479, 479 (1994).

⁴⁴ 42 U.S.C. § 9604(a)(1) (1995). Robert K. Luce, *If the Threat is Clear: PRP Letters as a "Suit" within the Duty to Defend Clause*, 1993 DET. C.L. REV. 1275, 1278 (1993).

⁴⁵ 42 U.S.C. § 9607(a)(1)-(4) (1995). Mark S. Dennison, *What Constitutes "Suit" Triggering Insurer's Duty to Defend Environmental Claims--State Cases*, 48 A.L.R.5th 355, 366 (1997).

⁴⁶ Liebesman, *supra* note 43, at 488.

⁴⁷ Dennison, *supra* note 45.

⁴⁸ Liebesman, *supra* note 43, at 481-82.

⁴⁹ *Id.* at 482.

⁵⁰ Shaw, *supra* note 42, at 140 (quoting *Aetna Casualty and Surety Co. v. Pintlar Corp.*, 948 F.2d 1507, 1516 (9th Cir. 1991)).

⁵¹ Dennison, *supra* note 45.

⁵² Shaw, *supra* note 42, at 140.

⁵³ *Seiden Associates, Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992).

⁵⁴ *Allendale Mutual Insurance Co. v. Excess Insurance Co.*, 970 F. Supp. 265, 269 (S.D.N.Y. 1997).

⁵⁵ *Williams v. Metzler*, 132 F.3d 937, 947 (3d Cir. 1997).

⁵⁶ *River Forest State Bank and Trust Co. v. Rosemary Joyce Enterprises, Inc.*, 689 N.E.2d 163, 167 (Ill. App. 1997).

⁵⁷ *Niagra County Sewer District No. 1 v. Town of Niagra*, 214 A.D.2d 978, 979 (N.Y. App. Div. 1995).

⁵⁸ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

Regarding interpretation of terms in business contracts, the court in *Uribe v. Merchants Bank of New York*⁵⁹ stated that the tests to be applied are common speech and the reasonable expectation and purpose of the ordinary business[person], against the "factual context in which terms of art and understanding are used."⁶⁰ The above test also applies to construction of insurance policies.⁶¹

2. PRP Letters in the Context of the Insurance Industry

Courts are split over the issue of whether a PRP letter constitutes a "suit" under the terms of comprehensive general liability policies.⁶² When courts construe PRP letters as "suits," the insurer's duty to defend is thereby triggered.⁶³ In *Michigan Millers Mutual Insurance Co. v. Bronson Plating Co.*,⁶⁴ the defendant ("Bronson") was engaged in electroplating various metal parts at its business in Bronson, Michigan.⁶⁵ As part of the production process, the Bronson facility released large amounts of waste water, which the EPA and the Michigan Department of Natural Resources subsequently determined was a possible source of contamination.⁶⁶ After receiving PRP letters from the EPA requesting voluntary participation in certain studies, Bronson notified its insurer, Michigan Millers Mutual Insurance Company ("Michigan Millers"), of its duty to defend and indemnify Bronson for suits filed against it.⁶⁷ Michigan Millers then sought a judicial determination that it was not obligated to defend Bronson because no "suit" had been commenced.⁶⁸

The Michigan Supreme Court considered the question of "whether the EPA letter notifying Bronson of its potential liability for alleged environmental contamination constitutes a 'suit' that gives rise to the insurer's duty to defend under the terms of the applicable insurance contracts."⁶⁹ The court held that (1) the term "suit," as used in the insurance policies, was ambiguous and capable of application to legal actions, other than court proceedings, that are the functional equivalent of a suit brought in a court of law; and (2) the PRP letter received by Bronson signaled "the initiation of a legal proceeding that was the functional equivalent of a traditional court action, and thereby triggered the insurer's duty to defend."⁷⁰ In arriving at its holding in favor of Bronson, the court noted that "Bronson could be held jointly and severally liable for 'all costs associated with the removal or remedial action and all other necessary costs incurred in cleaning up the site, including investigation, planning and enforcement.'"⁷¹ The court further stated that the EPA's powers could be "viewed as coercing the 'voluntary' participation of PRPs."⁷² On similar facts, in *American Bumper and Manufacturing Co. v. Hartford Fire Insurance Co.*,⁷³ the Michigan Supreme Court reaffirmed its holding in *Bronson Plating*.⁷⁴

Other courts have ruled the same way. In *Anderson Development Co. v. Travelers Indemnity Co.*,⁷⁵ the Sixth Circuit Court of Appeals likewise held that receipt of a PRP letter functioned as an initiation of suit, thereby triggering an insurer's duty to defend.⁷⁶ In *Hazen Paper Co. v. United States Fidelity and Guaranty Co.*,⁷⁷ the EPA sent a PRP letter to Hazen Paper Company ("Hazen"), alleging "environmental pollution by a facility to which Hazen had sent solvents for recycling from 1976 to 1979."⁷⁸ Hazen sued its insurer, USF & G, seeking a declaration that USF & G had a duty to

⁵⁹ 693 N.E.2d 740 (N.Y. 1998).

⁶⁰ *Id.* at 743.

⁶¹ *Ace Wire & Cable Co., Inc. v. Aetna Casualty & Surety Co.*, 457 N.E.2d 761, 764 (N.Y. 1983).

⁶² Liebesman, *supra* note 43, at 492.

⁶³ *Id.* at 493.

⁶⁴ 519 N.W.2d 864 (Mich. 1994).

⁶⁵ *Id.* at 866.

⁶⁶ *Id.*

⁶⁷ *Id.* at 867.

⁶⁸ *Id.* at 868.

⁶⁹ *Id.*

⁷⁰ *Id.* at 866.

⁷¹ *Id.* at 871.

⁷² *Id.* at 872.

⁷³ 550 N.W.2d 475 (Mich. 1996).

⁷⁴ *Id.* at 481 (stating that an EPA PRP letter constituted a suit under the insurance policy at issue).

⁷⁵ 49 F.3d 1128 (6th Cir. 1995).

⁷⁶ *Id.* at 1132.

⁷⁷ 555 N.E.2d 576 (Mass. 1990).

⁷⁸ *Id.* at 578.

defend and indemnify Hazen for the claims filed against it.⁷⁹ In deciding whether the EPA PRP letter constituted a “suit” under the insurance policy, the Supreme Judicial Court of Massachusetts stated that “the litigation defense protection that Hazen purchased from USF & G would be substantially compromised if USF & G had no obligation to defend Hazen’s interests in response to the EPA letter.”⁸⁰ The court noted that the letter advised Hazen of criminal penalties if it failed to provide certain requested information, that EPA processes had shifted from the use of lawsuits toward the use of agency demands, and that the requests were “dangerous for the alleged polluter to ignore because they often result[ed] in dispositive, extrajudicial solutions.”⁸¹ The court held that receipt of the EPA letter was “so substantially equivalent to the commencement of a lawsuit that a duty to defend arose immediately.”⁸²

Aetna Casualty and Surety Co. v Pintlar Corp.,⁸³ involved an EPA PRP letter sent to defendant regarding contamination associated with its mining and smelting facilities.⁸⁴ There, the Ninth Circuit Court of Appeals stated that “an ‘ordinary person’ would believe that the receipt of a PRP notice is the effective commencement of a ‘suit’ necessitating a legal defense.”⁸⁵ Furthermore, if the receipt of a PRP notice were held not to trigger the duty to defend, “then insureds might be inhibited from cooperation with the EPA in order to invite the filing of a formal complaint.”⁸⁶ The court held that the EPA letter triggered the insurers’ duty to defend.⁸⁷ And, in *Avondale Industries, Inc. v. Travelers Indemnity Co.*,⁸⁸ the court concluded that a PRP letter sent by the Louisiana State Department of Environmental Quality to insured constituted a “suit” for insurance purposes.⁸⁹

A number of other courts have ruled that receipt of a PRP letter does not constitute the initiation of a “suit” and thereby trigger the insurer’s duty to defend. In *Technicon Electronics Corp. v. American Home Assurance Co.*,⁹⁰ Technicon received an EPA PRP letter informing it that it was potentially responsible for polluting a creek.⁹¹ Technicon sought indemnification and defense from its liability insurer.⁹² The court stated that “[t]he EPA letter at issue merely informed Technicon of its potential liability under CERCLA and that the EPA was interested in discussing Technicon’s voluntary participation in remedial measures.”⁹³ Therefore, according to the court, the PRP letter was only an “invitation to voluntary action” on the part of Technicon and did not equate to the commencement of a formal proceeding under the meaning of the insurance policies.⁹⁴ The PRP letter did not constitute a “suit” requiring defense from the insurer.⁹⁵

In *Detrex Chemical Industries, Inc. v. Employers Insurance of Wausau*,⁹⁶ the court noted that “[m]erely because the PRP letters to Detrex informed it that it might be liable for cleanup costs, penalties and punitive damages under CERCLA, does not mean that these letters meet the attributes of a ‘suit.’”⁹⁷ Here, the court pointed out that the EPA had not yet tried to recover clean-up costs from Detrex, nor had it applied for an injunction to compel Detrex to abate the release of the contaminants.⁹⁸ Finally, in *Ryan v. Royal Insurance Co. of America*,⁹⁹ the court ruled that a PRP letter sent by the New York Department of Environmental Conservation was not the functional equivalent of a suit because it lacked

⁷⁹ *Id.*

⁸⁰ *Id.* at 580.

⁸¹ *Id.* at 580-81.

⁸² *Id.* at 581.

⁸³ 948 F.2d 1507 (9th Cir. 1990).

⁸⁴ *Id.* at 1509.

⁸⁵ *Id.* at 1517.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 887 F.2d 1200 (2d Cir. 1989).

⁸⁹ *Id.* at 1206.

⁹⁰ 141 A.D.2d 124 (N.Y. App. Div. 1988).

⁹¹ *Id.* at 126.

⁹² *Id.*

⁹³ *Id.* at 146.

⁹⁴ *Id.*

⁹⁵ *Id.* at 145.

⁹⁶ 681 F.Supp. 438 (N.D. Ohio 1987).

⁹⁷ *Id.* at 443.

⁹⁸ *Id.* at 445-46.

⁹⁹ 916 F.2d 731 (1st Cir. 1990).

adversarial or coercive qualities.¹⁰⁰ In so holding, the court noted that no mention was made in the PRP letter of a demand or an order.¹⁰¹

3. *The Duty to Defend Versus the Duty to Indemnify*

Under insurance policies, the duty to defend arises “whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be.”¹⁰² However, the duty to defend is “distinct and separable” from the duty to indemnify.¹⁰³ In this respect, an insurer’s duty to defend is “exceedingly broad,” much broader than its obligation to indemnify.¹⁰⁴ The duty to defend is also liberally construed.¹⁰⁵

The duty to indemnify does not arise until the “prime obligation has been established.”¹⁰⁶ In other words, it does not accrue when the injury or breach occurs, but when the indemnitee “suffers a loss or when a claim is asserted against it.”¹⁰⁷ No indemnification liability exists until it is “fixed” through a judgment or a fair settlement.¹⁰⁸ However, in *24 Leggett Street Ltd. Partnership v. Beacon Industries, Inc.*,¹⁰⁹ the court pointed out that there are two types of indemnity agreements: those which indemnify against liability and those which indemnify against loss.¹¹⁰ The court stated that when an indemnity agreement “‘indemnifies against liability as well as against loss. . .the indemnitee does not have to wait until the loss occurs, but may sue on the agreement as soon as liability is incurred.’”¹¹¹

C. *The CERCLA Claim*

In the recent case of *United States v. Bestfoods*,¹¹² the United States Supreme Court determined the extent to which a parent corporation will be held liable as an “operator” of a facility under CERCLA, when the facility is controlled by a subsidiary.¹¹³ In this case, the United States sued defendant under § 107(a)(2) of CERCLA to recover clean-up costs after discovering industrial waste generated by a chemical plant owned by defendant’s subsidiary.¹¹⁴ The Court held that a parent corporation will be liable under CERCLA (1) as an “owner” or “operator” of a facility controlled by a subsidiary, only when the corporate veil may be pierced,¹¹⁵ or (2) as an “operator” when it actively manages or operates a subsidiary’s facility.¹¹⁶

Regarding a parent corporation’s operator liability, the Court pointed out that “CERCLA’s ‘operator’ provision is concerned primarily with direct liability for one’s own actions.”¹¹⁷ Thus, under the plain language of CERCLA, any person who operates a facility is directly liable for cleaning up any resulting pollution.¹¹⁸ This applies regardless of

¹⁰⁰ *Id.* at 741.

¹⁰¹ *Id.* at 742.

¹⁰² *Seaboard Surety Co. v. Gillette Co.*, 476 N.E.2d 272, 275 (N.Y. 1984).

¹⁰³ *Avondale Industries, Inc.*, 887 F.2d at 1203.

¹⁰⁴ *Continental Casualty Co. v. Rapid-American Corp.*, 609 N.E.2d 506, 509 (N.Y. 1993).

¹⁰⁵ *Insurance Co. of North America v. Chinese Restaurant & Trading Corp.*, 85 A.D.2d 712, 713 (N.Y. App. Div. 1981).

¹⁰⁶ *Hobbs v. Scorse*, 59 A.D.2d 1037, 1038 (N.Y. App. Div. 1977).

¹⁰⁷ *Kane v. Magna Mixer Co.*, 71 F.3d 555, 561 (6th Cir. 1995).

¹⁰⁸ *Hutton Construction Co. v. County of Rockland*, 52 F.3d 1191, 1193 (2d Cir. 1995).

¹⁰⁹ 685 A.2d 305 (Conn. 1996).

¹¹⁰ *Id.* at 316 (quoting *Balboa Ins. Co. v. Zaleski*, 532 A.2d 973 (Conn. App. Ct. 1987) (citing 41 AM. JUR. 2D, *Indemnity* § 29)).

¹¹¹ *Id.*

¹¹² 524 U.S. 51 (1998).

¹¹³ *Id.* at 55.

¹¹⁴ *Id.* at 58.

¹¹⁵ *Id.* at 62-64. Quoting prior case law, the Court noted that, generally, a parent corporation is not held liable for the acts of its subsidiaries.

However, the corporate veil may be pierced when, through a subsidiary, the corporate form is otherwise “misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf.” The Court stated that because CERCLA does not expressly provide otherwise, the common law rules regarding corporate veil piercing are preserved.

¹¹⁶ *Id.* at 64.

¹¹⁷ *Id.* at 65.

¹¹⁸ *Id.*

whether the person is a parent corporation or a subsidiary.¹¹⁹ Most importantly, the Court defined an “operator” under CERCLA as:

... someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.¹²⁰

In reaching its holding, the Court rejected application of the “actual control” test employed by previous courts, which focuses on the extent to which a parent corporation actually involves itself in the business and operations of the subsidiary.¹²¹ The question, the Court said, “is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary.”¹²² The Court also noted that CERCLA “operator” liability is not established when officers and directors, serving in the same capacity at both the parent corporation and subsidiary, make policy decisions and together supervise activities at the facility.¹²³ However, dual officers must observe “corporate norms” of parental oversight when fulfilling their duties at the subsidiary.¹²⁴ The Court pointed out that if dual officers overstep the bounds of normal corporate behavior, they may subject the parent corporation to direct CERCLA liability:

Activities that involve the facility but which are consistent with the parent’s investor status, such as monitoring of the subsidiary’s performance, supervision of the subsidiary’s finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability. . . The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary’s facility.¹²⁵

IV. INSTANT DECISION

In the instant case, the court began its analysis of Datron’s claims by reviewing basic principles of contract law.¹²⁶ It noted that Datron’s argument that the word “proceeding” applied to PRP letters was “unpersuasive because the principles informing the construction of an indemnification provision are different from those animating a duty to defend in an insurance contract.”¹²⁷ The authority Datron relied on to support its argument with regard to the word “proceeding” focused instead on the meaning of “suit” in the “context of triggering an insurance company’s duty to defend.”¹²⁸ Here, the court pointed out that the duty to defend under an insurance agreement is distinct, separable, and construed more broadly from the duty to indemnify.¹²⁹ The court concluded that because of the different contexts, Datron’s analogy to PRP letters as “suits” under insurance agreements (and therefore as a “proceeding” under the indemnification provision) was unavailing.¹³⁰

In determining the meaning of the word “proceeding” under the indemnification provision, the court applied the tests of common speech and the reasonable expectation and purpose of the ordinary businessperson.¹³¹ The court noted

¹¹⁹ *Id.*

¹²⁰ *Id.* at 66-67.

¹²¹ *Id.* at 67. See, e.g., *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990) (CERCLA liability requires active involvement in the activities of the subsidiary), and *Jacksonville Electric Authority v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993) (parent corporation liable as “operator” under CERCLA when it exercises actual and pervasive control of its subsidiary).

¹²² *Id.* at 68 (quoting Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control*, 72 WASH. U.L.Q. 223, 269 (1994)).

¹²³ *Id.* at 69-70.

¹²⁴ *Id.* at 71.

¹²⁵ *Id.* at 72 (quoting Oswald, *supra*, note 122).

¹²⁶ See *infra* notes 53-60, and sub-subsection *General Principles of Contract Interpretation*.

¹²⁷ *Datron*, 42 F. Supp. 2d at 742.

¹²⁸ *Id.*

¹²⁹ *Id.* (citing *Avondale Industries, Inc. v. Travelers Indemnity Co.*, 887 F.2d 1200, 1203 (2d Cir. 1989)).

¹³⁰ *Id.*

¹³¹ *Id.* at 743 (citing *Ace Wire & Cable Co. Inc. v. Aetna Casualty and Surety Co.*, 457 N.E.2d 761, 764 (1983)).

that to construe the term "proceeding" as including letters from the EPA would expand its definition.¹³² Instead, the court accepted the definition of "proceeding" put forth by CRA as ordinarily meaning actions before judicial tribunals.¹³³ Consistent with this definition, the court concluded that, in "common parlance and understanding," the term "proceeding" has a legal connotation and should therefore be limited to actions before judicial and quasi-judicial tribunals.¹³⁴ The court added that "the definition of the term should be construed in the context of the principles of strict construction animating an indemnity agreement."¹³⁵

Datron argued that the Agreement did not require costs to be incurred within the five-year period to be indemnifiable, but rather that the breach of warranty occur during that period in order for CRA to remain obligated to indemnify.¹³⁶ Datron relied on *24 Leggett Street Ltd. Partnership v. Beacon Industries, Inc.*¹³⁷ for the proposition that liability may be incurred without costs being paid or a loss taking place.¹³⁸ In *Leggett*, the indemnity provision at issue stated that the seller would indemnify the buyer for any liabilities, losses, damages, costs, or expenses associated with environmental problems at the property.¹³⁹ The Connecticut Supreme Court noted that the indemnity provision protected against liability in addition to loss, and that therefore, the plaintiff need not wait until an actual loss occurred, but could sue once liability was incurred.¹⁴⁰ The court in *Datron* pointed out that such an interpretation was too broad and that *Leggett* failed to determine that a "breach of warranty within the indemnity period constituted liability for purposes of indemnification."¹⁴¹ The court agreed with CRA's contention that its indemnification obligations were limited to (1) a loss or liability paid by Datron or (2) a liability judicially determined in a final judgment, order or decree within the five-year period.¹⁴² The court then observed that general principles of indemnity governed the interpretation of the Agreement, and cited several cases standing for the proposition that the duty to indemnify is triggered when the liability is fixed.¹⁴³

Datron claimed the Agreement lacked language that required costs to be incurred in order to be indemnifiable.¹⁴⁴ The court observed that a consideration of the entire Agreement undermined this contention, pointing out that the exception to the five-year period under the indemnification provision was limited to "proceedings" commenced but not yet finished by the end of the period.¹⁴⁵ It reasoned therefore that, under the exception, CRA's indemnification obligation extended only to a "narrow scope of matters until their conclusion."¹⁴⁶ This meant that the exception would be "unnecessary and redundant" if Datron were only required to give CRA notice of a breach of warranty within the five-year window to obtain indemnification beyond such time.¹⁴⁷ The court concluded that Datron must have incurred liability before May 20, 1993, for CRA to be liable for indemnification under the Agreement.¹⁴⁸

Regarding Datron's claim that CRA was liable under CERCLA as an operator of the facilities, the court noted that Datron's evidence failed to show that CRA managed, directed, or conducted operations dealing with the disposal of hazardous waste under the standard put forth in *United States v. Bestfoods*.¹⁴⁹ Among Datron's evidence was evidence that CRA controlled the facilities: (1) ICC's (now CRA's) corporate policy referred to the subsidiaries as divisions; (2) ICC's corporate safety director conducted semiannual OSHA inspections of the properties; (3) ICC's corporate policy required all employees and divisions to comply with RCRA; and (4) the subsidiaries had to obtain ICC's approval for any

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 685 A.2d 305 (Conn. 1996).

¹³⁸ *Datron*, 42 F. Supp. 2d at 744. See *24 Leggett Street*, 685 A.2d at 1316.

¹³⁹ *Datron*, 42 F. Supp. 2d at 744. See *24 Leggett Street*, 685 A.2d at 1316.

¹⁴⁰ *Datron*, 42 F. Supp. 2d at 744. See *24 Leggett Street*, 685 A.2d at 1316.

¹⁴¹ *Datron*, 42 F. Supp. 2d at 744.

¹⁴² *Id.*

¹⁴³ *Id.* at 745.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* Here the court cited *Columbus Park Corp. v. Dept. of Housing Preservation and Development of City of New York*, 598 N.E.2d 702, 708 (1992) (contract that has the effect of rendering at least one clause superfluous or meaningless is not preferred and will be avoided if possible).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 747-48. See *United States v. Bestfoods*, 524 U.S. 51 (U.S. 1998).

credit arrangements beyond the normal commercial credit accounts.¹⁵⁰ The court pointed out that establishing corporate policies, conducting sporadic safety inspections, obtaining insurance, and referring to subsidiaries as divisions are activities which are consistent with a parent corporation's investor status.¹⁵¹ It concluded that CRA's involvement with the facilities fell well within the "parameters of normal oversight by a parent corporation over its subsidiaries."¹⁵²

V. COMMENT

In *Datron*, the court's evaluation of the word "proceeding" under the indemnification provision is flawed because it ignores a crucial preliminary step in contractual analysis: it fails to consider whether the term "proceeding" is ambiguous. By clinging to the legal backdrop of the duty to defend in the context of the insurance industry (and its inapplicability to the case at hand), the court effectively sidesteps the issue of ambiguity under the indemnification provision, and ultimately thwarts some of the underlying purposes of CERCLA.

Arguably, the term "proceeding" is indeed ambiguous. Its meaning is unclear within the indemnification provision. As *Datron* argued, CRA failed to qualify the term with words such as "legal" or "judicial."¹⁵³ CRA also did not explicitly define the scope of the word "proceeding," or what kinds of actions, legal or otherwise, might fall under it. As such, the court should have begun its analysis by asking if the term "proceeding" is ambiguous. For one, both parties argued that the Agreement was *unambiguous*, and yet each put forth an interpretation of "proceeding" which was directly at odds with the other side. In this respect, the court could well have included in its analysis the standard rule of contract law that states, "a court should construe ambiguous language against the interest of the party that drafted it."¹⁵⁴ It is not explicitly stated in the opinion, but presumably CRA, as seller and corporate successor to ICC, was the drafter of the Agreement. This being the case, the ambiguity of the term "proceeding" ought to have been construed in favor of *Datron*.

The court should have inquired more thoroughly about the intentions of the parties at the time of the drafting of the Agreement. As the court itself noted, "[w]hen construing and interpreting a contract, the intentions of the parties must control. That intention is revealed by the language the parties chose to use in the formation of the contract."¹⁵⁵ But the court did not analyze this issue. It simply adopted CRA's argument that "proceeding" meant actions before a court or judicial officer.¹⁵⁶ Recall that section 14(d) of the Agreement states that the environmental liabilities of the seller shall survive:

until the relevant statutes of limitations with respect of such matters have run (and for such additional time, in the event that any proceeding with respect to any such environmental matter has been initiated prior to the end of the relevant limitation period set forth in this subparagraph (d), the representations and warranties made by Seller herein with respect to such matter shall survive until the conclusion of such proceeding).¹⁵⁷

Would *Datron* have consented to enter into the stock purchase agreement if it could not hold CRA responsible for indemnification regarding cleanup of the sites? Of course not. It is plain that the purpose of the indemnification provision was to warrant that *Datron* would not have to be financially responsible for any environmental violations found on the newly acquired properties. Even more, the language "proceeding with respect to any such environmental matter" can plausibly be read to include EPA PRP letters. The terms "proceeding" and "environmental matter" are fairly nondescript. A PRP letter, which signifies the commencement of EPA action and has the potential to subject its recipient to severe financial burdens, appears to satisfy the conditions set forth under the indemnification provision.

Instead of examining the ambiguity of the term "proceeding," the court deftly skirts the issue by focusing on case law in the insurance industry and its inapplicability to the instant case. Granted, an indemnification provision must be strictly construed and the duty to defend in an insurance contract is broader than the duty to indemnify. But in determining whether or not a PRP letter amounts to a "proceeding," the court could reasonably have considered the case put forth by *Datron* about the interpretation of the word "suit" in the context of the insurance industry, without

¹⁵⁰ *Id.* at 747.

¹⁵¹ *Id.* at 748.

¹⁵² *Id.*

¹⁵³ *Datron*, 42 F. Supp. 2d at 741.

¹⁵⁴ *Mastrobuono*, 514 U.S. at 62.

¹⁵⁵ *Datron*, 42 F. Supp. 2d at 741.

¹⁵⁶ *Id.* at 743.

¹⁵⁷ *Id.* at 741.

undermining the principle of strict construction of indemnification provisions. After all, the question presented is a novel one and in such circumstances, courts routinely draw upon the reasoning of cases in analogous situations. The insurance cases which rule that PRP letters are “suits,” thus triggering the insurer’s duty to defend are not so dissimilar as to warrant complete dismissal by the court. Though an insurance policy may differ from the Agreement at issue, nevertheless both are contracts. And, at least with respect to the insurance cases cited in the opinion, all of them discuss policy provisions dealing with property damage, not to mention the fact that they also analyze the effects of PRP letters. By dismissing the insurance cases as irrelevant, the court fails to appreciate the importance of upholding CERCLA’s goals of encouraging voluntary and efficient clean-up of hazardous waste spills, and ensuring that “parties responsible for release of hazardous substances bear the costs of response and costs of damage to natural resources.”¹⁵⁸

In reaching its holding that the term “suit” is ambiguous, capable of application to legal actions other than court proceedings, and therefore the functional equivalent of a traditional court action, the court in *Bronson Plating Co.* makes three important observations. First, it declares that a typical layperson might reasonably expect the term “suit” to “apply to legal proceedings other than a court action initiated by a complaint.”¹⁵⁹ Second, the court notes that PRP’s have a strong incentive to “voluntarily” cooperate with the EPA, because “significant legal prejudice may develop if the PRP fails to do so.”¹⁶⁰ Third, the court points out that “[l]imiting an insurer’s duty to defend to an actual court proceeding preceded by a complaint would merely encourage PRPs to decline ‘voluntary’ involvement in site cleanups, waiting instead for an actual lawsuit to be brought in order to receive insurance coverage.”¹⁶¹

These observations apply equally in *Datron*’s situation. As noted, the term “proceeding” within the indemnification provision is ambiguous and reasonably susceptible to differing interpretations. Likewise, although requesting *Datron*’s “voluntary” participation, the EPA PRP letter carried great weight. By refusing to comply with EPA demands, *Datron* might well have subjected itself to an administrative order.¹⁶² Furthermore, by failing to comply with the administrative order, *Datron* would have risked being assessed penalties of up to \$25,000 per day “and/or treble damages based on the cost incurred by the use of Superfund monies.”¹⁶³ Surely, the power behind the PRP letter is enough to satisfy the definition of “proceeding” under the indemnification provision. Finally, it would be a great waste of judicial time and resources for *Datron* to have to wait until the filing of a formal complaint before invoking the indemnification obligation. The court system is already overburdened and expensive.

Admittedly, as the court points out, other state and federal courts within the insurance context have ruled that PRP letters do not constitute a “suits” triggering an insurer’s duty to defend.¹⁶⁴ But this is of no consequence because it only serves to illustrate the fact that words such as “suit” and “proceeding” are ambiguous, unless specifically defined by the drafter in a particular contract. Thus, at least in the insurance context, courts have ruled either way, depending upon the factual circumstances of the case. In the future, if not explicitly defined within the contract, a court should apply a liberal construction of the word “proceeding” or “suit” in order to further the stated goals under CERCLA.

As a result of the court’s decision in *Datron*, future potential purchasers may be loath to enter into sales transactions involving property for fear of being deemed an “owner” under CERCLA and thus liable for site remediation. Land transactions may decline due to the unwillingness of sellers to include PRP letters as a type of “proceeding” under indemnification provisions. Moreover, such a policy may allow those who actually cause pollution to pass property on to innocent purchasers, thereby escaping the responsibility for site cleanup.

It must be noted that the court’s analysis of the issue of fixed costs within the five-year period appears sound and reasonable. Nevertheless, discussion of this issue would have been obviated had the court determined that a PRP letter constitutes a “proceeding.” Then, costs incurred outside the five-year window would be valid, provided they were related to a “proceeding” not yet finished.

Under the *Bestfoods* standard, the court rules that CRA was not an operator of the facilities for purposes of CERCLA.¹⁶⁵ Specifically, the court notes that “ICC’s [CRA’s] involvement with the facilities falls soundly within the

¹⁵⁸ Liebesman, *supra* note 43.

¹⁵⁹ *Bronson Plating Co.*, 519 N.W.2d at 869.

¹⁶⁰ *Id.* at 870.

¹⁶¹ *Id.* at 872.

¹⁶² Liebesman, *supra* note 43, at 481-82.

¹⁶³ *Id.*

¹⁶⁴ *Datron*, 42 F. Supp. 2d at 742.

¹⁶⁵ *Id.* at 747.

parameters of normal oversight be a parent corporation over its subsidiaries.”¹⁶⁶ As George C. Hopkins notes, the only unusual aspect of the decision is that the court fails to provide an explicit point of reference for the “normal oversight” by a parent corporation over a subsidiary.¹⁶⁷ “While it seems evident that Datron’s allegations were insufficient for operator liability,” states Hopkins, “the court did not clarify the standard against which they are deficient. Thus, this case affords no real guidance on the all-important question of what are reference points for ‘accepted norms of corporate behavior.’”¹⁶⁸

VI. CONCLUSION

In *Datron*, the court’s analysis is flawed because it fails to consider the ambiguity of the term “proceeding” under the indemnification provision of the Agreement. Instead, it relies on the distinction between the duty to indemnify and the duty to defend within the context of the insurance industry, and deems those cases that hold that a PRP letter constitutes a “suit” irrelevant to the instant case. The court interprets “proceeding” constrictively as an action before a judicial court, rules that costs must be fixed within the five-year period, and holds that CRA’s involvement with its subsidiaries constituted “normal oversight” by a parent corporation. Thus, the court rules that CRA is not liable under the indemnification provision, or as an “operator” under CERCLA. It remains to be seen what effect these pronouncements will have on real estate transactions.

CHRISTOPHER J. LUCAS



¹⁶⁶ *Id.* at 748.

¹⁶⁷ George C. Hopkins, *United States v. Bestfoods: The U.S. Supreme Court Sets New Limits on the Direct Liability of Parent Corporations for Polluting Acts of Subsidiaries*, 29 ENVTL. L. REP. 10545 (1999).

¹⁶⁸ *Id.*