CERCLA SECTION 9658 AND STATE RULES OF REPOSE

Two decades after passage, unanimity still elusive on basic question of statutory interpretation

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On January 25, 2008, Alabama became the last state to adopt the so-called "discovery rule" for accrual of the statute of limitations in toxic tort actions. Griffin v. Unocal, -- So.2d ---, 2008 WL 204445 (Ala. Jan 25, 2008). Under the discovery rule as articulated by the Alabama Supreme Court, a tort arising from exposure to a toxic substance accrues not on the date of release or exposure, but when the plaintiff first suffers "a manifest, present injury." Id. at *2 (citing Cline v. Ashland, Inc., 970 So.2d 755, 762 (Ala. 2007) (Harwood, J., dissenting). The arrival of near-consensus among the states on the discovery rule[1] may focus new attention on a related question of law that is decades old: whether the *federal* discovery rule created by CERCLA for certain personal injury and property damage claims (in an era when many states did not recognize such a rule) preempts long-standing state rules of repose.

The federal Superfund statue, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"), establishes a complex scheme for identifying, investigating, cleaning up, and establishing liability for sites contaminated by hazardous substances. CERCLA also contains a provision potentially affecting time-based defenses to state-law toxic tort type claims. This

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[1] Despite general agreement as to the applicability of a discovery rule, the contours of the rule vary from state to state.

provision, 42 U.S.C. § 9658 ("Section 9658"),[2] establishes a "federally required commencement date" ("FRCD") for the running of state-law limitation periods on certain claims for personal injury or property damage — in effect, establishing a federally-created "discovery rule" that may preempt state law on the accrual of claims for statute of limitations purposes. The application of Section 9658 to claims arising from historical contamination, where the alleged tortious conduct may be decades old, can be pivotal to whether the claims may be pursued or are time barred.

There is some ambiguity in whether Section 9658 applies not only to statutes of limitations but also to state-law rules of repose. Like "statutes" of limitations, rules of repose may originate either in statutory or common law, but they differ from statutes of limitation in important ways. Generally speaking, repose periods are significantly longer (sometimes ten or even twenty years) than the limiting periods set by statutes of limitation. Unlike statutes of limitations repose periods are generally not subject to tolling. Consequently, the preemption of a state rule of repose by Section 9658 can have a far greater effect on a plaintiff's ability to pursue otherwise stale claims than the preemption of a statute of limitations.

Although many of the courts presented with this question have side-stepped the issue (often holding Section 9658 not to apply for other reasons[3]), those that have confronted it have followed divergent paths, typically looking to the text of the statute or CERCLA's legislative history to support their holdings. However, these answers may be

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[2] Title 42 U.S.C. § 9658 was actually Section 309 of the public law as enacted by Congress. For clarity and consistency, this article refers to the provision as "Section 9658" or the "FRCD." Some courts and commentators, however, also refer to it as "Section 309."

[3] *See, e.g.,* First United Methodist Church of Hyattsville v. U.S. Gypsum Company, 882 F.2d 862, 868 (4th Cir. 1989); Covalt v. Carey Canada, Inc., 860 F.2d 1434, 1436 (7th Cir. 1988); Electric Power Board of Chattanooga v. Westinghouse Elec. Corp., 716 F.Supp. 1069, 1079 (E.D. Tenn. 1988); Knox v. AC&S, Inc., 690 F.Supp. 752, 758 (S.D. Ind. 1988).

less than satisfactory. This article considers the text of Section 9658 and its interpretive case law, and then discusses some alternative arguments for and against applying the FRCD to state-law rules of repose.

CERCLA Section 9658

Section 9658 of CERCLA states that the FRCD shall apply in "any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility[.]" 42 U.S.C. § 9658(a)(1). For claims within its reach, Section 9658 provides that "if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute." 42 U.S.C. § 9658(a)(1). The FRCD is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4). This provision thus preempts both state laws that afford a different rule and also those providing for an earlier commencement of the statute of limitations than Section 9658 would allow. *See, e.g.*, O'Connor v. Boeing, 311 F.3d 1139, 1148 (9th Cir. 2002) (existing California discovery rule, which was less favorable to plaintiffs than FRCD, preempted by Section 9658).

Questions of Application

Like much of CERCLA, Section 9658 is "hardly a model of legislative clarity," and many questions remain about the extent of its reach. Commander Oil Corp. v. Barlo Equipment Corp., 215 F.3d 321, 327 (2d Cir. 2000); *see also* Robert D. Mowrey, Benjamin L. Snowden, and Orlyn O. Lockard III, *CERCLA's Preemptive 'Discovery Rule' for State Toxic Tort Claims: Scope, Strategies and Issues*, DRI (February 2007). The provision purports to displace "the applicable limitations period . . . as specified in the State statute of limitations or under common law." 42 U.S.C. § 9658(a)(1). The term "applicable limitations period" is defined as "the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought." 42 USC § 9658(a)(2); *see also* id. § 9658(b)(3) (defining "commencement date" as "the date specified in a statute of limitations as the beginning of the applicable limitations period"). This language strongly suggests that Section 9658 affects only statutes of limitations, and not rules of repose, and a number of courts have so held. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355, 362 (5th Cir. 2005) (holding that "the plain language of § 9658 does not extend to statutes of repose"); German v. CSX Transp., 510 F.Supp.630 (S.D. Ala. 2007); McDonald v. Sun Oil, 423 F. Supp. 2d 1114, 1126-27 (D. Ore. 2006). However, other courts —including some from the same jurisdictions— have reached the opposite conclusion. *See, e.g.*, ASI v. Sanders, 835 F. Supp. 1349, 1358 (D. Kan. 1993); Fisher v. Ciba Specialty Chems., 2007 U.S. Dist. LEXIS 76174, at *63-*67 (S.D. Ala. Oct. 11, 2007); Abrams v. Olin Corp., 2007 WL 4189507, at *6 (S.D. Ala. Nov. 21, 2007); Buggsi, Inc. v. Chevron U.S.A., Inc., 857 F. Supp. 1427 (D. Ore. 1994).

There are clearly important differences between rules of repose and statutes of limitation which suggest that courts should not presume identical treatment of the two under Section 9658. "A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action." First United Methodist Church of Hyattsville v. U.S. Gypsum Company, 882 F.2d 862, 866 (4th Cir. 1989).[4] Because they are essentially procedural, statutes of limitations may generally be tolled, for instance, by a defendant's fraudulent concealment of its actions or the plaintiff's inability to discover her injury through the exercise of reasonable diligence. *See* Burlington No. & Santa Fe Ry. Co., 419 F.3d at 363 & n.35; Bolin v. Cessna Aircraft Co., 759 F.Supp. 692, 704 n.13 (D. Kan. 1991) ("the traditional classification of statutes of limitation as 'procedural' has long enabled the forum to disregard the time limitation imposed by the sovereign that created the right."). Tolling generally operates by delaying the date on which a plaintiff's claim accrues, and on which the statute as a result begins to run. Under Section 9658, it is the accrual date of the state statute of limitations that is preempted by the FRCD, not the statute itself. *See* 42 U.S.C. § 9658(b)(3).

By contrast, a rule of repose "creates a substantive right in those protected to be free from liability after a legislatively-determined length of time." First United Methodist Church of Hyattsville, 882 F.2d at 866. "In other words, a statute of repose establishes a 'right not to be sued,'" which inheres in a potential defendant. Burlington No. & Santa Fe Ry. Co., 419 F.3d at 363. Thus, rules of repose are not subject to tolling, even by fraud, *see*, *e.g.*, Am. Gen. Life Ins. Co. v. Underwood, 886 So.2d 807, 812-13 (Ala. 2004); Cunningham v. Huffman, 609 N.E.2d 321, 325 (Ill. 1993); Nett v. Bellucci,

[4] *But see* Guaranty Trust Co. v. York, 326 U.S. 99, 110-11 (1945) (state-law statutes of limitations are considered substantive, rather than procedural, for Erie purposes).

774 N.E.2d 130, 134(2) (Mass. 2002); *see also* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991) (period of repose under federal Securities Exchange Act not subject to tolling). Such tolling "would upset the economic balance [between the rights of potential plaintiffs and potential defendants] struck by the legislative body." First United Methodist Church of Hyattsville, 882 F.2d at 866. Generally speaking, the only circumstance that will save a claim from the action of the rule of repose is a defendant's recognition of the plaintiff's right to recover on a claim. *See, e.g.,* Am. Gen. Life Ins. Co. v. Underwood, 886 So.2d at 812-13. In most jurisdictions, the concept of accrual is foreign to rules of repose, which often begin to run as soon as the tort giving rise to a claim has been completed. *See, e.g.*, Klein v. DePuy, 506 F.3d 553, 557 (7th Cir. 2007) (Indiana law); Evans v. Boyle Flying Service, Inc., 680 So.2d 821, 827 n.4 (Miss. 1996); Universal Engineering Corp. v. Perez, 451 So.2d 463, 465 (Fla. 1984).

These distinctions between rules of repose of statutes of limitations are particularly significant in the context of Section 9658. Rules of repose create substantive rights, which would be abrogated if Section 9658 were held to affect state rules of repose — a significantly more ambitious legislative objective than tolling the statute of limitations. And because the concepts of tolling and accrual are (under state law) inapplicable to rules of repose, it seems counter-intuitive to toll a rule of repose by means of a federally-imposed accrual date.[5]

[5] The distinction appears to be recognized in certain federal laws, as well. 28 U.S.C. § 1658(b)(2), for example, creates a five-year statute of repose for private actions involving securities fraud. This period (which is not specifically denoted a "repose" period) is not tolled by fraud and is not (unlike the general statute of limitations for federal claims set forth in 28 U.S.C. § 1658(a)) dependent on the date on which the action accrues.

Such an anomalous result might be less troublesome if Section 9658 were not at its heart a preemption statute. Preemption laws are construed narrowly, and it is generally presumed that Congress does not preempt state law by statute unless it clearly expresses the intent to do so. *See*, *e.g.*, New York State Dept. of Social Servs. v. Dublino, 413 U.S. 405 (1973) ("If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."). Requiring that Section 9658 apply only to statutes of limitation (which are unambiguously referenced in the text of the statute) is consistent with this principle of narrow construction.

A construction of CERCLA not encompassing rules of repose would also allow courts to avoid potentially difficult constitutional questions in the application of Section 9658. If the FRCD were held to affect the rule of repose in a case where the repose period had ended prior to the 1986 enactment of the SARA Amendments, Section 9658 could have the effect of "reviving" a cause of action that is substantively extinct (as opposed to being only procedurally barred by a statute of limitations). Along the same lines, it would extinguish the repose rights of potential defendants, arguably violating their due process rights. *See* Alfred R. Light, *New Federalism, Old Due Process, and Retroactive Revival: Constitutional Problems with CERCLA's Amendment of State Law*, 40 U. Kan. L. Rev. 365, 392-95 (1992).

Conclusion

Even as the states reach consensus on the recognition of a "discovery rule" for toxic tort type claims, the application of CERCLA Section 9658 to state statutes of limitations remains important to litigants, particularly in situations where there is no underlying CERCLA cleanup involved. The battle lines, however, are also clearly being drawn in response to the increased number of cases where plaintiffs seek to invoke CERCLA as a means to circumvent the application of state rules of repose. Despite the passage of two decades since the enactment of the provision, courts that have addressed this issue to date are divided on whether Congress intended that Section 9658 should apply in this context. Until courts achieve clarity on the issue, toxic tort litigants are well-advised to consider carefully the complexities of CERCLA's potential application to state rules of repose, as well as statutes of limitation.