1990

TSCA Liability in Court: Is Ignorance Bliss or Will a Strict Liability Standard be the Result?

Robert E. Fabricant

Follow this and additional works at: http://scholarship.law.edu/jchlp

Recommended Citation
Available at: http://scholarship.law.edu/jchlp/vol6/iss1/18
TSCA LIABILITY IN COURT: IS IGNORANCE BLISS OR WILL A STRICT LIABILITY STANDARD BE THE RESULT?

INTRODUCTION

On December 7, 1983, the United States Environmental Protection Agency ("EPA") charged Huth Oil Company with violations of the Toxic Substances Control Act ("TSCA" or "the Act"). The violations resulted from the Company’s improper use, marking and recordkeeping of a waste oil tank which contained violative levels of PCBs. On May 15, 1983 EPA amended the charges by adding as a defendant Joyce Nichols, one of the Company’s bookkeepers, based solely upon her ownership of the property where the violations occurred. Because EPA provided evidence that clearly established the violations, liability for Ms. Nichols rested on a single issue: whether the simple ownership of the property in violation of the statute establishes liability under TSCA. The Administrative Law Judge ("ALJ") adjudicating for Region V of the EPA held that Ms. Nichols was not liable. In his June 2, 1986 decision, the ALJ stated that, "the Toxic Substances Control Act is not a strict liability statute" and "that Ms. Nichols’ bare title to the ... property ... is insufficient to hold her liable." 

On March 19, 1986 (three months earlier), an ALJ for Region VII of the EPA rendered a contrary opinion in Garden City Unified School District #457. The ALJ held that the respondent, Garden City Unified School District #457, was in violation of TSCA based on a failure to adequately inspect all school buildings and locate all friable material by June 28, 1983.

1. In re Huth, No. TSCA-V-C-196 (initial decision, June 2, 1986) at 3.
2. Id. at 3. PCBs or Polychlorinated biphenyls are used “for their chemical stability, fire resistance, and electrical resistance properties. They are frequently used in electrical transformers and capacitors. However, PCBs are extremely toxic to humans and wildlife. ... Epidemiological data and experiments on laboratory animals indicate that exposure to PCBs pose carcinogenic and other risks to humans.” Environmental Defense Fund v. EPA, 636 F.2d 1267, 1270 (D.C. Cir. 1980).
5. Id. See infra note 73.
7. Id. at 15. “’Friable material’ means any material applied to ceilings, walls, structural
Upon the discovery of friable asbestos-containing material, the ALJ held that the respondent was in violation of recordkeeping, notice and clean-up regulations as promulgated under TSCA. In its defense, the school district contended that the failure to discover the friable material relieved the district of a duty to comply with the regulations until the actual date of the asbestos discovery. Underlying this argument was the district’s assertion that they lacked the requisite intent to violate the statute. The ALJ, however, rejected the defense and stated that “[i]ntent to violate is not an element of any violation for which civil penalties are assessed.”

In sum, the Garden City decision supports the application of a strict liability standard by holding that intent is not an element of a violation of TSCA. However, the contemporaneous Huth decision contradicts Garden City’s holding by expressly rejecting strict liability. This split at the administrative level suggests that EPA’s interpretation of TSCA’s standard of liability is in a state of confusion. This Comment addresses the confusion and urges its resolution in federal court.

A fundamental element of statutory enforcement is the establishment of liability. Furthermore, the determination of the statutory standard of liability is critical in establishing actual liability. Several standards of liability exist, including: strict liability and negligence. The application of a standard to a statute will greatly affect the scope of the statute. For example, a strict liability standard expands the scope of the statute, because a violation does not require actual intent. On the other hand, a negligence standard constricts the scope because a violation requires the breach of a reasonable

members, piping, ductwork or any other part of the building structure which, when dry, may be crumbled, pulverized, or reduced to a powder by hand pressure.” 40 C.F.R. § 763.105 (1988). After the discovery of “friable material,” a school must sample and analyze the material for the presence of asbestos. 40 C.F.R. §§ 763.107-763.109 (1988).

8. Garden City, at 15.
9. Id. at 16.
10. Id. at 15.
11. “‘Strict liability’... means liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care . . . .” W. PROSSER & W.P. KEETON, THE LAW OF TORTS 534 (5th ed. 1984) [hereinafter PROSSER]. “Negligence is the failure to use such care as a reasonably prudent and careful person would use under the circumstances . . . .” BLACK’S LAW DICTIONARY 930 (5th ed. 1979). This Comment will also refer to “negligence” when describing statutory intent-based liability. See infra note 40 and accompanying text. However, in a pure common law tort discussion the distinction between an intentional tort and negligence would be made. PROSSER, at 33.
12. See generally Dechert & Smith, Environmental Liability and Economic Incentives For Hazardous Waste Management, 25 Hous. L. REV. 935, 936 (1988) (stating that “[t]he greatest uncertainty is that of not knowing what treatment standard will be enforced in the future, and therefore we cannot know what potential liability the firm may face.”).
standard of care. Therefore, the determination of the standard of liability is of crucial importance to both the effective enforcement of a statute (i.e., who legitimate actions are brought against), and the public's proper statutory compliance (i.e., what standard of care the statute requires).

A clear determination of the standard of liability is most important where a statute seeks to protect the public health and safety. Under such statutes, a strict or negligence standard greatly affects whether the best care or only reasonable care protects the public, and whether a lack of knowledge shields a defendant from liability. For example, under a negligence system the regulated community will be discouraged from using the best safety measures because only a reasonable care standard is required. Furthermore, because negligence requires intent, the community will be encouraged to remain ignorant of potential hazards to the public welfare. Therefore, a negligence standard creates increased risk for the public.

An example of a statute enacted to protect the public health and safety is the Toxic Substances Control Act. Congress enacted TSCA in 1976 "to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment." However, as evidenced by the Huth and Garden City decisions, the question remains: what is the correct

---

13. The legislature, within its constitutional powers, may see fit to place the burden of injuries 'upon those who can measurably control their causes, instead of upon those who are in the main helpless in that regard.' In such a case the defendant may become liable on the mere basis of his violation of the statute. No excuse is recognized, and neither reasonable ignorance nor all proper care will avoid liability. Such a statute falls properly under the head of strict liability, rather than any basis of negligence . . .

PROSSER, supra note 11, at 227.

14. A strict liability standard produces "a stronger incentive than under fault liability rules to compare the costs of damage payments with the costs of abating the environmental pollution by switching product lines (e.g., redesigning a product to eliminate a hazardous chemical) or by reducing the level of use of damaging product inputs and production processes." F. ANDERSON, D. MANDELKER & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 636 (1984) [hereinafter ENVIRONMENTAL PROTECTION].

15. The Toxic Substances Control Act, 15 U.S.C. §§ 2601-54 (1988). See also Gaynor, The Toxic Substances Control Act: A Regulatory Morass, 30 VAND. L. REV. 1150 (1977) [hereinafter TSCA: A Regulatory Morass]. TSCA provides the EPA "broad authority to regulate the manufacture, processing, distribution in commerce, use, and disposal of chemical substances and mixtures." Id. Gaynor, TSCA: Significant Developments in 1988, 1989 ALI-ABA COURSE OF STUDY: ENVTL. L. 39, 40. In 1987, "30% of all civil cases filed by the [Environmental Protection] Agency were under TSCA and the program collected fines totalling 4.7 million dollars that were only 30 percent less than the Water program, EPA's highest penalty generating program." Id.

16. 15 U.S.C. § 2601(b)(2)(1988). See also TSCA: A Regulatory Morass, supra note 15, at 1150. Congress enacted TSCA because of "the need for authority requiring the testing of chemicals to determine their health and environmental effects, restricting the use and distribution of some chemicals when necessary to protect human health and the environment, and
standard of TSCA liability? The question arises from (1) the lack of statutory clarity, and (2) the confusion over inconsistent administrative adjudication. The lack of clarity results from Congress’ failure to include express “strict liability” language in the statute, and the confusion results from the failure of the courts to harmonize inconsistent administrative decisions interpreting TSCA liability.

Absent clear statutory language, the determination of TSCA’s standard of liability is a role for the courts. This Comment contends that TSCA liability should be strict liability. However, with the split at the administrative level and the judicial doctrine of deference to agency decision-making, a strict liability standard is far from absolute. The leading case addressing the judicial review of agency statutory interpretation is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*

Accordingly, this Comment will apply the *Chevron* analysis to the issue at hand.

In 1984, the Supreme Court asserted its position on judicial deference to agency decision-making in *Chevron*. In this case, the Court upheld the validity of regulations adopted by the EPA defining a “stationary source” in the Clean Air Act Amendments of 1977, and established a general formula for the judicial review of agency statutory interpretation. The *Chevron* analysis involves a two-step formula. The first step requires the court to determine whether the intent of Congress is clear. “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on providing for the development of adequate data on the environmental and health effects of chemicals.” *Id.*

17. 467 U.S. 837 (1984). See Byse, Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron’s Step Two, 2 ADMIN. L.J. 255, 255 (1988) (stating that *Chevron* “has been cited more than 600 times in the three and a half years since it was decided in June 1984. The case has been described by Judge Kenneth W. Starr as ‘one of the most important administrative law decisions in recent memory’ and by Professor Ronald M. Levin as ‘the leading case on the subject . . . of deference to [administrative] agencies on . . . issues’ of statutory interpretation. (citations omitted)).

Section 19 of TSCA provides for the judicial review of administrative orders using a “substantial evidence” standard; however, it is unlikely to be controlling when applied to the legal issue of TSCA’s standard of liability. See 15 U.S.C. § 2618(c)(1988). Caselaw holds that “this rule [TSCA section 19] does not include the agency’s determination of legal questions.” United States Environmental Protection Agency v. New Orleans Public Service, Inc., 826 F.2d 361, 364 (5th Cir. 1987) (reviewing an administrative order assessing penalties under TSCA, where the legal issue arose whether transformers in violation of the Act were components of a building, and as such owned by the building's owner). Moreover, a commentator suggests that “the different standards of review have no discernible effect upon the manner in which the court reviews agency decisions.” *TSCA: A Regulatory Morass*, supra note 15, at 1157 (citing K. Davis, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.00 (1976)). Thus, regardless of section 19 of TSCA, a reviewing court will most likely apply the *Chevron* two-step formula.

18. See generally Byse, supra note 17, at 255-56 (describing the *Chevron* two step analysis).
the precise question at issue, that intention is the law and must be given effect.”19 However, “if the statute is silent or ambiguous with respect to the specific issue,” then step two must be applied.20

Simply stated, step two requires the court to accept an agency’s statutory interpretation if it is “reasonable.”21 In Chevron, the Court describes the congressional delegation of authority, both explicit and implicit, which enables an agency to fill statutory gaps.22 An explicit delegation results from “an express delegation of authority to the agency,” and the Court applies the “arbitrary and capricious” test to the agency’s interpretation.23 An implicit delegation is an implied delegation, and the court applies a “reasonableness” test.24 In application, however, the broad nature of implicit delegation25 coupled with the similarity of the “arbitrary and capricious” and “reasonableness” tests,26 simplifies the second step as to whether the agency’s interpretation is “reasonable.”

This Comment will apply the Chevron analysis to the issue of TSCA’s standard of liability. First, the Comment will address step one of the Chevron analysis: the question being whether the intent of Congress is clear? Congressional intent will be determined through the analysis of several sources of statutory construction: a) the plain meaning rule, b) the legislative history, c) the comparison of language within the statute, and d) the doctrine of pari materia. Second, the Comment will determine the EPA’s interpretation of TSCA’s standard of liability and the policy behind the interpretation. Finally, the Comment will address step two of the Chevron analysis: is the EPA’s interpretation reasonable?

I. STEP ONE: IS THE INTENT OF CONGRESS CLEAR?

The construction of legislative intent requires an analysis of various sources. Sources of congressional intent which support the creation of a strict liability standard for TSCA include: a) the plain meaning rule; b) the

20. Id. at 843.
22. Chevron, 467 U.S. at 843-44.
23. Id.
24. Id. at 844.
26. Id. at 246 (stating that “[a]gency views . . . will be reviewed under a ‘reasonableness test,’ which may not be very different, if at all, from an ‘arbitrary and capricious’ review.” (citations omitted)).
legislative history; c) the comparison of the language within the statute; and d) the doctrine of pari materia. Each will be addressed in their respective order.

A. The Plain Meaning Rule

"The plain meaning of the words of a statute is the most persuasive evidence of Congressional intent."27 Section 15 of TSCA provides:

PROHIBITED ACTS

It shall be unlawful for any person to
(1) fail or refuse to comply with (A) any rule promulgated or order issued under section 2603 of this title, . . .

(3) fail or refuse to (A) establish or maintain records, (B) submit reports, notices, or other information, or (C) permit access to or copying of records, . . .

(4) fail or refuse to permit entry or inspection as required by section 2610 of this title.28

This language expressly prohibits, regardless of negligence or intent, the failure to comply with the respective provisions of TSCA.29 At least one legal commentator supports the argument; he states that, "scienter [is] not required for a civil violation" of TSCA.30 Thus, the plain meaning of the TSCA's language provides strong evidence supporting the conclusion that Congress intended to create a strict liability standard for TSCA.

B. The Legislative History

An analysis of the Act's legislative history provides a second source of evidence supporting the congressional intent to establish a strict liability standard for TSCA.31 This analysis includes a description of: 1) the language of early drafts of TSCA, 2) the legislative debate surrounding these drafts, and 3) the similar interpretation of the legislative histories of other environmental legislation.

1. Early Drafts of TSCA

Legislative consideration of TSCA began in 1972 under the 92nd Con-

29. The exception is TSCA section 15(2) which expressly establishes a "knew or should have known" standard. 15 U.S.C. § 2614(2) (1988).
During that year, the Senate held eight days of hearings on S. 1478, the "Toxic Substances Control Act of 1971," and, following committee action, passed the bill with amendments on May 30, 1972. However, late House action prevented a final reconciliation with the Senate.

In 1973, the House passed, with amendments, H.R. 5356, but again the differences with the Senate proved irreconcilable. Similarities existed, however, in both S. 1478 and H.R. 5356. Specifically, both bills contained identical "PENALTIES" sections. These provided:

PENALTIES

Sec. 17(a): Any person who knowingly violates Sec. 16 of this Act shall be subject to a civil penalty not to exceed $25,000 for each day of violation. For the purposes of this subsection, the term "knowingly" means (1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care.

This compares to the present Act which provides:

PENALTIES

(A) Civil. (1) Any person who violates a provision of Section 2614 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

As evidenced by these two early drafts, both the Senate and the House should have been aware of TSCA's original language which required a knowing violation for civil penalties. Therefore, the conspicuous absence of the "knowingly" language in the present form of the Act logically supports the conclusion that Congress intended a strict liability standard for TSCA.

2. Legislative Debate

Language changes and the legislative debate surrounding these changes provides evidence of congressional intent. These changes support the proposition that Congress was aware that specific language establishes specific standards. The Senate changed "knowingly" with definition in S. 1478 to "other than willfully" in a bill proposed by the 93rd Congress, S. 426. Then, in the amended form of S. 426, the language was returned to "knowingly," however, without the respective definition.

33. Id.
The debate over these amendments provides valuable insight regarding intent, because it illustrates what Congress intended to accomplish with these modifications. The House debate of July 23, 1973, began with extensive consideration of the term "knowingly" and its respective definition in the "PENALTIES" section of the Bill.\(^{37}\) Congressman Young (R-Ill.) raised the issue and suggested the deletion of the definition to establish the typical common law usage of "knowingly" which requires actual knowledge, and not a "knew or should have known" standard.\(^{38}\) However, in defense of the bill, its sponsor, Congressman Eckhardt (D-Tx.) suggested:

that the language used in [the penalties section] . . . is ameliorating language and is more favorable language to the accused than the language which appears in most administrative procedure bills. In most administrative bills there is no qualification of "knowingly" at all. That is, a violation of the act in fact, whether the person knew it or not, and knew he was violating it or not, becomes illegal.\(^{39}\)

In this early draft of TSCA, Congress intended a "knowingly" or negligence standard. Moreover, Congressman Moss (D-Ca.) supported this conclusion, maintaining that, "the definition of 'knowingly' here undoubtedly is analogous to negligence."\(^{40}\)

Congressman Dingell (D-Mi.), in an attempt to clarify the standards under consideration, categorized statutory enforcement standards into three types. He maintained:

[1] The type which says nothing about knowingly or willful, in which case we have the crime being consummated by the simple commission of the act . . . .

[2] We have the second type where we apply the word "knowingly," which simply means the individual intended the consequences of his act . . . .

[3] The third or the last category would apply to willful or willfully malicious acts . . . .\(^{41}\)

As evidenced by the congressional debate, the drafters were acutely aware of 1) the different standards of liability; 2) the language required to establish a specific type of liability; and 3) in the early drafts of TSCA, the congressional intent to create a negligence standard.

Based on an analysis of the legislative debate, the deletion of the "knowingly" language in the present Act supports the determination that Congress

\(^{39}\) Id.
\(^{40}\) Id.
also intended to establish a strict liability standard. Case law also supports this conclusion: "It is a canon of statutory construction that where . . . the words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning." Additionally, the debate provided a logical purpose behind Congress’ subsequent replacement of the negligence standard with a strict liability standard. Congressman Eckhart’s soliloquy, which characterized the "knowingly" standard as "ameliorating" as compared to the typical standards of administrative statutes, suggests that Congress replaced the weaker "knowingly" standard with a more consistent strict liability standard.

3. The Interpretation of Other Legislative Histories

Under conditions analogous to TSCA, courts have held that section 311 of the Clean Water Act ("CWA") utilizes a strict liability standard. Congress established a "knowingly" standard in early drafts of CWA, then expressly deleted the language from the present Act. Therefore, the conclusion that TSCA utilizes a strict liability standard based on the express deletion of the "knowingly" requirement is perfectly consistent with the rules of statutory construction, case law, and the parallel judicial determination of CWA section 311 liability.

As evidenced by CWA Section 311, a statute does not require express strict liability language in order to establish strict liability. Courts have

42. Klein v. Republic Steel Corp., 435 F.2d 762, 765-66 (3d Cir. 1970) (which found that the 1937 amendments of the Kohler Act, which added an "in such a negligent manner" provision, established a new negligence standard for the Pennsylvania statute). See also Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444 (D.C. Cir. 1988) (The court stated: "[t]he IRA [Indian Reorganization Act] and the OIWA [Oklahoma Indian Welfare Act] address the same subject, albeit for different tribes, and were enacted just two years apart. It is contrary to common sense as well as sound statutory construction to read the later, more general language to incorporate the precise limitations of the earlier statute. Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning."); cert. denied, 109 S. Ct. 795 (1989); United States v. Crocker-Anglo National Bank, 277 F. Supp. 133, 155 (N.D. Cal. 1967).

43. See, e.g., United States v. M/V Big Sam, 681 F.2d 432, 441 (5th Cir.) (stating that, "strict liability . . . is apparent from the legislative history."); reh'g denied, 693 F.2d 451 (5th Cir. 1982), cert. denied, 462 U.S. 1132 (1983); Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979) (stating that, "[t]he final bill embodied the Senate's strict liability proposal"); United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979) (stating that the provisions of the CWA "were written without regard to intentionality . . . making the person responsible for the discharge of any pollutant strictly liable.").


also interpreted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") to require strict liability without express language. In State of New York v. Shore Realty Corp., the court held that "Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability [under CERCLA] was not included." In light of Congressman Dingell's division of statutory standards suggesting that strict liability is established by simply "say[ing] nothing about knowingly or willfully," it is perfectly consistent to determine that Congress intended a strict liability standard for TSCA, even though the statutory language does not expressly mandate such a standard.

C. The Comparison of Language within the Statute

The comparison and analysis of the language within the statute itself provides evidence of legislative intent. Section 15(2) of TSCA provides:

It shall be unlawful for any person to-

(2) use for commercial purposes a chemical substance or mixture which a person knew or had reason to know was manufactured, processed, or distributed in commerce . . . .

Therefore, since Congress expressly provided a "knew or should have known" standard in this one isolated situation, it is most likely that Congress intentionally omitted this language from the other subsections for the specific purpose of creating a strict liability standard. A rule of statutory

The Federal Safety Appliance Act, 45 U.S.C. § 2 (1983) states: "[i]t shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Id. at 387 n.2. The Court held that this language alone is enough to establish a strict liability standard against a carrier for injuries sustained by plaintiff because of faulty couplers. Further, the Court stated: "a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability - a liability that cannot be escaped by proof of care or diligence." Id. at 390. But see PROSSER, supra note 11, at 228. "These statutes [which establish strict liability without express language] are, however, the exception, and in the aggregate they make up only a very small percentage of the total safety legislation. Normally no such interpretation will be placed upon a statute, and no such conclusion reached, unless the court finds that it was clearly the purpose of the legislature." Id.

46. 759 F.2d 1032 (2d Cir. 1985).
47. Id. at 1042. Converse to both TSCA and CWA, the original drafts of CERCLA possessed "strict liability" language which Congress expressly deleted for a CWA section 311 standard of liability. Id. Thus, based on judicial interpretation, the court held CERCLA a strict liability statute under more disharmonious circumstances than either TSCA or CWA.
interpretation supports this conclusion: "[W]here Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."51

Another example of Congress' explicit use of a fault standard is the presence of a "knowingly or willfully" standard for criminal penalties.52 In United States v. Pacific Hide & Fur Depot, Inc., the court required a finding of intent before a violation could be found, holding that, "if [the] defendants did not know the capacitors contained PCBs, their convictions were improper."53 Therefore, TSCA requires a determination of actual intent to establish a knowing or willful criminal violation.

The presence of an actual knowledge standard for criminal violations, coupled with the "knew or had reason to know" standard for civil violations under section 2614(2), provides strong evidence that Congress was aware of and used specific language to establish an intent-based standard of liability. Consequently, the conspicuous absence of either "knowingly" or "knew or had reason to know" in the TSCA section 15, "prohibited acts," subsections (1), (3) and (4) is indicative of congressional intent to create a strict liability standard for these subsections.

Additionally, the EPA provides valuable insight into Congress' purpose behind the deletion of the "knowingly" requirement for civil violations in the present Act. In response to the "knowingly" requirement, the EPA in its capacity as Administrator stated:

In place of Section 17(a) of H.R. 5356 [which includes the "knowingly" requirement], we recommend the provision for civil penalties provided in Section 16(b) of the Administration bill [which does not include the "knowingly" requirement]. We consider it inappropriate for a civil penalties provision to require that the violation charged must be established "knowingly," a requirement quite appropriate in the case of criminal violations.54

Thus, the deletion of "knowingly," as recommended by the EPA, supports the legislative intent to create a strict liability standard for TSCA.

51. City of Burbank, 329 F.2d at 832.
52. TSCA section 16(b) states:
Any person who knowingly or willfully violates any provision of section 2614 of this title, shall, in addition to or in lieu of any civil penalty which may be imposed under subsection (a) of this section for such violation, be subject, upon conviction, to a fine of not more than $25,000 for each day of violation, or to imprisonment for not more than one year, or both.
D. The Doctrine of Pari Materia

Under the doctrine of *pari materia*, legislation of similar purpose and character can be used to determine legislative intent.\(^55\) This doctrine is based on "the supposition that the several statutes were governed by one spirit and policy, and were intended to be consistent . . . in their several parts and provisions."\(^56\) In establishing TSCA as a strict liability statute it is of

---

\(^{55}\) Historically, environmental regulation has utilized a strict liability standard. As an ultrahazardous or abnormally dangerous activity, pollution (e.g., the accumulation of sewage or smoke, dust, bad odors, noxious gases from industrial enterprises), as an absolute nuisance, requires a strict liability standard. Prosser, *supra* note 11, at 552. The Court of Appeals for the Second Circuit recently held in State of New York v. Shore Realty Corp. that the owner of property, which contained a hazardous waste site, "is liable for maintenance of a public nuisance irrespective of negligence or fault." 759 F.2d 1032, 1051 (2d Cir. 1985). Thus, strict liability regulation of pollution through common law nuisance remains intact, even today.

Additionally, statutory regulation of pollution traditionally uses a standard of strict liability. An example is the Rivers and Harbors Appropriation Act of 1899. This Act "prohibits discharging from a ship or shore installation into navigable waters of the United States or their tributaries 'any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state.'" W. Rodgers, *Environmental Law* 387 (1977). Courts have upheld this Act to utilize a strict liability standard. United States v. United States Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970), aff'd, 482 F.2d 439 (7th Cir. 1973), cert. denied, 414 U.S. 909 (1973). In sum, there is substantial evidence that the interpretation of TSCA as a strict liability statute is consistent with past environmental regulation.


particular importance to compare it with CWA section 311 and CERCLA liabilities.

CWA, CERCLA and TSCA possess analogous purposes: to protect the public health by the regulation of hazardous substances. The purpose of TSCA is to "regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment." Section 311 of CWA was designed to prevent the discharge of "oil and any hazardous substances . . . which may be harmful to the public health or welfare." Similarly, Congress enacted CERCLA to regulate cleanup, if "there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare." Clearly, the purposes of these environmental statutes arise under the same "spirit" and "policy" as defined by the doctrine of pari materia and, accordingly, should be analyzed together.

In recent years, environmental legislation has attempted to increase the regulation of toxic substances to a point which commentators suggest is "cradle to grave" regulation. Consequently, new legislation attempts to unify the statutory scheme by filling in the gaps of this "cradle to grave" regulation. Congress designed TSCA "to fill a number of regulatory gaps" existing in the scheme of environmental regulation. Similarly, it has been stated that, "CERCLA . . . represents an attempt to fill gaps left by other federal strict liability statutes - including section 311 of the CWA." It has also been held that, there are "marked similarities in the enforcement and

enact the . . . Act in a vacuum [sic] . . . [and was] well aware that the provisions and the purposes of the Act . . . would have to co-exist." Id. The court also held when:

interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it a construction as will carry into execution the will of the legislature.

Id. at 650. See also SmithKline Corp. v. Staats, 668 F.2d 201, 208 (3d Cir. 1981) (stating that "in the absence of convincing evidence that different statutory provisions were intended, interrelated interpretations should be given a harmonious construction"), cert. denied, 461 U.S. 913 (1983); See Eskridge, Public Values In Statutory Interpretation, 137 U. PA. L. REV. 1007, 1039 (1989).

policy provisions underlying the TSCA and . . . the FWPCA [or CWA]."\(^6\)

As required by the unified nature of environmental legislation, the determination of legislative intent regarding TSCA should be analyzed in light of and within the context of related legislation. Consequently, based on the established strict liability standards of both CWA section 311 and CERCLA, the conclusion that TSCA utilizes a strict liability standard is consistent with the intent of Congress and the doctrine of pari materia.

Based on the strict liability provisions of the other related statutes, a determination that TSCA uses a negligence standard would be an anomaly in the scheme of environmental regulation. This anomaly, however, exists at the administrative level. As evidenced by the Huth decision, the EPA does not uniformly implement TSCA as a strict liability statute.\(^6\) Because of this anomaly and the judicial deference given to the decision-making of administrative agencies, a complete analysis of TSCA liability in the courts must include a discussion of EPA's interpretation of TSCA's standard of liability.

II. WHAT IS THE EPA'S INTERPRETATION OF TSCA'S STANDARD OF LIABILITY AND THE POLICY BEHIND IT?

Beyond the recommendation of the EPA to establish a strict liability standard in the early drafts of TSCA,\(^6\) the EPA's interpretation as the administrator of environmental legislation carries considerable weight in judicial decisions. Therefore, a determination of EPA's interpretation of the standard of liability of TSCA is critical to judicial review.

"Agency views regarding statutory issues may be formulated as part of either 'formal' or 'informal' agency processes. The first includes rulemaking and adjudication functions and the latter encompasses interpretations contained in, for example, letter rulings and internal agency directives and guidelines."\(^6\)

A. The EPA's Interpretation

The first "formal" process to analyze is EPA rulemaking. The EPA's codification of TSCA narrowly supports a strict liability standard for provisions regulating PCBs. EPA regulations define a "PCB Item . . . as any PCB Article, PCB Article Container, PCB Container or PCB Equipment, that


\(^6\) \textit{See supra} text accompanying notes 1-5.

\(^6\) \textit{See supra} text accompanying note 54.

\(^6\) Luneburg, \textit{supra} note 25, at 244.
deliberately or unintentionally contains or has a part of it any PCB or PCBs." Accordingly, intent is not a requirement when establishing a "PCB Item."

The language of this definition also led to the establishment of TSCA as a strict liability statute in the second "formal" process, adjudication. In Continental Plastic Containers, the ALJ determined that even if the defendant "did not know or suspect that the fluid... contained PCB's in excess of 50 ppm, ... [it does] not constitute a defense to charges of violations." However, not all administrative decisions are consistent, as evidenced by Huth, where the ALJ held that the owner of land which contained storage tanks in violation of TSCA was not liable based on the owner's lack of intent to violate. Suburban Station also supports the Huth position. In this decision the City of Philadelphia, which performed the actual PCB clean-up, was liable for clean-up violations, while SEPTA, the transportation authority which owned the contaminated property, was not liable. The ALJ adjudicating for the EPA stated that, "[i]n order to impose strict liability on SEPTA for wrongs committed by its licensee, there must be an indication that Congress specifically intended this result. ... That indication of intent by Congress ... is simply missing here." As evidenced by these decisions,

69. Id. at 5. See also In re Hodag Chemical Corp., No. TSCA-V-C-025-88 (initial decision Nov. 16, 1988), at 17 (stating that "[r]espondent's contention that it is not liable because the violations were unknowing violations is not supported by the statute, its legislative history or precedent thereunder"); see generally Environmental Defense Fund, Inc. v. EPA, 636 F.2d 1267, 1280 (D.C. Cir. 1980) (discussing EPA's establishment of a 50 ppm (parts per million) PCB level to exclude widespread ambient sources of PCB's from regulation).
72. Id. at 17.
73. Id. at 16-17. However, a discussion of the "innocent landowner" defense is warranted, because both Huth and Suburban Station question the applicability of strict liability to landowners. The court in United States v. Burns, 512 F. Supp. 916, 921 (W.D. Pa. 1981), indirectly suggests that this defense may be applicable by law. This case involved the illegal disposal of PCBs under TSCA. Defendants in this case argued that as "innocent absentee landlords... they are not within the reach of the statutory language as a matter of law." Id. However, the court rejected the motion to dismiss, and stated that "[t]he extent of the... defendants' involvement with Burns [the tenant who disposed of the PCBs] is disputed and must be resolved at trial." Id. Therefore, the Burns' court implies that simple ownership - which would be enough under a strict liability standard - may not be enough to establish liability by law, and that more facts regarding the involvement of the landowners in a TSCA violation would be required. The defendants' in Burns argue that they are not within the "statutory language" as a matter of law. Although the opinion does not expressly discuss the issue, it is likely that the argument
the EPA interpretation of TSCA liability is in a state of confusion, with some evidence narrowly supporting strict liability in EPA rulemaking, and a split of decisions existing in the adjudicatory forum.

The "informal" processes, which establish an Agency's interpretation of a statute, include internal guidelines.74 The EPA in Guidelines for the Assessment of Civil Penalties under Section 16 of TSCA; PCB Penalty Policy provides:

Since the law only requires the Agency to consider the culpability of the violator as an adjustment factor, the existence of a violation can be established without relying solely on this "blame worthiness" factor. In other words, the Agency may pursue a policy of strict liability in penalizing for a violation, though some allowance must be made based on the extent of the violator's culpability.75

arises from the omission of "owner or operator" liability language in TSCA. Instead, the relevant liability provisions utilizes "person." See, e.g., 15 U.S.C. § 2614 (1988). The ALJ in Suburban Station relied on this omission to discharge the liability of the landowner, SEPTA, from a TSCA violation directly performed by its licensee. In re Suburban Station, No. TSCA-III-40, at 16 (initial decision Sept. 4, 1986) (stating that "[n]either TSCA, nor the PCB Ban Rule, contain any definition of 'owner or operator,' which would indicate that the statute or regulation was intended to impose . . . liability on owners of property without regard to whether they had in any way caused the violation."). However, regardless of the omission the court in Burns continued to rely on the EPA interpretation, and stated that "it is . . . likely that Congress intended PCB regulations to be limited to owners and operators." Burns, 512 F. Supp. at 919. Thus, an "innocent landowner" falls within the reach of the regulations, but may escape liability by proving the affirmative defense of "innocence."

An important factor to consider, however, is that Congress has expressly provided for the "innocent landowner" defense in other related environmental legislation. For example, under section 107 of CERCLA, innocent landowners may escape liability where "the act or omission of a third party" who is not an "employee or agent of the defendant," or not in a "contractual relationship" with the defendant causes the release of hazardous substances on the landowner's property. 42 U.S.C. § 9607(b)(3) (1988). See also 33 U.S.C. § 1321(g) (1988) (providing for a third party defense under CWA); see generally Anderson, Will the Meek Even Want the Earth?, 38 MERCER L. REV. 535 (discussing the "innocent landowner" defense in a broad range of contexts). Moreover, TSCA in regards to PCBs is consistent with the purposes of both CWA and CERCLA - the cleanup of hazardous waste. Under TSCA section 6(e)(1)(B), EPA is required to provide regulations for the "disposal" of PCBs. 15 U.S.C. § 2605(e)(1)(B) (1988). This "disposal" mandates the proper cleanup and removal of leaks and spills. See 40 C.F.R. § 761.60(b)(2) (1988) (providing that "PCBs resulting from the clean-up and removal of spills, leaks, and other uncontrolled discharge, must be stored and disposed of."); see also United States v. Commonwealth Edison Co., 16 Envtl. L. Rep. (Envtl. L. Inst.) 20187 (N.D. Ill. 1985) (requiring the cleanup of PCBs from ruptured capacitors under TSCA § 6(e)). Significantly, under the "third party" defenses of both CERCLA and CWA the "innocent landowners" in Burns, Huth and Suburban Station could not escape liability. Therefore, it is arguably improper for courts to establish defenses to liability under TSCA where Congress did not expressly establish a defense, and which are inconsistent with the scheme of environmental regulation.

74. Luneburg, supra note 25, at 244.
Based on this guideline, culpability plays a role in the amount of the penalty, but not in determining liability, where the applicable standard is no fault or strict liability.

In sum, EPA's interpretation of TSCA's standard of liability generally supports the application of strict liability, with the conspicuous exception of several adjudicatory decisions. To more fully understand the Agency's interpretive process, a discussion of the underlying policy considerations is valuable.

**B. Policy Considerations**

The Court in *Chevron* stated that "policy arguments are more properly addressed to legislators or administrators, not to judges."\(^{76}\) The Court relegated its role to ensuring that an EPA interpretation is "a reasonable policy choice for the Agency to make . . . ."\(^{77}\) Therefore, although the Court will not make the policy choice, it will determine if the policy is reasonable. This section describes some policy considerations involved in the interpretation of TSCA's standard of liability. These considerations revolve around economic and justice concerns.

1. **Economic Concerns**

The first policy consideration is economic. Welfare economists rely on a basic premise of microeconomic theory: "that markets will efficiently allocate resources only if prices reflect all the costs of doing business."\(^{78}\) Therefore, if the application of strict liability requires a business to consider a greater percentage of the total costs of production in their product prices, then strict liability will increase economic efficiency.

The application of strict liability to environmental harms shifts non-negligent injury costs to the defendant, increasing cost internalization.\(^{79}\) Cost internalization increases economic efficiency by requiring producers to establish consumer prices that better reflect all the costs of doing business.\(^{80}\) Cost internalization also increases efficiency by increasing production costs.

---

77. *Id.* at 845.
78. *ENVIRONMENTAL PROTECTION*, *supra* note 14, at 636.
79. *Id.*
80. *Id.* But see *id.* at 637. All external costs, however, are not negative and it would be difficult to apply these to the cost of doing business *Id.* "Industrial facilities almost invariably generate positive externalities (benefits not captured through product prices) such as employment, family health care, and participation in community activities. Imposing strict liability on the defendant may cause it to shut down or reduce operations, resulting in the loss of these positive externalities." *Id.*
These increased costs encourage producers or "disrupters of the environmental quality . . . to compare the costs of damage payments with the costs of abating the environmental pollution by switching product lines . . . or by reducing the level of use of damaging product inputs and product processes."81 This increases efficiency because producers of potentially dangerous products are generally the "part[ies] best able to make a cost benefit analysis between accident costs and accident avoidance costs and then to act on that analysis."82

In a more practical vein, the application of strict liability increases economic efficiency regardless of cost internalization. "Courts and parties can reduce transaction costs by focusing on causation and the measure of damages and eliminating the inquiry into fault . . . ."83 The EPA, by applying a strict liability standard and reducing transaction costs, encourages the maximization of the Agency's limited resources.84 Therefore, the EPA by adopting a strict liability standard 1) promotes both "accident prevention . . . and the elimination of the necessity for proving negligence;"85 2) decreases the cost of a TSCA enforcement case; and 3) increases resources for additional enforcement cases or other pressing environmental problems.

Another result of a strict liability standard is increased insurance coverage for environmental harms. At least one court supports the application of strict liability because it "practically ensure[s] that enterprises would obtain liability insurance to cover any environmental disruption they might

81. Id. at 636. See generally R. POSNER, ECONOMIC ANALYSIS OF LAW 163 (3d ed. 1986) [hereinafter POSNER] (stating that "[i]f a class of activities can be identified in which activity-level changes by potential injurers [such as environmental disrupters] appear to be the most efficient method for accident prevention, there is a strong argument for imposing strict liability on the people engaged in those activities.").

82. ENVIRONMENTAL PROTECTION, supra note 14, at 636. See POSNER, supra note 81, at 166 (describing information costs in the context of product liability). "Strict liability in effect impounds information about products hazards into the price of the product . . . ." Id.

83. ENVIRONMENTAL PROTECTION, supra note 14, at 636. See generally Posner, supra note 81, at 528-29.

Since strict liability eliminates a major issue in tort litigation, that of the care exercised by each party, the amount of uncertainty involved in predicting the outcome of litigation if the claim is not settled would be reduced; and a reduction in uncertainty concerning the outcome of the litigation should reduce the fraction of claims that go to trial. Simplification of issues might also lead to a reduction in the cost of each trial. . . .

Id. However, strict liability would also "lead to increase in the number of injury claims, because the scope of liability would be greater." Id. at 528.

84. "The limited resources available to any Agency demand that those resources be utilized in a manner that will produce the maximum benefit." Note, Superior Air Products, Inc. v. NL Industries, Inc.: An Economic Efficiency Approach To New Jersey's Environmental Cleanup Responsibilities Act, 2 ADMIN. L.J. 363, 381 (1988).

85. PROSSER, supra note 11, at 693.
cause." By increasing insurance coverage, the cost of insurance premiums rises which requires that the producer shift the additional premium costs to the consumer by increasing product and/or service prices. Therefore, more costs are internalized again increasing economic efficiency.

2. Justice Concerns

The second policy consideration is justice. However, the first aspect of this consideration is closely related to economic concerns. Cost internalization, a consequence of a strict liability standard, supports justice; it requires that those who benefit from a dangerous activity or product pay for the injuries that are inflicted on the public and environment (e.g., the company through decreased profits and the consumer through increased prices).

Beyond economic concerns, corrective justice supports the application of a strict liability standard to environmental statutes. The doctrine of strict liability at its core reflects the judgment that even if some harm is inevitable, the social value of some enterprises is greater than their costs, but if an enterprise’s benefits exceed its costs, fundamental fairness requires at least that profits be net of any harm inflicted.

This concept, that those who benefit from an activity must pay for the harms that they inflict, it has been argued, must in fairness be imposed regardless of economic efficiency.

However, as a commentator suggests, fairness “cuts two ways.” When a negligence standard replaces a strict liability standard, “[t]he best justification that can be offered for the fault [or negligence] principle is the assertion that most people believe it is fair.” A fault standard is considered fair because liability arises through culpability, not through the mere unintentional actions of the defendant.

Under TSCA, however, culpability is a mitigating factor in the assessment of penalties, and plays an important role in establishing a “fair” result in

86. Environmental Protection, supra note 14, at 636.
87. Id.
88. Id.
89. Id.
90. Id.
91. Id. See also Prosser, supra note 11, at 537. “The courts have tended to lay stress upon the fact that the defendant is acting for his own purposes, and is seeking a benefit... from such activities, and that he is in a better position to administer the unusual risk by passing it on to the public than is the innocent victim.” Id.
92. Environmental Protection, supra note 14, at 637.
93. Prosser, supra note 11, at 609; See also Environmental Protection, supra note 14, at 637 (suggesting that strict liability seems fairest when liability is imposed on a faultless but profit making enterprise where a faultless but injured natural person is involved).
light of the stringent standard of strict liability. Congress intended to establish culpability as a mitigating factor, rather than an element of liability.\(^9\) Section 16(b) of TSCA provides:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of such prior violations, the degree of culpability, and other such matters as justice may require.\(^9\)

Thus, by requiring culpability to play a role in the assessment of penalties, Congress minimizes the "unfair" affects of a strict liability standard.

In sum, policy considerations support the application of a strict liability standard, based on both an increase in economic efficiency and the support of justice considerations.

### III. Step Two: Is the EPA's Interpretation of TSCA's Standard of Liability Reasonable?

Step one of the *Chevron* analysis considers the intent of Congress. If the intent is clear, a court's review is finished and the congressional intent is given effect.\(^9\) After a review of congressional intent, most evidence supports the establishment of a strict liability standard for TSCA. However, arguing in the alternative, if a court does not find that "Congress has directly spoken to the precise question at issue,"\(^9\) the court must apply step two of the *Chevron* analysis.\(^9\) Step two requires the court to determine whether Congress delegated interpretive authority to the EPA, and if so, whether the interpretation is reasonable.\(^9\)

*Chevron* suggests two types of congressional delegation of authority, explicit and implicit.\(^1\) The first, explicit, requires the "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."\(^1\) Clearly, in the case at hand, Congress did not delegate express authority to EPA to establish TSCA's standard of liability in either the statutory language or legislative history.

However, a determination of implicit delegation under *Chevron* is prob-
able. The Court in *Chevron* describes a broad range of reasons for implicit delegation:

Perhaps . . . [Congress] consciously desired the administrator to strike the balance at this level, thinking that those with great expertise and charged with the responsibility of administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; . . . [or] perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.\(^\text{102}\)

With the door to implicit delegation left wide open by the Court, EPA apparently has the authority to interpret TSCA's standard of liability, absent the clear intent of Congress. The only hurdle remaining for judicial deference would be the test for "reasonableness."

The Court in *Chevron* stated that if an agency's interpretation "represents a reasonable accommodation of conflicting policies that [are] committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that the Congress would have sanctioned."\(^\text{103}\) Accordingly, agency interpretations are "reasonable," unless they are "manifestly contrary to the statute."\(^\text{104}\) However, in the case at hand, the current interpretation of the EPA is unclear.\(^\text{105}\) The question arises, which EPA interpretation, strict liability or negligence, will be applied to the "reasonableness" test?

Clearly, based on the construction of legislative intent, if the EPA's interpretation of strict liability is put to the test, it will be found to be reasonable, and in no way "manifestly contrary" to the statute. However, if the EPA's interpretation of negligence is tested, the result is not as clear.

Arguably, congressional intent is not clear enough to give strict liability effect without agency interpretation. However, this intent, which is supportive of strict liability, may be enough to show a negligence standard is "man-

\(^{102}\) *Id.* at 865.

\(^{103}\) *Id.* at 845 (citations omitted). Congress established policy guidelines in section 2 of TSCA, which provide that EPA "shall consider the environmental, economic, and social impact of any action . . . [EPA] takes or proposes to take." 15 U.S.C. § 2601(c) (1988). *See supra text accompanying notes 77-96 (discussing several aspects of the policy under these guidelines).*

\(^{104}\) *Id.* at 844.

\(^{105}\) *See id.* at 838. The court in *Chevron* states: "[T]he fact that the EPA has from time to time changed its interpretation of the term "source" does not lead to the conclusion that no deference should be accorded the EPA's interpretation of the statute." *Id.* Thus, if the current interpretation is clear, but contrary to previous interpretations, judicial deference is still afforded.
festly contrary to the statute." Thus, the vehicle which reaches the court for review, whether rulemaking or adjudication, and its interpretation of TSCA's liability, will be critical to a court decision. Even in light of the evidence supporting strict liability, if an adjudicatory decision supporting a negligence standard reaches a court for review, it is plausible that judicial deference under *Chevron* may uphold it. This anomalous result would require the question to be posed, as a commentator describing judicial deference aptly stated: "[a]re agencies right when they are wrong?"106

**CONCLUSION**

This Comment addresses the question - what is the correct standard of TSCA liability? The analysis reveals that due to unclear statutory language and inconsistent agency decisions, the question is unresolved. A second question naturally follows - what will TSCA liability be when it reaches the courts? The answer is more certain, but far from absolute. Based on the application of *Chevron*, the likely result of a court decision would be a strict liability standard for TSCA. However, the application of judicial deference to an agency decision condemning strict liability could quite possibly result in a negligence standard. Thus, a third question is the only one truly resolved - what should TSCA liability be? Clearly, based on the persuasive evidence of Congressional intent, the history and current scheme of environmental regulation, and the support of policy considerations, TSCA liability should be strict liability.

*Robert E. Fabricant*

---