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After 3550 Stevens Creek Associates v. Barclays Bank: Will Response Costs for Asbestos Removal Be Permitted Under CERCLA?

JENNIFER G. MARWITZ*

INTRODUCTION

In response to increasing environmental problems associated with the disposal and release of hazardous substances, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹ in 1980.² The statute was enacted "to provide for liability, compensation, cleanup and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste sites."³ CERCLA originally provided a \$1.6 billion fund for the cleanup of hazardous waste sites, but increased the fund to \$8.5 billion in 1986.⁴ Despite the allocation of federal funds for the cleanup of hazardous waste sites, Congress intended those responsible for the creation of the hazardous waste site be held financially responsible.⁵

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¹ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96510, § 101, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)) [hereinafter CERCLA].

² See H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1 at 1718 (1980) *reprinted in* 1980 U.S.C.C.A.N. 6119-6120.

³ 3550 Stevens Creek Assoc. v. Barclays Bank, 915 F.2d 1355, 1357 (9th Cir. 1991) (quoting Pub. L. No. 96510, 94 Stat. 2767 (1980)), *cert. denied*, 111 S. Ct. 2014 (1991), 114 L. Ed.2d 101 (1991).

⁴ CERCLA § 111, 42 U.S.C. § 9611(a)(1988).

⁵ According to one court: "The essential policy underlying CERCLA is to place the ultimate responsibility for cleaning up hazardous waste on 'those responsible for problems caused by the disposal of chemical poison.'" *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1553 (11th Cir. 1990) (quoting *Florida Power & Light Co. v. Allis-Chalmers Corp.*, 893 F.2d 1313, 1316 (11th Cir. 1990)).

CERCLA provides a wide range of liability provisions so the cost of cleanup can be shifted from the federal government to those responsible for the hazardous waste site. Section 107(a) of the Act, for example, imposes strict liability⁶ on the following groups: (1) present owners and operators of a facility at which there was a release or threatened release of a hazardous substance; (2) owners and operators of facilities at the time the waste was disposed; (3) hazardous waste generators or those who arranged for the treatment, disposal or transportation of hazardous substances found at the facility; and (4) transporters of the hazardous substance to a facility.⁷

Potentially responsible parties are liable for cleanup costs incurred at a facility⁸ from which there is a "release, or threatened release"⁹ of a hazardous substance.¹⁰ CERCLA allows the President, through the Environmental Protection Agency, to respond when a release or threat of release of a hazardous substance has occurred.¹¹ CERCLA also enables private parties to recover the costs of cleanup, "response costs", against responsible parties.¹²

A decade after its enactment, courts are still struggling to interpret CERCLA.¹³ This comment examines the Ninth Circuit's attempt to interpret CERCLA in *3550 Stevens Creek Associates v. Barclays Bank*.¹⁴ Attention will be given to the court's analysis of the requirements for CERCLA liability, and the holding that CERCLA does not allow for recovery of costs incurred in removing asbestos from a building.¹⁵

⁶ See CERCLA § 101, 42 U.S.C. § 9601 (32) (1988). This provision stipulates that the standard of liability shall be the same as the standard under the Clean Water Act, Pub. L. No. 92500, § 2, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)), amended by Pub. L. No. 101-549, 104 Stat. 2531 (1990).

⁷ CERCLA § 107, 42 U.S.C. § 9607(a)(4) (1988).

⁸ See CERCLA § 107, 42 U.S.C. § 9607(a) (defining "facility"); see *infra* part II A (discussing the facility requirement).

⁹ CERCLA § 107, 42 U.S.C. § 9607(a)(4) (1988).

¹⁰ See CERCLA § 101, 42 U.S.C. § 9601 (14) (1988) (defining "hazardous substance").

¹¹ CERCLA § 104, 42 U.S.C. § 9604(a)(1).

¹² CERCLA § 107, 42 U.S.C. § 9607(a)(4)(B) (1988).

¹³ See *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D. Md. 1986); *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1553-1560 (11th Cir. 1990).

¹⁴ *3550 Stevens Creek Assoc. v. Barclays Bank*, 915 F.2d 1355 (9th Cir. 1990).

¹⁵ *Id.* at 1357-1365.

I. 3550 STEVENS CREEK ASSOCIATES V. BARCLAYS BANK: FACTS AND BACKGROUND

Stevens Creek brought suit under section 107(a) of CERCLA¹⁶ against Barclays Bank to recover the costs of removing asbestos from a commercial building constructed in 1963 with asbestos insulation and fire retardants.¹⁷ Barclays Bank acquired title to the property and eventually sold it to Stevens Creek.¹⁸ Stevens Creek remodeled the building and spent more than \$100,000 in removing the asbestos.¹⁹

Stevens Creek brought suit in the United States District Court for the Northern District of California where Barclays Bank's motion for judgment on the pleadings was granted.²⁰ Stevens Creek appealed and the Ninth Circuit affirmed.²¹ In its analysis, the *Stevens Creek* court examined the elements of liability under section 107(a)(2)(b) of CERCLA.²² The court concluded that in order for a private party to recover response costs, plaintiff must establish:

a "release" or "threatened release" of a hazardous substance, and the defendant must be a person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substance was disposed of."²³

The plaintiff must thus prove the existence of: (1) a facility; (2) a release; (3) response costs; and (4) a responsible party.

II. LIABILITY REQUIREMENTS UNDER CERCLA

A. *The Facility Requirement*

In order to recover response costs under section 107(a)(2)(B), a plaintiff must establish that the defendant was a person "who at the time of the disposal of any hazardous substance owned

¹⁶ CERCLA § 107, 42 U.S.C. § 9607(a)(4)(B) (1988).

¹⁷ *Stevens Creek*, 915 F.2d at 1356.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1365.

²² *Id.* at 1357-1365; see CERCLA § 107, 42 U.S.C. § 9607(a).

²³ *Stevens Creek*, 915 F.2d at 1359 (quoting CERCLA § 107, 42 U.S.C. § 9607(a)(2),(4) (1988)).

or operated any facility at which such hazardous substances were disposed of.”²⁴ A facility is defined as “any site or area where a hazardous substance has been . . . disposed of . . . or otherwise come to be located.”²⁵

In determining whether the Stevens Creek building was a facility, the court had to answer two questions: [1] “[w]as the asbestos a hazardous substance and [2] if so, was it disposed of at the site?”²⁶ The court in *Stevens Creek* concluded asbestos was a hazardous substance without serious deliberation, relying on the Clean Water Act’s designation of asbestos as a “toxic pollutant”²⁷ and the Clean Air Act’s designation of asbestos as a “hazardous air pollutant.”²⁸ Support was also given to the district court’s finding that asbestos is a hazardous substance, but the court concluded this fact alone was not enough to determine that the asbestos had been disposed of at the site.²⁹

CERCLA defines disposal by reference to the Solid Waste Disposal Act,³⁰ which defines disposal as “the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air”³¹ Hazardous waste is defined as a solid waste which may cause an increase in mortality or illness and which may pose a substantial threat to human health if improperly disposed of or treated.³² Solid waste is defined as any garbage or refuse from a waste treatment plant or other discarded material in solid, semisolid gaseous or liquid form.³³

The court in *Stevens Creek* concluded the disposal requirement pertains to hazardous waste or solid waste and not to

²⁴ CERCLA § 107, 42 U.S.C. § 9607(a)(2) (1988).

²⁵ CERCLA § 101, 42 U.S.C. § 9601(9)(B) (1988).

²⁶ Kimberly Marsh, *Environmental Quality: Hazardous Waste*, 21 ENVTL. L. 1141, 1152 (1991).

²⁷ *Stevens Creek* 915 F.2d 1355, 1360 (9th Cir. 1990) (quoting Clean Water Act § 307, 33 U.S.C. § 1317 (1988), amended by Pub. L. No. 101-549, 104 Stat. 2531 (1990)).

²⁸ *Stevens Creek*, 915 F.2d at 1360 (quoting Clean Air Act § 112, 42 U.S.C. 7412 (1988)).

²⁹ *Id.*

³⁰ CERCLA § 101, 42 U.S.C. § 9601(29) (1988) (“The terms ‘disposal,’ ‘hazardous waste’ and ‘treatment’ shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. § 6903]”).

³¹ CERCLA § 103, 42 U.S.C. § 6903(3) (1988).

³² *Id.* at § 6903(5).

³³ *Id.* at § 6903(27).

building materials that do not fit under either category.³⁴ For the court, hazardous waste was a subset of solid waste defined as discarded materials, not materials used in the construction of a building.³⁵ Here there was no allegation that Barclays Bank or its predecessors had discarded asbestos. Rather the material was simply used in the construction of a building, which does not amount to a discharge, leakage or spillage of hazardous waste into the environment as required by the definition of disposal.³⁶

The plaintiff in *Stevens Creek* argued the specific reference to disposal of a hazardous *substance* in CERCLA overrides the definition of disposal in the Solid Waste Disposal Act which refers to a disposal in terms of a hazardous *waste*.³⁷ *Stevens Creek* was attempting to persuade the court that the placing of asbestos in the structure of a building constituted a disposal of a hazardous substance and this should be sufficient to impose liability under CERCLA.

The court rejected plaintiff's argument citing two reasons. First, if Congress intended the disposal requirement to include hazardous substances and not be limited to hazardous wastes, Congress could have specifically provided so in CERCLA.³⁸ Congress could have defined disposal under CERCLA any way it deemed appropriate, but instead chose to rely on the definition provided in the Solid Waste Disposal Act.³⁹ The definition in the Solid Waste Disposal Act specifically refers to disposal in terms of hazardous waste.⁴⁰ Second, hazardous waste and hazardous substance have often been used interchangeably.⁴¹ This rationale provided further support for the court's conclusion that the disposal requirement refers to hazardous wastes and not hazardous substances.⁴² Since hazardous substance was often used in the place of hazardous waste, asbestos in the nonwaste form, such as in the structure of a building, was not intended to be covered.⁴³ A Superfund Study Group's report supported

³⁴ *Stevens Creek*, 915 F.2d at 1361.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1362 (emphasis added).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ CERCLA § 103, 42 U.S.C. § 6903(3).

⁴¹ *Stevens Creek*, 915 F.2d at 1362.

⁴² *Id.*

⁴³ *Id.*

this reasoning when it concluded: "both the terms hazardous *substance* and hazardous *wastes* are used, and their use is often interchangeable, because in the context of CERCLA, hazardous substances are generally dealt with at the point when they are about to, or have become, wastes."⁴⁴

The *Stevens Creek* court's interpretation of disposal does find support in other federal opinions. For example, in *Prudential Insurance Co. of America v. National Gypsum Co.* plaintiffs brought suit under CERCLA for compensatory damages against designers, manufacturers and suppliers of asbestos-laden materials used in the construction of certain structures.⁴⁵ The court in *Prudential* concluded that since there was "no affirmative act to get rid of the asbestos beyond the sale of it as part of a complete, useful product, for use in a building structure, the plaintiffs' allegations fail to reveal that there has been an arrangement for the disposal of hazardous substances. . . ."⁴⁶ Further support is found in *Edward Hines Lumber Co. v. Vulcan Materials Co.*⁴⁷ in which an owner and operator of a wood treatment facility brought an action against chemical suppliers seeking contribution for the cost of removing contaminants from a holding pond.⁴⁸ The court concluded the chemical suppliers were not liable under CERCLA because the sale of hazardous substances for use in wood treatment by plaintiff did not constitute a disposal under CERCLA.⁴⁹

B. The Response Cost Requirement

Stevens Creek contended at trial that CERCLA must be broadly construed to accomplish its goals.⁵⁰ The court noted,

⁴⁴ SUPERFUND SECTION STUDY GROUP, INJURIES AND DAMAGES FROM HAZARDOUS WASTE ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES: A REPORT TO CONGRESS IN COMPLIANCE WITH SECTION 301(E) OF [CERCLA], PART I, 26 (1982). This report has been given substantial weight by other federal courts. See *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1437-38 (7th Cir. 1989) (noting the emphasis in the study was on remedying adverse consequences of improper disposal, transportation, spills or improperly maintained or closed disposal sites).

⁴⁵ 711 F. Supp. 1244 (D.N.J. 1988).

⁴⁶ *Id.* at 1254.

⁴⁷ 685 F. Supp. 651 (N.D.Ill. 1988).

⁴⁸ *Id.* at 653; see also *Jersey City Redevelopment Auth. v PPG Indus.* 655 F. Supp. 1257, 1260-61 (D.N.J. 1987); *United States v. Westinghouse Elec. Corp.* 22 Env't Rep Cas. (BNA) 1230 (S.D.Ind. 1983). But see *In re Asbestos Sch. Litig.*, No. 830268 1191 U.S. Dist. LEXIS 12576 (E.D. Pa. Sept. 4, 1991).

⁴⁹ *Id.* at 654.

⁵⁰ *Stevens Creek*, 915 F.2d at 1362-63.

CERCLA was designed to deal with the problem of inactive and abandoned hazardous waste disposal sites.⁵¹ Other courts agree CERCLA must be interpreted broadly, including *United States v. Mottolo* where the court held CERCLA must be construed broadly in order to give effect to its remedial goals.⁵² Recognizing such case law, the Stevens Creek court refused to adopt a construction the statute would not permit on its face—that disposal sites include buildings.⁵³

CERCLA section 104(a)(3)(B) directly addresses the removal of hazardous substances that are part of the structure of a building: “The President shall not provide for a removal or remedial action under this section in response to a release or threat of release . . . from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures.”⁵⁴ The *Stevens Creek* court interpreted this section as a specific limitation on governmental action when the release or threatened release concerns materials which are part of the building structure.⁵⁵

The plaintiff contended section 104(a)(3)(B) was only a limit on governmental action, and thus private parties could still maintain a cause of action under CERCLA when the hazardous substance was part of the construction of the building.⁵⁶ Plaintiffs relied on section 104 of the Act which provides that the President may respond to a release if there is a threat to the public and no other person with the authority or capacity can respond in a timely manner.⁵⁷ The plaintiff interpreted this to mean private parties could recover when the substance involved was part of the building.⁵⁸ Plaintiff further suggested the “no other person” in section 104 would make sense only if private parties were permitted to respond to these situations even when the federal government could not.⁵⁹ The court disagreed, refusing to read CERCLA as providing a private cause of action in

⁵¹ *Id.* at 1363. See also 1980 U.S.C.C.A.N. 6119, 6125.

⁵² 605 F. Supp. 898, 902 (D.N.H. 1985); see also *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 192 (W.D. Mo. 1985).

⁵³ *Stevens Creek*, 915 F.2d at 1363.

⁵⁴ CERCLA § 104, 42 U.S.C. § 9604(a)(3)(B) (1988).

⁵⁵ *Stevens Creek*, 915 F.2d at 1363.

⁵⁶ *Id.*

⁵⁷ *Id.* See also CERCLA § 104, 42 U.S.C. § 9604(4) (1988).

⁵⁸ *Stevens Creek*, 915 F.2d at 1363.

⁵⁹ *Id.*

removing asbestos from a building.⁶⁰ The legislative history of CERCLA precluded such an action, according to the court.⁶¹

For example, when the Senate discussed the Superfund Amendment and Reauthorization Act⁶² to CERCLA, what is now codified as section 104(a)(3)(B) was specifically discussed: "CERCLA response authorities are extremely broad but there are nevertheless situations, some of which may be lifethreatening which are not within the law's scope."⁶³ Specifically, the amendment clarifies that, situations involving materials contained in the structure of a building are not subject to the remedial actions of CERCLA.⁶⁴ While the court in *Stevens Creek* acknowledged the Senate discussion may not be authoritative, the court refused to infer a private cause of action without the clear intent of Congressional authorization.⁶⁵

Other courts have refused to recognize a private cause of action, including *First United Methodist Church of Hyattsville v. United States Gypsum*.⁶⁶ In *First United*, for instance, a church brought suit against the manufacturer of asbestos-containing plaster.⁶⁷ In refusing to allow the plaintiff to recover, the court reviewed the legislative history of the Act and concluded "in view of this clear expression of Congressional intent, we will not expand CERCLA to encompass asbestos-removal actions."⁶⁸

A second court, in *Retirement Community Developers, Inc. v. Merine*, emphasized that response costs are unreasonable unless consistent with the National Contingency Plan.⁶⁹ The National Contingency Plan provides that certain provisions governing federal removal actions may also be applied to private parties.⁷⁰ The *Retirement Community* court concluded that in order for a

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² CERCLA was amended by the Superfund Amendment and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat 1615 (codified in sections 10, 26, and 42 U.S.C. (1988)).

⁶³ S. REP. No. 11, 99th Cong., 1st Sess. 16 (1985).

⁶⁴ *Id.* at 17.

⁶⁵ *Stevens Creek*, 915 F.2d at 1365.

⁶⁶ 882 F.2d 862 (4th Cir. 1989), *cert. denied* 493 U.S. 1070.

⁶⁷ *Id.* at 864.

⁶⁸ *Id.* at 868. *But see* *Prudential Ins. Co. of America v. U.S. Gypsum*, 711 F. Supp. 1244, 1256 (D.N.J. 1989) (concluding that while section 9604 was a limit on presidential action, it did not apply to private party's removal actions).

⁶⁹ 713 F. Supp. 153, 155 (D. Md. 1989) (quoting 42 U.S.C. § 9607(a)(4)(B)).

⁷⁰ 40 C.F.R. § 300.700(c)(5).

private cause of action to be consistent with the National Contingency Plan, the party must follow the same rules that apply to governmental removals.⁷¹ Since the government cannot remove substances considered part of the building structure without Presidential approval, it follows that private parties must also have Presidential approval.⁷²

The Ninth Circuit in *Stevens Creek* provided a final argument why disposal should be construed broad enough to include materials part of the building structure. The plaintiffs argued such a holding would have "substantial and far-reaching legal, financial and practical consequences."⁷³ The *Stevens Creek* Court was not persuaded.⁷⁴ As the court in *First United* noted: to extend CERCLA's liability scheme to all past and present owners of buildings containing asbestos as well as to all persons who manufactured, transported, and installed asbestos products into buildings, would be to shift billions of dollars of removal cost liability based on nothing more than an improvident interpretation of a statute that Congress never intended to apply in this context.⁷⁵

Another court concerned about extending the liability of CERCLA too far was the district court in *Retirement Community Developers, Inc. v. Merine*.⁷⁶ For this court, if CERCLA was extended to include the removal of asbestos, there would be such far-reaching effects that, absent the clear intent of Congress, such a result should not be achieved.⁷⁷ Such a result could [c]onceivably hold liable for removal or remedial costs all persons who presently own houses or buildings with asbestos in them, all persons who ever installed asbestos, all persons who transported or delivered asbestos, and all manufacturers of asbestos.⁷⁸

C. The Release Requirement

While the disposal requirement controlled in *Stevens Creek*, the court nevertheless discussed the release requirement.⁷⁹ Release

⁷¹ *Retirement Community*, 713 F. Supp. at 157.

⁷² *Id.*

⁷³ *Stevens Creek* 915 F.2d at 1359.

⁷⁴ *Id.*

⁷⁵ 882 F.2d 862, 869 (4th Cir. 1989).

⁷⁶ 713 F. Supp. 153 (D.Md. 1989).

⁷⁷ *Id.* at 158.

⁷⁸ *Id.*

⁷⁹ *Stevens Creek*, 915 F.2d at 1365.

is defined in section 101(22) of CERCLA as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment"⁸⁰ Under this section, the term "environment" includes surface water, ground water, land surface or "ambient air within the United States."⁸¹ The *Stevens Creek* court noted that, while the issue of whether the escape of asbestos in a building was a release into the environment was not specifically addressed in this case, courts addressing the issue had concluded releases within a building should not be considered a release into the environment.⁸² The court emphasized that "[e]ven when an action is taken that makes the asbestos friable, the resulting hazard is within the building."⁸³

Other courts also conclude releases into a building are not releases into the environment. For example, in *First United Methodist Church of Hyattsville v. United States Gypsum*, the court held releases inside a building were not releases into the environment and, thus, the cost of asbestos removal from a building could not be recovered.⁸⁴ In *Covalt v. Carey Canada, Inc.*, moreover, the interior of a workplace was not the environment for purposes of an asbestos-based claim under CERCLA.⁸⁵ The court in *Prudential Insurance Co. of America v. National Gypsum* also questioned whether the release of asbestos fibers into a building constituted a release into the environment in light of other court decisions concluding that the atmosphere within a building is not the environment as defined under CERCLA.⁸⁶

D. The Responsible Party Requirement

In concluding recovery of response costs for the removal of asbestos was not possible under CERCLA, the *Stevens Creek* court relied on the lack of a disposal and a release.⁸⁷ Nowhere did the court specifically address whether the defendant fell within one of the four classes of responsible parties.⁸⁸ However,

⁸⁰ 42 U.S.C. § 9601(22) (1988).

⁸¹ *Id.* § 9601(8)(A) and (B).

⁸² *Stevens Creek*, 915 F.2d at 1359.

⁸³ *Id.* at 1361.

⁸⁴ 882 F.2d 862, 867 (4th Cir. 1989).

⁸⁵ 860 F.2d 1434, 1436 (7th Cir. 1988).

⁸⁶ 711 F. Supp. 1244, 1255 n.3 (D. N.J. 1989).

⁸⁷ *Stevens Creek*, 915 F.2d at 1359.

⁸⁸ See *infra* Introduction discussing responsible parties.

based on the court's holding, it is possible to infer that the defendant was not within one of the four classes of responsible parties. Each of the classes of possible responsible parties has either a release or a disposal requirement.⁸⁹ Since the court questioned whether there was a release and concluded that there was no disposal, the defendant could not be a responsible party.

CONCLUSION

Stevens Creek holds, in no uncertain terms, that building materials incorporated into the structure of a building are not "disposed" of as required by CERCLA. If followed by other courts, probably no situation will allow a plaintiff to recover the costs of removing asbestos from the structure of a building. At least one court has found the reasoning of *Stevens Creek* to be the majority rule. In *Anthony v. Blech*,⁹⁰ the court addressed whether CERCLA provides a cause of action by a tenant against the owner of a building for costs incurred in removing asbestos dust that resulted from fire damage within the building.⁹¹ The court concluded *Stevens Creek* controlled and the plaintiff could not recover the costs of removing the asbestos dust.⁹² The lack of a disposal of materials within the building was controlling.⁹³

The decision in *Stevens Creek* is also unique because it is one of the first decisions to specifically emphasize that section 104(a)(3)(B) of CERCLA⁹⁴ should be deemed a limitation on private causes of action as well as governmental actions when the hazardous substance is part of the construction of a building. If this decision is followed by subsequent courts, plaintiffs will be severely limited, if not totally unable, to recover the costs of removing any hazardous substance from a building.

⁸⁹ *Id.*

⁹⁰ 760 F. Supp. 832, (C.D. Cal. 1991).

⁹¹ *Id.* at 833.

⁹² *Id.* at 837.

⁹³ *Id.*

⁹⁴ 42 U.S.C. § 9604(a)(3)(B).

