

# Client Alert

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## The “Discovery” Rule Is No Longer Supreme: The Supreme Court Holds That State Statutes of Repose Are Not Preempted by CERCLA

By Peter Hsiao, William Tarantino, Robert Falk, and Andrew Stanley

On June 9, 2014, the Supreme Court ruled in *CTS Corp. v. Waldburger et al.*<sup>1</sup> that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, or the “Superfund” law), which preempts state statutes of limitations for certain tort actions involving environmental harms, does not preempt state statutes of repose. 42 U.S.C. § 9658. The Court reversed the Fourth Circuit’s decision that Section 9658 applies to both state statutes of limitations and state statutes of repose. While the Court’s ruling does not affect CERCLA-based cleanups or natural resources damages claims, it has particular significance for claims brought under non-CERCLA alternative theories, where a CERCLA-based claim is unavailable. Such claims would include those subject to CERCLA’s petroleum exclusion or exemption for federally permitted releases of hazardous substances, as well as claims for personal injury, medical monitoring, or diminution in property values.

### BACKGROUND

Congress enacted CERCLA in 1980 to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination. Under CERCLA’s Section 9658 framework, state statutes of limitations in covered actions are preempted. Congress included Section 9658’s preemption provision because of the potentially long delay from the time that the release of contamination occurs and the time that a plaintiff discovers the resulting injury. The statute of limitations instead begins to run when a plaintiff discovers, or reasonably should have discovered, that the harm in question was caused by the contaminant.<sup>2</sup>

In *CTS Corp.*, the Supreme Court faced the question of whether Section 9658 also preempts state statutes of ultimate repose. A statute of repose puts an outer limit on the right to bring a civil action measured from the date of the defendant’s last culpable act or omission. Statutes of repose reflect legislative decisions that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability.<sup>3</sup>

In this case, defendant CTS Corporation operated an electronics plant in Asheville, North Carolina, from 1959 to 1985. CTS stored various chemicals on its property and sold the property in 1987. The buyer eventually sold portions of the property to individuals who, together with adjacent landowners, brought a state-law nuisance suit against CTS alleging damages from contaminants on the land.<sup>4</sup> The plaintiffs brought the suit in 2011, two years

<sup>1</sup> No. 13-339 (June 9, 2014), available at [http://www.supremecourt.gov/opinions/13pdf/13-339\\_886a.pdf](http://www.supremecourt.gov/opinions/13pdf/13-339_886a.pdf).

<sup>2</sup> This is known as the “discovery rule.”

<sup>3</sup> *CTS Corp.*, No. 13-339, slip op. at 6 (June 9, 2014) (citing *School Board of Norfolk v. United States Gypsum Co.*, 234 Va. 32, 37, 360 S.E.2d 325, 328 (1987)).

<sup>4</sup> *Id.* at 3.

# Client Alert

after they allegedly learned from the U.S. Environmental Protection Agency that their well water was contaminated. CTS moved to dismiss the claim, citing North Carolina's 10-year statute of repose.<sup>5</sup> Because CTS' last act occurred in 1987, when it sold the electronics plant, the District Court granted the motion to dismiss the nuisance claim as time-barred. The Fourth Circuit reversed, holding that the federal CERCLA applied to preempt North Carolina's statute of repose.

## RULING

In a decision based on principles of statutory construction, the Court held that state statutes of repose are not preempted by Section 9658. Justice Kennedy, writing for the majority, found it instructive that Section 9658 uses the term "statute of limitations" four times, but not the term "statute of repose."<sup>6</sup> In addition, Section 9658 characterizes preemption as the "exception" to the regular rule<sup>7</sup> and describes the covered limitations period in the singular.<sup>8</sup> Finally, Congress was aware of the difference between a statute of limitations and a statute of repose because the distinction was reflected in the 1982 Study Group Report that guided Section 9658's enactment.<sup>9</sup>

Justices Sotomayor and Kagan joined the opinion in full. Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined as to all of the opinion except part II-D, where Kennedy stated 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.'"<sup>10</sup>

## CONCLUSION

The Court's opinion effectively empowers state legislatures to decide, as a matter of local policy, the extent to which they want their tort laws to reach back in time with respect to liabilities for legacies of environmental contamination. States that wish to limit such liabilities may now rely upon or enact statutes of repose, which mandate a "hard-stop" on the filing of such tort claims based upon when the contamination actually occurred. States that instead prefer to allow lengthy reach-backs to potentially responsible parties for environmental contamination may continue to rely on CERCLA's preemptive shield that applies a three-year "discovery" rule to state-law statutes of limitations on tort claims.

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<sup>5</sup> N.C. Gen. Stat. Ann. § 1-52(16) ("[N]o cause of action shall accrue more than 10 years after the last act or omission of the defendant giving rise to the cause of action").

<sup>6</sup> *CTS Corp.*, No. 13-339, slip op. at 11 (June 9, 2014).

<sup>7</sup> *Id.* at 10.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 17 (quoting *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008)).

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