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Contents

FEDERAL ENVIRONMENTAL LAWS SHOULDN'T SET STANDARDS IN STATE LIABILITY SUITS[1]

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INTRODUCTION

The period immediately after the birth of the environmental movement nearly thirty years ago saw a proliferation of complex environmental statutes and detailed regulations targeting activities such as discharges into the nation's waters, emissions into the air, and the management and disposal of various hazardous wastes. Indeed, one well-respected environmental practitioner has described this blizzard of environmental laws and regulations as "eclipsing the tax code in legal and technical complexity."[2] Much as an afterthought, these statutes promote private enforcement through citizen suits, allowing individuals to recover enforcement costs such as legal fees.[3] However, these statutes stop short of permitting recovery for damages.[4] Thus, plaintiffs seeking to recover for injuries allegedly caused by their violation must turn to the traditional common law vehicles.[5]

This article focuses on the circumstance in which a plaintiff attempts to recover common law damages based on evidence of violations of these environmental statutes. Courts have adopted essentially three approaches in hearing these claims. The first is that evidence of a federal statute's violation constitutes a negligence *per se* claim. At the other end of the continuum are those cases that hold such a statutory violation cannot form any basis for a negligence action. The distinction made between these two extremes, discussed more fully below, is the extent to which Congressional intent should be considered. In the former instance, it is deemed irrelevant. In the latter, such intent is of conclusive importance. A third approach, not so much a compromise as a recognition of the function of these statutes and their regulation, construes such violations as "mere evidence," which can be considered by a jury in making its determination of liability.[6]

This article proposes that the second approach, which denies negligence *per se* effect to federal environmental violations, is the more defensible position in light of both theory and practice.

I. STATE LAW CONTROLS

Initially, it should be emphasized that it is state law, and not federal statutory law, that governs the question whether a violation of a federal environmental statute constitutes a negligence *per se* claim for damages. This is important because of the context in which these claims may arise. Consider, for example, an action in federal district court to recover some sort of environmental response costs which is accompanied by state law claims for damages under traditional theories such as negligence, nuisance, or trespass. Both federal response costs and state damage claims are based on the same conduct. A federal district court, hearing the state law claims in diversity,[7] must apply substantive state law to those causes of action.[8] But are the states empowered to adopt federal statutory or regulatory standards as the duty of care owed in a state negligence claim?

This question has been squarely answered by the Supreme Court in *Merrell Dow Pharmaceuticals v. Thompson,*[9] where the Court held that a complaint alleging a violation of a federal statute as an element of a state cause of action does not state a claim "arising under the Constitution, laws, or treaties of the United States," when Congress has determined that there should be no private, federal cause of action for the violation.

Even though a plaintiff may not assert a private cause of action under a federal statute as a federal cause of action, that statute might nevertheless serve as a standard of conduct which, if breached, gives rise to an action for common law negligence.[10] Indeed, absent some preemptive congressional action, the field is left open for states to apply whatever standard of care they choose.[11] Because Congress has not seen fit to occupy the field with respect to environmental regulations, states have adopted one of three approaches to determining the effect of federal environmental regulations on state law claims. These approaches are discussed below.

II. THE THREE STATE LAW APPROACHES

A. Federal Environmental Violations as Negligence *Per Se*

In most jurisdictions, the violation of an applicable statutory or regulatory standard is negligence as a matter of law.[12] A majority of American jurisdictions that base negligence *per se* claims upon violations of these laws have done so under the doctrine of "implied remedies," which existed at common law.[13]

Thus, in *Bernbach v. Timex Corp.*,[14] the plaintiffs, owners of residential property adjacent to a long-time manufacturing facility owned by the defendant, brought a nineteen count complaint seeking response costs and damages under various common law claims, including negligence *per se*.[15] In denying the defendant's motion to dismiss the negligence *per se* claim for violations of CERCLA and RCRA, the district court stated that, "Connecticut law does not require the legislature expressly to create a private cause of action in order for statutory duties to become superimposed on general duties of care."[16]

Also in *Armstrong v. Asbestos Defendants (BHC)*,[17] the plaintiff, who claimed to be suffering from mesothelioma as a result of asbestos exposure, sued several defendants under common law claims of negligence *per se*, based upon violations of the Clean Air Act. In remanding that case to the state court for lack of jurisdiction, the district court opined that the plaintiff pleaded a "viable state law tort claim" under California law which did not necessarily require the interpretation of federal law, even though federal law formed the basis of the claim.[18]

Similarly, in *Gill v. LDI*,[19] the defendant operated a rock quarry that discharged plumes of silt into the plaintiff's pond through a spring located next to the quarry. When the plaintiffs were able to prove that the defendant had done so without a permit under the National Pollution Discharge Elimination System ("NPDES"),[20] the district court held that, under Washington state law, such emissions constituted a nuisance *per se* in that case.[21]

B. Federal Environmental Violations Not Negligence *Per Se*

The cases noted above rely on the common law notion of implied remedies as justification for the existence of a *per se* claim based upon statutory environmental violations. Other jurisdictions have confronted the same question and found no such implied common law claim to exist. Those courts reasoned that affirmative evidence of legislative intent, and not the mere enactment of a statute, is crucial to the existence of an implied remedy.[22] For example, in *Rodriguez v. American Cyanamid Co.*,[23] the district court held unavailable, under Arizona law, a negligence *per se* action under FIFRA. In so doing, the court noted a lack of congressional intent to create such a cause of action.[24]

Similarly, in *323-343 E. 56th St. Corp. v. Mobil Oil Corp.*,[25] the district court addressed the availability of a claim of negligence *per se* based upon violations of certain RCRA regulations.[26] In finding that no such claim existed, the court opined that RCRA was enacted for the purpose of protecting the public from water and soil contamination, not persons seeking to recover money damages. "None of the RCRA provisions indicate that the class of persons to be protected is any less broad than the entire population of the United States."[27] Thus, allowing a negligence *per se* claim to proceed under RCRA, when its very specific citizen suit provisions serve only to allow private plaintiffs to act as "private attorneys general," was held improper.[28]

The district court in *Short v. Ultramar Diamond Shamrock*,[29] which also confronted a claim of negligence *per se* for violations of RCRA, employed nearly identical reasoning to that of the *323-343 E. 56th St. Corp.* court. In holding that such a claim was not available under Kansas law, the court noted that evidence of statutory violation alone is insufficient to establish negligence *per se*. Rather, a court must examine "whether the statute creates a duty to individuals, or conversely if the statute was enacted to protect the public at large."[30] After concluding that RCRA was aimed at the latter, the court noted that to allow such a negligence *per se* claim to proceed would be nothing short of "bootstrapping" a cause of action for damages when no such relief is provided under RCRA.[31]

Finally, the Connecticut federal district court has, on two separate occasions, reconsidered the question of negligence *per se* claims based upon both RCRA and CERCLA violations, and has held that neither is available under Connecticut state law, calling into question the continuing vitality of *Bernbach*.[32]

C. Violations as Mere Evidence of Liability

The middle ground courts employ in toxic tort claims has been to consider negligence *per se* as something less than judicial adoption of the legislative standard of care. These courts, recognizing the inherent power of the federal government to gather data for decision-making purposes, treat a violation of a statutory or administrative rule as evidence of negligence, rather than as a breach of the duty of care itself, leaving the jury free to reject or accept the legislative determination of what conduct is proper.[33] Such was the holding of the court in *Nutrasweet Co. v. X-L Engineering Corp.*,[34] where a defendant moved to dismiss that count of the complaint which alleged negligence *per se* for violations of RCRA, on the basis that such a private cause of action was not permitted under the statute. In denying the motion on that basis, the district court stated that, "RCRA is mere evidence, to be used at trial, which could establish to a jury or judge . . . that the failure to meet RCRA requirements constitutes a breach of . . . duty."[35]

III. WHY PER SE NEGLIGENCE IS WRONG

A. The Argument in Favor of *Per Se* Recovery Disrespects the Role of Judge and Jury

In common law actions used by plaintiffs to remedy injuries caused by pollution, it is the reasonableness of a defendant's actions that is typically at issue. When no fixed standard of conduct exists, the reasonableness of those actions depends on many factors, including a balancing of the rights and responsibilities of the respective parties. The resulting uncertainty of such a scheme, in the eyes of some jurisdictions, renders common law actions inadequate to control various types of pollution. Thus, those jurisdictions that recognize *per se* causes of action for environmental violations believe that the judge's or jury's need to conduct such balancing has been supplanted by a legislative act. The elected officials, in essence, have done the balancing.[36] The problem with this approach is that it abrogates the power vested, by the common law, in the courts and juries.[37]

B. Against *Per Se* Recovery: A Question of Policy

As reflected in section II above, many federal courts that have addressed the issue of implied remedies have found that no such cause of action exists for statutory environmental violations. Unanimously citing a lack of express congressional intent to provide such private causes of action under the federal environmental statutes,[38] these decisions all hold that plaintiffs seeking personal damages are not within the class of persons to be protected by the statutory scheme.[39]

As the Third Circuit has explained:

> Most formulations of the standards for implying a private cause of action center on the presence or absence of legislative intent to impose civil liability. In theory, at least, application of the negligence per se doctrine represents a judicial policy judgment independent of legislative intent with respect to the imposition of civil liability. Both however, address the question of *whether the policy behind the legislative enactment will be appropriately served by using it to impose and measure civil damage liability.*[40]

Thus, it would go against the expressed intentions of the legislature, and consequently, the policy considerations that supported the enactment of federal environmental statutes, to permit *per se* actions for violations of those statutes. Though Congress clearly had the rights of private citizens in mind when it drafted its environmental statutes, it nevertheless elected to protect those rights by way of existing common law remedies, such as actions for negligence and nuisance.[41]

This approach, rejecting the availability of common law claims for statutory violations, is also consistent with the Restatement approach. Section 288 provides in part that:

> The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively . . . to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public.[42]

Further expounding upon its meaning, the American Law Institute's comments to clause (b) state that certain:

> legislative enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm . . . In the ordinary case, . . . harm suffered by . . . an individual is not within the purpose of the provision, and *the statute or regulation will not be taken to lay down a standard of conduct with respect to such harm.*[43]

The strength of the decisions denying such common law recovery is more fully understood when considered in light of how these statutes are practically applied. A cause of action under the environmental regulatory scheme is, for example, easier to bring and win because each is aimed at protecting the *environment*, not any particular class of *people.*[44] To that end, the government entities charged with environmental compliance regularly enact standards of environmental protection based upon the best information available to them.

But that best available information may prove to be entirely incorrect.[45] Moreover, those agencies establish their standards by exercising virtually unchallengeable judgment[46] and allowing certain "margins of safety," a euphemism for more stringent standards than the available evidence might suggest are necessary to achieve the object of the statutes.[47] Thus, a violation of such a standard, constructed to afford more protection than is usually necessary and not subject to direct scrutiny by the electorate, may not indicate "unreasonable" behavior in terms of health or environmental risks. Yet, its violation subjects a defendant to a finding of negligence that cannot be refuted regardless of the inherent trustworthiness of the regulation, its consistency or lack thereof with Congressional intent, or on the reasonableness of the conduct involved.[48]

This dilemma is compounded when, under the opposing approach, a potentially liable party is not allowed to confront this expert evidence under Federal Rule of Evidence 702 or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Thus, defense counsel is unable to seek a preliminary assessment of whether the reasoning or methodology used in establishing environmental standards are scientifically valid.[49] This includes a determination of, among other things: (1) whether the theory or technique can be or has been tested; (2) whether it has been subjected to peer review and publication; (3) whether the technique has a high known or potential rate of error and whether there are standards controlling its operation; and (4) whether the theory or technique enjoys general acceptance within a relevant scientific community.[50]

C. The Response by *Per Se* Proponents and Why it Misses the Mark

In response to these contentions, *per se* proponents might argue that such a construction of the environmental laws would lead to a pattern of protecting everyone and yet protecting no one. They might also argue that because public pollution control legislation was enacted to address the common law's inability to force the technology necessary to reduce pollution to acceptable levels, such environmental regulations are extensions of the common law designed to address these problems from a public perspective.

This contention lacks logic and merit. Far from providing no remedy to plaintiffs for environmental harm, the major environmental statutes explicitly provide that nothing contained therein proscribes recovery for damages under traditional common law claims.[51] The cases that reject utilization of the federal statutes in *per se* cases do so because allowing state causes of action premised on federal statutes that do not allow such recovery would render the language, and more importantly the policy, of those environmental statutes meaningless. The statutes do exactly as they were intended. They protect the public and the environment.

Moreover, this argument underestimates the power and flexibility of the common law. Those claims remain the most enduring and effective means by which plaintiffs continue to redress their grievances. "Problems of statutes of limitations, causation, multiple defendants, expert proof, novel injuries, and case management have all been addressed individually and collectively . . . Common law courts are responding to concrete problems by developing jurisprudence to deal with the unique features of toxic tort litigation."[52]

D. The Alternative Approach

As to the third or "mere evidence" approach to statutory violations, while less preferable to an outright state law prohibition on the use of environmental statutes in *per se* cases, such an approach at least allows a potentially liable party to confront and refute the inherent trustworthiness of the regulatory scheme. In this respect, a defendant would presumably be allowed to challenge, under *Daubert* or comparable state rule, the use of administratively created standards and scientific data. Once the presentation of evidence is complete, these courts would instruct the jury that violation of such a statute is evidence upon which a finding of negligence could be based.[53]

However, employment of this approach still ignores the fundamental rule espoused by the Supreme Court that a court will not imply a private right of action from legislation when the statute in question was not meant to protect a *specific* plaintiff from that *specific* harm. Thus, those courts that reject negligence *per se* claims predicated on the violation of environmental statutes have dismissed such claims and not permitted evidence of their breach to be presented.[54]

IV. CONCLUSION

Legislative intent is the only solid ground to determine the application of federal environmental statutory or regulatory standards in a cause of action for negligence *per se*. The process by which those standards are determined, the end goal sought to be achieved by allowing such strict regulations, and the concomitant effect and inability of a liable party to refute such findings of liability, all argue in favor of a policy of non-applicability of federal environmental standards to common law claims. Proof of facts relating to the reasonableness of a defendant's conduct, rather than adherence to rigid statutory or regulatory standards, remains the most effective means by which a judge or jury can gauge a party's actions and assess the proper distribution of liability.

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[2] *See* Sheila G. Bush, *Can You Get There From Here?: Noncompliance with Environmental Regulations as Negligence Per Se in Tort Cases*, 25 IDAHO L. REV. 469, 474 n.25 (1988/1989) (internal quotations omitted). The "seven major environmental statutes" are: the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§136-136y (West 1999) ("FIFRA"); the Toxic Substances Control Act, 15 U.S.C.A. §§ 2601-2629 (West 1997) ("TSCA"); the Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 2001) ("CWA"); the Safe Drinking Water Act, 42 U.S.C.A. §§ 300f-30j-26 (West 1991 & Supp. 2001) ("SDWA"); the Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901-6992 (West 1995 & Supp. 2001) ("RCRA"); the Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (West 1995 & Supp. 2001) ("CAA"); and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601-9675 (West 1995 & Supp. 2001) ("CERCLA"). *See* Bush, note 1 *supra*, at 478 n.38.

[3] *See* 33 U.S.C.A. § 1365(d) (CWA); 42 U.S.C.A. § 6972(e) (RCRA), and § 7604(d) (CAA).

[4] *See Powell v. Cannon*, 914 F.2d 1459, 1462 (11th Cir. 1990) (no recovery of damages under CAA); *Davis Bros., Inc. v. Thornton Oil Co.*, 12 F. Supp. 2d 1333, 1338 (M.D. Ga. 1998) (no recovery of damages under RCRA); *Saboe v. State of Oregon*, 819 F. Supp. 914 (D. Or. 1993) (no recovery of damages under CWA).

[5] While nothing in RCRA expressly prohibits common law suits for recovery on similar facts, provisions of the CWA and CAA expressly reserve existing common law remedies for plaintiffs. *See* 33 U.S.C.A. § 1365(e); 42 U.S.C.A. § 7604(e).

[6] Roger Meiners and Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923, 962 (1999).

[7] 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2001).

[8] *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

[9] 478 U.S. 804 (1986).

[10] *Hofbauer v. Northwestern Nat'l Bank of Rochester*, 700 F.2d 1197, 1201 (8th Cir. 1983).

[11] Paul Sherman, *Use of Federal Statutes in State Negligence Per Se Actions*, 13 WHITTIER L. REV. 831, 905 (1992). This inherent power of the states to adopt federal environmental statutory proscriptions as the applicable standard of care in common law causes of action has been expressly recognized by one federal district court. *See Jeffers v. Wal-Mart Stores, Inc.*, 84 F. Supp. 2d 775, 780 n.5 (S.D. W.Va. 2000) ("[T]hat a federal private right of action does not exist under FIFRA does not, automatically, restrain the states from basing a state common law action for the violation of a standard imposed under FIFRA)."

[12] Kenneth S. Abraham, THE RELATION BETWEEN CIVIL LIABILITY AND ENVIRONMENTAL REGULATIONS: AN ANALYTICAL OVERVIEW (2001) (unpublished manuscript, on file with authors).

[13] Sherman, note 11 *supra*, at 889.

[14] 989 F. Supp. 403 (D. Conn. 1996).

[15] 989 F. Supp. at 406.

[16] *Id.* at 408.

[17] No. C-97-1514 SI, 1997 WL 273846, at *1 (N.D. Cal. May 14, 1997).

[18] *Id.* at *2.

[19] 19 F. Supp. 2d 1188 (W.D. Wash. 1998).

[20] 33 U.S.C.A. § 1342.

[21] *Gill*, 19 F. Supp. 2d at 1199.

[22] *Frederick L. v. Thomas*, 578 F.2d 513, 517 (3d Cir. 1978).

[23] 858 F. Supp. 127 (D. Ariz. 1994).

[24] *Rodriguez*, 858 F. Supp. at 129.

[25] 906 F. Supp. 669 (D.D.C. 1995).

[26] Those regulations dealt with the use of underground storage tanks ("UST"). *See* 40 C.F.R. pts. 280-81 (2001).

[27] *323-343 E. 56th St. Corp.*, 906 F. Supp. at 688.

[28] *Id.*

[29] 46 F. Supp. 2d 1199 (D. Kan. 1999).

[30] *Id.* at 1200.

[31] *Id.* at 1201. *See also Miller v. E.I. Du Pont de Nemours & Co.*, 880 F. Supp. 474, 480-81 (S.D. Miss. 1994) (holding negligence *per se* recovery unavailable, pursuant to Mississippi law, for RCRA violations).

[32] *See Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F. Supp. 2d 203, 210 (D. Conn. 2001) (RCRA); *Middlebury Office Park Ltd. P'ship v. Timex Corp.*, No. 3:95-CV-2160 (EBB), 1998 WL 351583, at *4 (D. Conn. June 16, 1998) (CERCLA).

[33] These states include Maryland, Massachusetts, Maine, Pennsylvania, Texas, Nebraska, New York, Minnesota and New Jersey. *See* 65 C.J.S. *Negligence* § 137 nn. 4-6 (2000); Sherman, note 11 *supra*, at 881 n.306.

[34] 926 F. Supp. 767 (1996), *aff'd* 227 F.3d 776 (7th Cir. 2000).

[35] *Id.* at 771.

[36] Thomas C. Buchele, *State Common Law Actions and Federal Pollution Control Statutes: Can They Work Together?*, 1986 U. ILL. L. REV. 609, 627 (1986).

[37] The argument to the contrary finds notable support from then-New Hampshire Supreme Court Justice David Souter who opined:

> If such a cause of action is appropriate to compensate the general public for the cost of clean up that it would otherwise bear in the interest of public health and safety, a similar cause of action is appropriate to compensate a private property-owning plaintiff for the acute damage and injury that can result from unlicensed disposal. Since such a plaintiff, unlike the general public, can suffer personal injury and harm to property, the private right of action should provide compensation for these elements of damage in addition to recoupment of money actually expended on cleanup and contamination. *Bagley v. Controlled Env't Corp.*, 127 A.H. 556, 503 A.2d 823 (1986).

See 33 U.S.C.A. § 1251(a) (The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.); 42 U.S.C.A. § 7401(b)(1) (stating that the CAA's purpose is to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.).

[39] The analysis employed by the Supreme Court to determine the existence of implied remedies has undergone several permutations. "When federal statutes were less comprehensive, the Court applied a relatively simple test . . . If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class." *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Curran*, 456 U.S. 353, 376 (1982). In 1975, the Court unanimously decided to modify its approach. While continuing to consider class membership, the new four-prong approach focused upon Congressional intent. *See Cort v. Ash*, 422 U.S. 66, 78 (1975). Since that time, the *Ash* inquiry has been condensed, essentially "converting one of its four factors (congressional intent) into the *determinative factor* with the other three merely indicative of its presence or absence." *Thompson v. Thompson*, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) (emphasis in original) (citations omitted). Nevertheless, *both* class membership and congressional intent continue to be emphasized by courts considering the existence of implied remedies under environmental statutes. *See, e.g., Rodriguez*, 858 F. Supp. at 130.
Use of this test for determining the existence of state law claims, whose implied causes of action descend from "old common law" concepts rather than more modern concerns of "legislative intent and federalism," has drawn some criticism. *See* Sherman, note 12 *supra*, at 889.

[40] *Frederick L.*, 578 F.2d at 517 n.8 (emphasis added).

[41] *See Lutz v. Chromatex, Inc.*, 718 F. Supp. 413, 428 (M.D. Pa. 1989) (examining Pennsylvania state environmental laws).

[42] RESTATEMENT (SECOND) OF TORTS § 288(b) (1965).

[43] *Id.* comment c (emphasis added).

[44] Meiners and Yandle, note 6 *supra*, at 952.

[45] For examples, *see* Bush, note 2 *supra*, at 478.

[46] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

[47] *See* Bush, note 2 *supra*, at 478 n.38.

[48] *Id.* at 489.

[49] *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001).

[50] *Daubert*, 509 U.S. at 592-94.

[51] *See* note 5 *supra*, and accompanying text.

[52] Allan Kanner, *Toxic Tort Litigation in a Regulatory World* (Sept. 22, 2001) (unpublished article from CLE symposium at Washburn University) (on file with authors).

[53] *See* 65 C.J.S. *Negligence* § 137 (2000)

[54] *See USX Corp.*, 156 F. Supp. 2d at 210 (Motion to Dismiss); *Short*, 46 F. Supp. 2d at 1201 (Motion to Dismiss); *Timex Corp.*, 1998 WL 351583, at * 4 (Motion to Dismiss); 325-343 *E. 56th St. Corp.*, 906 F. Supp. 2d at 688 (Motion to Dismiss); *Miller*, 880 F. Supp. at 480 (Motion for Partial Summary Judgment); *Rodriguez*, 858 F. Supp. at 129-31 (Motion for Partial Summary Judgment).