



Environmental ADVISORY ■

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Supreme Court to Address Whether CERCLA Preempts State Limitations Periods for Property Damage and Personal Injury Claims

The U.S. Supreme Court heard oral arguments yesterday in *CTS Corporation v. Waldburger, et al.* to consider whether a provision in the federal Superfund statute, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq. (CERCLA), preempts all state-imposed time limits for claims of property damage or personal injuries arising from the release of hazardous substances. The Court's decision in this case, forthcoming later this term, could substantially impact the ability of plaintiffs to recover damages for historical contamination that would otherwise be time-barred under state tort theories.

While CERCLA is generally associated with the recovery of cleanup costs, CERCLA Section 9658 addresses the right of tort plaintiffs to seek redress for latent contamination and associated personal injury and property damage claims. Specifically, Section 9658 expressly refers to and preempts state statutes of limitations, to the extent they begin running before the federal statute of limitations. The federal statute of limitations begins running when a plaintiff discovers or should have reasonably discovered that hazardous substances released to the environment caused or contributed to personal injuries or property damage. Where state statutes of limitations commence earlier than the point of "discovery," CERCLA prolongs the period in which a plaintiff may sue for contamination under state tort theories, notwithstanding any state law.

CTS Corporation v. Waldburger addresses the unsettled question of whether the federal discovery rule, under CERCLA Section 9658, also preempts state statutes of repose.

A. Statutes of Limitations vs. Statutes of Repose

At the heart of this case lies the distinction between a "statute of limitations" and a "statute of repose." A statute of limitations sets forth a time limit by which a plaintiff must bring a legal claim based on when that cause accrued, such as when the injury occurred or the plaintiff discovered the injury. Statutes of repose differ by requiring that legal actions be brought within a certain period of time after a defendant acted, even if that period ends before a potential plaintiff suffers a resulting injury. In contrast to statutes of limitations, statutes of repose generally impose longer time periods and are not subject to equitable considerations, such as tolling. Interestingly, during oral argument, Justices Scalia and Kennedy acknowledged this was the first time they had encountered the distinction between statutes of limitations and repose.

B. Summary of the Case and Related Decisions

In *CTS Corporation v. Waldburger*, a group of landowners initially sought recovery for property and personal injury damages against CTS Corporation (“CTS Corp.”) for alleged contamination from a former electronics manufacturing and disposal plant. North Carolina has a 10-year statute of repose to bring an action after the last act or omission that gave rise to that cause of action. CTS Corp. committed its last alleged act or omission in 1987. The landowners first discovered the alleged contamination in 2009 and brought their lawsuit in 2011. Following dismissal by the district court, the Fourth Circuit reversed and reinstated the plaintiffs’ claims, holding CERCLA’s federal discovery rule preempted North Carolina’s 10-year statute of repose. See *Waldburger v. CTS Corporation*, 723 F.3d 434 (4th Cir. 2013).

The Fourth Circuit’s decision became the third on point, adding to an existing split among the Circuits. The Ninth Circuit previously found that CERCLA preempts both state statutes of limitations and statutes of repose, while the Fifth Circuit held the preemption provision is limited to state statutes of limitations. See *McDonald v. Sun Oil Co.*, 548 F.3d 774 (9th Cir. 2008); *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co., Inc.*, 419 F.3d 355 (5th Cir. 2005). In January 2014, the Supreme Court granted certiorari to review the Fourth Circuit’s opinion.

C. Summary of Arguments

Petitioner CTS Corp., arguing against a finding of preemption for statutes of repose, has focused on the different functions of statutes of limitations as compared to statutes of repose and on the plain language of Section 9658. CTS Corp. also argues that CERCLA’s legislative intent supports a finding against preemption, since Congress was aware “statute of limitations” was a term of art that did not encompass statutes of repose at the time Congress enacted Section 9658. Finally, CTS Corp. argues the Court should apply the presumption against preemption under the principles of federalism and avoid a potential constitutional question implied by interfering with states’ limits to substantive tort liability. The United States filed briefs and argued in support of CTS Corp., raising similar arguments against a finding of preemption.

Arguing in favor of preemption, the Respondent landowners argue the plain meaning of Section 9658 supports the conclusion that Congress did not intend to carve out statutes of repose from the preemption provision, otherwise leaving plaintiffs in some states with less favorable commencement dates for lawsuits. Respondents also argue that the congressional record supports a finding of preemption, noting that Congress has enacted statutes of repose several times without using the word “repose”; the definition of “statutes of limitations” included “statutes of repose” at the time; and Congress enacted Section 9658 to protect plaintiffs who may not discover the cause of latent harm until long after contamination took place.

D. Anticipated Outcome

Since Section 9658 does not expressly refer to statutes of repose, most observers of the Supreme Court—particularly in light of its recent CERCLA jurisprudence—have been predicting the Court will likely adopt a “plain language” analysis and hold that CERCLA does not preempt North Carolina’s (or other states’) statutes of repose, thereby reversing the Fourth Circuit. For instance, in *Burlington Northern & Santa Fe Railway Co. v. U.S.*, 129 S. Ct. 1870 (2009) and *U.S. v. Atlantic Research Corporation*, 127 S. Ct. 2331 (2007)—both authored by Justice Thomas—the Court narrowly construed and focused on the plain language of CERCLA in rendering its decisions.

Based on questions from the Court—in particular, by Justices Ginsburg and Kagan—several members of the Court appear to be struggling with the question of whether Congress intended to draw a distinction between statutes of limitation and statutes of repose in Section 9658, in relation to its intended purpose to preserve certain latent tort claims. Based on the discussion, this could be a much closer case than most had predicted, with Justices Kennedy and Scalia likely holding the decisive votes. In any event, a unanimous decision seems highly unlikely.

We will provide a further update and analysis upon issuance of the Court’s decision later this term.

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