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ENERGY & ENVIRONMENTAL ALERT

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Supreme Court Holds That CERCLA Preemption Is Inapplicable to Statutes of Repose

By Carl J. Schaerf and Robert L. Collings

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), preempts statutes of limitations applicable to state-law tort actions for personal injury or property damage in certain circumstances. §9658 of CERCLA applies to statutes of limitations governing actions for personal injury or property damage arising from the release of a hazardous substance, pollutant, or contaminant into the environment. The preemption creates a discovery rule to be used in determining the accrual date of any state cause of action arising from the release of contamination where state law does not provide a discovery rule. §9658 was adopted out of a Congressional concern for diseases or harms with long latency periods.

CTS Corp. v. Waldburger, decided June 9, 2014, addresses whether §9658 likewise preempts statutes of repose. CTS Corporation and a subsidiary operated an electronics plant in Asheville, North Carolina from 1959 to 1985. Trichloroethylene (TCE) and cis-1, 2-dichloroethane (DCE) were used on site. In 1987, CTS sold the property. The buyer eventually sold portions of the property to individuals who, along with adjacent landowners, brought suit alleging damage from contaminants released on the land.

North Carolina has a 10-year statute of repose barring all claims brought more than 10 years after the last act or omission of the defendant, and also a statute of limitations with a discovery rule. If the statute of repose is not preempted, all claims against CTS Corp. are barred as a matter of law, despite the fact that no one knew or should have known of the exposure and injuries during that 10-year period. The claim may be barred by the statute of repose before any claim accrues for injuries that might not appear and be discovered for many more years after the last act of the defendant.

Procedurally, the District Court found that the statute of repose applied, was not affected by CERCLA's discovery rule (or by the state statute of limitation and its discovery rule) and barred all claims. The Fourth Circuit reversed, finding that §9658 preempted the statute of repose to the extent that it denied relief in the form of claims otherwise preserved by the discovery rule. The Supreme Court, in a 7-2 decision authored by Justice Kennedy, decided that §9658 does not preempt statutes of repose. Therefore CTS Corp. has no liability in the underlying lawsuit.

The Court first reasoned that there are relevant differences between statutes of limitations and statutes of repose. A statute of limitations focuses on the injury and the knowledge of the plaintiff. It cuts off suits for damages on claims that have accrued after the injured party has knowledge and the opportunity to bring the accrued claim A statute of repose focuses on the date of culpable act or omissions of the defendant, and the desire to limit access to the courts after a defined period has expired. It protects defendants from their liability and the courts from resource commitments to manage cases which time may have made difficult to adjudicate fairly.

The Supreme Court observed that the preemption CERCLA provides for is effectively a form of tolling, a concept inconsistent with a statute of repose citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U. S. 350, 363 (1991) ("[A] period of repose [is] inconsistent with tolling"). The CERCLA provision at issue in the case is essentially mandatory federal tolling applied to the minority of states which do not allow such tolling by statute or common law.

The Supreme Court then turned to the question of Congressional Intent. It rejected an expansive construction doctrine favoring pre-emption of repose statutes as applied to claims under this remedial legislation, observing:

> The Court of Appeals supported its interpretation of §9658 by invoking the proposition that remedial statutes should be interpreted in a liberal manner. The Court of Appeals was in error

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> when it treated this as a substitute for a conclusion grounded in the statute's text and structure. After all, almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem. And even if the Court identified some subset of statutes as especially remedial, the Court has emphasized that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U. S. 522, 525–526 (1987) (per curiam). Congressional intent is discerned primarily from the statutory text. In any event, were the Court to adopt a presumption to help resolve ambiguity, substantial support also exists for the proposition that "the States' coordinate role in government counsels against reading" federal laws such as §9658 "to restrict the States' sovereign capacity to regulate" in areas of traditional state concern. *FTC v. Phoebe Putney Health System, Inc*., 568 U. S. ___, ___ (2013) (slip op., at 18).

There was a question, a large focus at oral argument, concerning whether the difference between a statute of limitations and a statute of repose was understood by Congress (or the legal community in question) when they passed the preemption provision at issue:

> From all this, it is apparent that general usage of the legal terms has not always been precise, but the concept that statutes of repose and statutes of limitations are distinct was well enough established to be reflected in the 1982 *Study Group Report*, commissioned by Congress under section 301(e) of CERCLA. In one of its recommendations, the *Study Group Report* called on States to adopt the discovery rule now embodied in §9658. *Study Group Report*, pt. 1, at 256. The *Report* identified statutes of repose as distinct and different from statutes of limitation, and made a recommendation to pre-empt them, in effect eliminating statutes of repose. The *Report* to Congress stated "The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states[,] have the same effect as some statutes of limitation in barring [a] plaintiff's claim before he knows that he has one." *Ibid*. The scholars and professionals who were discussing this matter (and indeed were advising Congress) knew of a clear distinction between the two. The *Report* clearly urged the repeal of statutes of repose as well as statutes of limitations. But in so doing the *Report* did what the statute does not: It referred to statutes of repose as a distinct category. And when Congress did not make the same distinction, it is proper to conclude that Congress did not exercise the full scope of its preemption power."

There is a Section D of the main opinion, not joined by all seven of the justices who concur in result, suggesting that there should be a presumption against preemption, in effect requiring a greater degree of explicit statutory language to achieve preemption even where the ordinary meaning of the statute and its purposes suggest an intent to preempt State law. In a concurrence authored by Justice Scalia, and joined by the Chief Justice and Justice Alito, they concluded that ordinary concepts of statutory construction should be used in construing preemption clauses, with no presumption of narrowness applied.

The dissent argues that the majority is misconstruing §9658, and that a plain meaning approach suggests that the last act of a defendant triggering a statute of repose should be treated as preempted by the "Federally required commencement date" containing a discovery rule. Justice Ginsburg, who authored the dissent, suggests no reason (other than the remedial purpose of the statute itself) why a statute of repose should be treated as identical to a statute of limitations or why a statute of repose, absent a clear expression of Congressional intent, would ever be subject to pre-emptive tolling other than to prevent facilities from concealing contamination to take advantage of statutes of repose, which are reported to be quite rare in the area of environmental claims.

The decision comes as a bit of a surprise. It is a 7-2 decision, with Justice Sotomayor and Justice Kagan voting with the majority. The decision seems contrary to the tone and tenor of the oral argument, which can be found at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-339_ah69.pdf.

Interestingly, the Obama Administration filed a brief supporting the "no preemption" argument.

The decision clearly finds that Congress has the power to preempt statutes of repose should it choose to do so in the future. In the current climate, it seems unlikely that Congress would have the will to do so. Readers should consider

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this opinion in light of its limited application (there are few states with statutes of repose applicable to environmental damage and property damage claims), and also in light of the federal government's position supporting reversal on the pre-emption of the statute. The federal government has a Marine Corps base in North Carolina at Camp Lejeune. Claims are being raised by people who allege exposure to chlorinated compounds released at that camp. The contamination was recently discovered, many years after the last reported use of the compounds at the base. Preservation of the North Carolina statute of repose at issue here may provide a defense to any such claims against the government, without affecting most applications of §9658 in states which do not have statutes of repose but do have statutes of limitation. The United States has already notified the 11th Circuit of the Waldburger decision in the Bryant case, where the government is appealing a district court order pre-empting the same statute of repose under CERCLA §9658 in a Camp Lejeune claim. The opinion in this case also did not mention the fact that Congress considered and rejected creating federal tort claims for personal injury or property damages resulting from contamination when it enacted CERCLA in 1980. That action suggests that Congress may have less interest in ensuring such claims under State law than the dissent finds. ◆

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