LATHAM&WATKINS

Client Alert Commentary

Latham & Watkins Environmental Litigation Practice June 20, 2014 | Number 1698

Supreme Court Ruling Resolves Conflict on State Statutes of Repose

US Supreme Court rules CERCLA Section 309 does not preempt state statutes of repose. Federal causes of action remain unaffected.

Last week, in a 7-2 decision, the US Supreme Court ruled in *CTS Corp. v. Waldburger* that Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 309[1] does not preempt state statutes of repose.[2] The Court's decision resolves a split between the Fourth, Fifth and Ninth Circuits regarding the preemptive effect of Section 309 on state statutes of repose.[3]

Case History

In *Waldburger*, CTS Corporation, the former owner of an electronics and electronics parts plant in North Carolina, faced state nuisance claims brought by the property's current owners and neighboring landowners based, in part, on allegations that CTS Corporation contaminated the groundwater with chlorinated solvents. CTS Corporation operated at the site from 1959 to 1985 and sold its former property in 1987. In 2009, EPA allegedly notified Plaintiffs that nearby well water was contaminated.

In 2011, 24 years after CTS Corporation sold its North Carolina property, Plaintiffs filed suit seeking "reclamation" of "toxic chemical contaminants," "remediation of the environmental harm caused" by the contaminants, and monetary damages for "all the losses and damages they have suffered...and will suffer in the future."[4] The district court dismissed plaintiffs' claims based on North Carolina's statute of repose,[5] which provides a 10-year filing deadline "from the last act or omission of the defendant giving rise to the cause of action."[6] The Fourth Circuit reversed the district court on the basis of Section 309 preemption. But, the Supreme Court agreed with the district court that the state statute of repose applied and reversed the Fourth Circuit decision.

Scope of Preemption Under CERCLA

CERCLA preempts state law statutes of limitations applicable to personal injury or property damages caused by environmental contaminants that include a limitations period that is shorter than the federal limitations period.[7] Section 309 also adopts the discovery rule, under which a statute of limitations does not begin to run until the plaintiff discovers, or reasonably should have known, that a given harm was caused by a contaminant.[8]

The US Congress added Section 309 to CERCLA in 1986 in response to a 1982 Study Group Report commissioned by Congress that evaluated "the adequacy of existing common law and statutory remedies in providing legal redress for harm to [hu]man[s] and the environment caused by the release of hazardous substances into the environment," including "barriers to recovery posed by existing statutes of limitations."[9]

Latham & Watkins operates worldwide as a limited liability partnership organized under the laws of the State of Delaware (USA) with affiliated limited liability partnerships conducting the practice in the United Kingdom, France, Italy and Singapore and as affiliated partnerships conducting the practice in Hong Kong and Japan. The Law Office of Salman M. Al-Sudairi is Latham & Watkins associated office in the Kingdom of Saudi Arabia. In Qatar, Latham & Watkins LLP is licensed by the Qatar Financial Centre Authority. Under New York's Code of Professional Responsibility, portions of this communication contain attorney advertising. Prior results do not guarantee a similar outcome. Results depend upon a variety of factors unique to each representation. Please direct all inquiries regarding our conduct under New York's Disciplinary Rules to Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022-4834, Phone: +1.212.906.1200. © Copyright 2014 Latham & Watkins. All Rights Reserved.

Statutes of Limitation vs. Statutes of Repose

In *Waldburger*, the Supreme Court considered the scope of CERCLA Section 309, and whether the federal statute preempts both state statutes of limitations and state statutes of repose. Justice Kennedy, writing for the majority, focused on whether Section 309 distinguishes between state-enacted statutes of limitations and statutes of repose.[10] Although there are differences between the two types of statutes, courts' use of the different terms "has not always been precise."[11] Moreover, both use time as a bar to a plaintiff's suit, and the policies that underlie them are similar.[12]

The Court reviewed the meaning and background of statutes of limitations and statutes of repose, and made the following comparisons:

	State Statutes of Limitation	State Statutes of Repose
Purpose	"[A] time limit for suing in a civil case, based on the date when the claim accrued."[13]	"[P]uts an outer limit on the right to bring a civil action."[14]
Timing	A claim accrues "when the injury occurred or was discovered."[15]	The outer limit "is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant."[16]
Rationale	"[P]romote[s] justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[17]	"[E]ffect[s] a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'"[18]
Tolling	Equitable tolling permitted.[19]	Equitable tolling generally not permitted.[20]

Statutory Interpretation of CERCLA Section 309

The Court then turned to the text of CERCLA Section 309. The Court held that, under the statute, "state law is not pre-empted unless it falls into the precise terms of the exception."[21] The Section uses the term "statute of limitations" four times and never uses the term "statute of repose."[22] Although Congress has used the term "statute of limitations" when enacting statutes of repose, the Court found that the concept that statutes of repose and statutes of limitations are distinct was reflected in the 1982 Study Group Report that Congress relied on in drafting Section 309.[23] The Study Group 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."[24] Therefore, according to the Court, it is "proper" to conclude Congress did not intend for Section 309 to preempt state statutes of repose.[25]

The Court found further support for its conclusion that CERCLA Section 309 does not encompass state-enacted statutes of repose from the "presumptions about the nature of pre-emption."[26] The Court noted, for example, that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"[27] Additionally, the Court presumes that preemption does not apply absent the "clear and manifest purpose of Congress."[28] Justices Scalia, Thomas and Alito joined all of the majority opinion except for this discussion about the nature of preemption, stating that "language should be given its ordinary meaning" when determining whether preemption applies.[29]

Dissent

The dissent, written by Justice Ginsburg, found that the text of Section 309 and its legislative history favored a finding of preemption. As the dissent notes, the Congressional Conference Report states that "[t]his section – [42 U.S.C.] § 9658 – addresses the problem identified in the [1982 Study Group Report]."[30] The procedural barriers to recovery in court action for personal injuries resulting from exposure to waste that the Study Group addressed "cannot be solved when statutes of repose remain operative."[31] Moreover, "altering statutes of limitations to include a discovery rule would be of little use in States with repose prescriptions."[32] The dissent also found that a "straightforward reading" of CERCLA Section 309 illustrates that Congress had directed that the federally prescribed discovery rule "shall apply 'in lieu of' the earlier 'commencement date' (the defendant's 'last act or omission') specified in N.C. Gen. Stat. § 1-52(16)."[33]

Applicability of *Waldburger*

The Court's decision applies only to state statutes of repose. Federal causes of action are unaffected by this ruling. According to the dissent, Connecticut, Kansas, Oregon and North Carolina have general statutes of repose; Alabama has a common-law rule of repose.[34] Other states, including Texas, have statutes of repose relating to product liability, which are sometimes relevant in tort cases related to environmental contamination (*e.g.*, spills related to allegedly faulty products).[35]

Implications of *Waldburger*

The Supreme Court's decision could be beneficial to defendants facing certain state claims related to historical contamination. Some state causes of action for personal injury or property damage based on releases of hazardous substances in states that have statutes of repose now are clearly barred. Although certain state actions may be barred by statutes of repose, defendants may still be liable under CERCLA and other state statutes for cost recovery and contribution claims stemming from the release of hazardous substances. In states that do not have statutes of repose, defendants may also still be liable for personal injury or property damage under state law for historic contamination that is discovered long-after the apparent running of applicable statutes of limitation.

Prospective property owners therefore must continue to take care in performing environmental due diligence prior to acquiring property known or suspected to be contaminated or to have been the site of industrial, manufacturing, mining or waste disposal operations. Parties will also want to review and consider the impacts of state statutes of repose in drafting agreements, including tolling agreements, and prior to bringing or defending claims based on the release of hazardous substances.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

James Barrett
+1.202.637.2265
james.barrett@lw.com
Washington, D.C.

Matthew Thurlow
+1.202.637.1051
matthew.thurlow@lw.com
Washington, D.C.

Laura Glickman
+1.202.637.2328
laura.glickman@lw.com
Washington, D.C.

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit http://events.lw.com/reaction/subscriptionpage.html to subscribe to the firm's global client mailings program.

Endnotes

[1] 42 U.S.C. § 9658 (2014).

[2] *CTS Corp. v. Waldburger*, 573 US __ (2014). Justice Kennedy delivered the opinion for the majority, which was joined in full by Justices Sotomayor and Kagan. Justices Roberts, Scalia, Thomas and Alito joined the majority opinion as to all but Part II-D. Justice Scalia filed an opinion concurring in part and concurring in the judgment in which Justices Roberts, Thomas and Alito joined. Justice Ginsburg filed a dissenting opinion, which was joined by Justice Breyer.

[3] *Id.*, Maj. Op. at 4-5. The Fourth, Fifth and Ninth Circuits reached conflicting decisions on whether CERCLA Section 309 preempts state statutes of repose.

The Fourth Circuit's Reasoning in *Waldburger*

In its decision finding that Section 309 preempts state statutes of repose, the Fourth Circuit first looked to the text of Section 309. Noting that Section 309 was ambiguous, the Fourth Circuit found that preemption applied because the North Carolina statute (1) is a limitations period "specified in the State statute of limitations or under common law", and (2) it comports with the definition of "applicable limitations period." *Waldburger v. CTS Corp.*, 723 F.3d 434, 442 (4th Cir. 2013). Moreover, the "commencement date…is earlier than the federally required commencement date" because "the period begins to run when the defendant commits his last act, rather than when the plaintiff has knowledge of harm." *Id.* The court also noted that it employed a "standard of liberal construction" because CERCLA is a remedial statute. *Id.* at 444.

The Ninth Circuit's Reasoning in *McDonald*

In *McDonald*, the Ninth Circuit found that the term "statute of limitations" in Section 309 was ambiguous and turned to the legislative history of the provision. *McDonald v. Sun Oil Co.*, 548 F.3d 774, 781-83 (9th Cir. 2007). The court found that the Study Group Report and a committee print, taken together, "show that Congress's primary concern in enacting [Section 309] was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of it—precisely the type of circumstance involved in this case." *Id.* at 783. Therefore, Congress intended the term "statute of limitations" to include statutes of repose. *Id.*

The Fifth Circuit's Reasoning in *Skinner Tank*

The Fifth Circuit concluded in *Skinner Tank* that Section 9658 did not preempt a Texas statute of repose relating to product liability actions. *Burlington N. & Santa Fe Ry. Co. v. Skinner Tank*, 419 F.3d 355, 362 (5th Cir. 2005). Relying on "common sense", the court

found that the plain language of CERCLA Section 309 did not extend to statutes of repose because the statute did not mention peremptory statutes or statutes of repose. *Id.* at 364. The court concluded it was bound to that language because "Congress did not express a contrary intent in this instance." *Id.*

[4] Maj. Op. at 3-4.

[5] *Id.* at 4.

[6] N.C. Stat. Ann. § 1-52(16).

[7] Maj. Op. at 1.

[8] *Id.*

[9] *Id.* at 2; 42 U.S.C. § 9651(e)(1), (3)(F).

[10] Maj. Op. at 5.

[11] *Id.* at 12.

[12] *Id.* at 6.

[13] *Id.* at 5.

[14] *Id.* at 6.

[15] *Id.* at 5.

[16] *Id.* at 6.

[17] *Id.*

[18] *Id.* at 6-7.

[19] *Id.* at 7.

[20] *Id.*

[21] *Id.* at 10-11.

[22] *Id.* at 11.

[23] *Id.* at 11-13.

[24] *Id.* at 13.

[25] *Id.* The Court also used other textual clues to support its conclusion. Congress' use of the singular "applicable limitations period" to mandate preemption of two different time periods with two different purposes would be "awkward". Furthermore, the definition of the limitations period as "the period" during which a "civil action" under state law "may be brought" presupposes that a civil action existed. A statute of repose, however, can prohibit the very existence of a cause of action. *Id.* at 13-14.

[26] *Id.* at 16 (quoting *Medtronic, Inc. v. Lohr*, 518 US 470, 484-85 (1996)).

[27] *Id.* at 17 (quoting *Altria Group, Inc. v. Good*, 555 US 70, 78 (2008)).

[28] *Id.* (quoting *Medtronic*, 518 US at 485).

[29] Concurring Op. at 1.

[30] Dissenting Op. at 4.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 2.

[34] *Id.* at 4.

[35] *See Burlington N. & Santa Fe Ry. Co.*, 419 F.3d at 358.