

ordered to seek a new hearing at which time the court record and any additional evidence would be considered.

JANET L. WOODKA

II. FEDERAL CASE LAW

A. *The Comprehensive Environmental Response, Compensation, and Liability Act; The Superfund Amendments and Reauthorization Act*

Claussen v. Aetna Casualty & Surety Co., 754 F. Supp. 1576 (S.D. Ga. 1990)

Defendant, Aetna Casualty and Surety Company, sought a summary judgment against the plaintiff, Henry Claussen, to avoid payment of an insurance policy protecting damage to property. Claussen had contracted land he owned in Florida to the city of Jacksonville to be used as a landfill. In 1982, the Environmental Protection Agency (EPA), pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988), notified Claussen that it was investigating the release of hazardous materials from the landfill. Later, EPA determined that the ground water beneath the landfill had been contaminated by toxic substances. Claussen, alleging that Aetna, in bad faith, refused to pay the claim, sought to amend his complaint to recover attorney's fees and punitive damages. Aetna claimed it was not liable to its insured, Claussen, for these damages.

The court rejected Aetna's arguments in support of summary judgment. First, Aetna argued that an "owned property" exclusion clause contained in the insurance policy prevented recovery based solely on damages to Claussen's property. The court rejected this argument because, under the controlling law, Claussen did not own the ground water under his land. Further, the toxic dumping damaged not only Claussen's land but surrounding land and water. Second, Aetna argued that a "pollution exclusion" clause contained in the insurance policy excluded coverage for pollution-related property damage, unless the discharge of pollution was "sudden and accidental." The court rejected this argument because the Georgia Supreme Court had defined the term "sudden and accidental" to mean "unexpected and unintended" from the point of view of the insured. Because evidence existed that Claussen did not expect

or intend the discharge of pollution, a question of fact was present which was inappropriate for summary judgment.

Aetna further argued that the court should reject a decision of the Georgia Court of Appeals which allowed, as "damages" within the meaning of a liability policy, coverage for the costs that an insured incurs in undertaking remedial pollution measures as mandated by EPA. The court refused to reject the Georgia Court of Appeals' determination and followed the precedent.

Because the Georgia Supreme Court had clarified the issues on which Aetna had based its defense in refusing to pay Clausen's claims and had no good faith defense to justify its refusal, the court allowed Clausen to amend his complaint against Aetna.

DAVID M. LOPER

Fertilizer Institute v. United States EPA, 935 F.2d 1303 (D.C. Cir. 1991)

In response to an EPA rule which established the reportable quantities (RQ) for radionuclides, two groups of petitioners filed suit. The first set of petitioners and intervenors challenged EPA's interpretation of the Comprehensive Environmental Response, Compensation and Liability Act of 1980's (CERCLA) reporting requirement as set forth in the preamble to the final rule. The second set of petitioners challenged the administrative exemptions created by EPA as well as the RQ established for radon-222. The court rejected petitioners' contention that EPA's preamble ran counter to the Administrative Procedure Act (APA), however it vacated that portion of the final rule which interpreted CERCLA as requiring parties to report the placement of an RQ of a hazardous substance into an enclosed containment structure. The court also held that EPA provided inadequate notice and comment regarding the creation of administrative exemptions to CERCLA's reporting requirement. The court allowed these exemptions to stay in place pending further notice and comment. Finally, the court declined to address the issue of whether the RQ set for radon-222 was arbitrary because of the petitioners' failure to raise the issue before the agency.

In the preamble to the final rule, EPA set out in detail its interpretation of what constitutes a "release" of hazardous sub-