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Environment Reporter™

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STATUTES OF REPOSE AND PREEMPTION

The U.S. Supreme Court held in CTS Corp. v. Waldburger that CERCLA's discovery rule doesn't preempt North Carolina's statute of repose. In so holding, the court made clear that CERCLA's discovery rule applies solely to statutes of limitation. The U.S. Court of Appeals for the Eleventh Circuit recently considered a similar issue in Bryant v. United States, in which it considered whether North Carolina's attempt to legislatively exclude groundwater contamination cases from its statute of repose applied retroactively. Finding that the legislation can't be applied retroactively, the Eleventh Circuit barred plaintiffs' claims but offered little guidance to plaintiffs in other states with statutes of repose. In this article, Frank Leone and Mark A. Miller analyze the two decisions, consider effects on statutes of repose outside North Carolina, and conclude that the general ''presumption against preemption'' remains on shaky ground.

What's Past Is Prologue: Statutes of Repose in Post-Waldburger Environmental Contamination Cases

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When Congress amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) to enable toxic tort suits by preempting shorter state statutes of limitation, did it mean to cover statutes of repose as well? Reversing the U.S. Court of Appeals for the Fourth Circuit, the U.S. Supreme Court in *CTS Corp. v. Waldburger*[1] ruled in June that Congress said what it meant, meant what it said, and that CERCLA's ''federally required commencement date'' (FRCD), 42 U.S.C. § 9658, which engrafts a discovery rule to extend state statutes of limitation, applies only to statutes of limitation and not statutes of repose. The case involved some unusual

[1] 134 S. Ct. 2175, 78 ERC 1505, 2014 BL 158584 (2014).

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litigation postures, with toxic tort plaintiffs arguing that federal law trumped state law, and defendants—supported by the U.S. government—arguing that state law governed. The Supreme Court held that CERCLA did not preempt North Carolina's statute of repose, and thus the plaintiff's chlorinated solvent-related property damage claim was barred.

Following *Waldburger*, the U.S. Court of Appeals for the Eleventh Circuit held that North Carolina's attempt to legislatively exclude groundwater contamination cases from its statute of repose did not apply retroactively, and the claims of the plaintiffs in that case (who sought damages arising from TCE contamination of drinking water at Camp Lejeune, N.C.) also were barred.[2] The impact of *Waldburger*, however, may be limited because relatively few states (Connecticut, Kansas, North Carolina, Oregon and Vermont) currently have broad statutes of repose that bar environmental property damage or personal injury claims. Approximately half of the states have statutes of repose applicable to product liability actions and, if an allegedly defective product caused environmental contamination, the *Waldburger* opinion makes it clear the CERCLA FRCD would not extend these statutes of repose.

CTS Corp. v. Waldburger—The FRCD Does Not Extend to State Statutes of Repose. CERCLA does not provide a federal cause of action for personal injury or property damage arising from environmental contamination.[3] However, Congress in 1986 facilitated such lawsuits by codifying a federal ''discovery rule'' in the form of the FRCD, 42 U.S.C. § 9658(b)(4)(A), which preempts state statutes of limitation that would otherwise bar plaintiffs' claims. Section 9658(a)(1) provides that any state law claim for personal injury or property damage resulting from a release of a hazardous substance into the environment from a facility is subject to the FRCD if the applicable state statute of limitation or common law provides for an earlier accrual date. The FRCD starts the limitations clock from ''the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by [a] hazardous substance.''[4] If a state statute of limitation has an accrual date providing a shorter time period than the FRCD in which to file a lawsuit, it is preempted and the FRCD applies.[5] *Waldburger* concluded that § 9658 did not similarly preempt statutes of repose, resolving a dispute among the circuits.[6]

Waldburger involved an industrial site in Asheville, N.C., where defendant CTS Corp. (CTS) operated an electronics manufacturing plant from 1959 to 1985.[7] During plant operations, CTS stored various hazardous substances used or generated by its operations, including trichloroethylene (TCE), and some of these chemicals allegedly were released into the environment. CTS sold the plant site in 1987 and had no further involvement there. The property was sold again to the plaintiffs who, in 2009, discovered that their well water was contaminated with TCE. Then, 24 years after CTS left the property, plaintiffs filed a state law nuisance action. The North Carolina statute of repose, N.C. Gen. Stat. Ann. § 1-52(16), applied to any claim ''for personal injury or physical damage to [a] claimant's property'' and provided that ''no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.'' Plaintiffs argued that under the FRCD the accrual date for their claim was 2009, and the North Carolina statute of repose therefore did not bar their claims.

The district court granted the defendant's Fed. R. Civ. P. 12(b)(6) motion dismissing the case, finding that the North Carolina statute of repose barred the claim because it was filed more than 10 years after the defendant sold the property in 1987, its last act relating to the contamination. Although tort plaintiffs typically oppose federal preemption of state law, in this case they argued that § 9658 preempted the North Carolina statute of repose. The Fourth Circuit reversed, holding 2-1 that CERCLA's use of the term ''statute of limitations'' was ambiguous, Congress intended no distinction between statutes of limitation and repose, and CERCLA's remedial purpose demanded a liberal construction of the statute favoring preemption.[8]

The Supreme Court, in a 7-2 decision authored by Justice Anthony Kennedy, disagreed and held that CERCLA did not preempt state statutes of repose. The court first rejected the view that CERCLA's remedial purpose required liberal statutory interpretation, stating that such an approach could not ''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.''[9] The court next turned to the plain text of § 9658 and observed that it expressly uses ''statutes of limitation,'' not ''statutes of repose.''

The court also concluded that Congress knew the difference between statutes of limitation and repose when it enacted the FRCD. The court noted that a 1982 Study

[2] *Bryant v. United States*, 2014 BL 286518, 11th Cir., No. 12-15424 (10/14/14).

[3] *See, e.g.*, *Waldburger*, 134 S. Ct. at 2180, 2188.

[4] 42 U.S.C. § 9658(b)(4)(A).

[5] *See, e.g.*, *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1148, 55 ERC 1628 (9th Cir. 2002) (''Because application of California's suspicion standard would result in an earlier commencement date for the one-year limitations period than the federal commencement date, we hold that the federal discovery rule under § 9658 preempts the California rule.'').

[6] *Compare, e.g.*, *Waldburger v. CTS Corp.*, 723 F.3d 434, 76 ERC 1929, 2013 BL 184776 (4th Cir. 2013) (preempted), and *McDonald v. Sun Oil Co.*, 548 F.3d 774, 67 ERC 1970, 2008 BL 257558 (9th Cir. 2008) (same), with *Burlington N. & Santa Fe R.R. Co. v. Poole Chem. Co., Inc.*, 419 F.3d 355, 60 ERC 1993 (5th Cir. 2005) (not preempted), and *Clark Cnty. v. Sioux Equip. Corp.*, 2008 SD 60, 753 N.W.2d 406 (S.D. 2008) (same).

[7] *See Waldburger v. CTS Corp.*, No. 1:11CV39, *report and recommendation adopted*, 2012 BL 33081 (W.D.N.C. Feb. 6, 2012).

[8] *Waldburger*, 723 F.3d at 443-44.

[9] *Waldburger*, 134 S. Ct. at 2185. ''CERCLA, it must be remembered, does not provide a complete remedial framework. . . . Section 9658 leaves untouched States' judgments about causes of action, the scope of liability, the duration of the period provided by statutes of limitations, burdens of proof, rules of evidence, and other important rules governing civil actions. The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them. Respondents have not shown that in light of Congress' decision to leave those many areas of state law untouched, statutes of repose pose an unacceptable obstacle to the attainment of CERCLA's purposes.'' *Id.* at 2188 (quotations and citations omitted; alteration original).

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Group Report—commissioned by Congress ''to determine 'the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment,' including 'barriers to recovery posed by existing statutes of limitations' ''—specifically recommended repealing both state statutes of repose and statutes of limitation.[10] ''And when Congress did not make the same distinction [in the text of § 9658], it is proper to conclude that Congress did not exercise the full scope of its pre-emption power.''[11]

The court further examined other evidence and concluded that statutes of limitation and repose embody distinct concepts, measured from different points and seeking to attain different objectives.[12] Unlike statutes of limitation, which ''create[] a time limit for suing in a civil case[] based on the date when the claim accrued,'' statutes of repose ''put[] an outer limit on the right to bring a civil action. That 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.''[13] Repose statutes operate to bar claims regardless of the plaintiff's degree of knowledge, and can preclude claims before an injury even arises.[14] ''Thus, a statute of repose can prohibit a cause of action from coming into existence.''[15] The court further noted that although statutes of limitations may be tolled, statutes of repose may not.[16]

The court, having recognized that statutes of limitations and repose have different starting points (claim accrual versus defendant's last act), viewed CERCLA's singular language in describing the covered period (e.g., ''the applicable limitations period,'' ''such period shall commence'') as evidence that the provision was meant to apply only to statutes of limitation. Concluding otherwise ''would be an awkward way to mandate the pre-emption of two different time periods with two different purposes.''[17] Section 9658's definition of ''applicable limitations period'' describes when a claim ''may be brought,'' which ''presupposes'' a civil action exists. This also points to statutes of limitation because repose statutes ''prohibit a cause of action from ever coming into existence.'' The court further explained that § 9658 contains a tolling provision for minor or incompetent plaintiffs, which is a ''critical distinction'' between statutes of limitation and repose because a ''repose period is fixed and its expiration will not be delayed by estoppel or tolling.''[18]

Justice Kennedy's opinion also relied upon the general ''presumption against preemption,'' although this section (Part II-D) was not part of the court's opinion. ''[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.' ''[19] This presumption is designed to ''support, where plausible, 'a narrow interpretation' of an express pre-emption provision, especially 'when Congress has legislated in a field traditionally occupied by the States.' ''[20] Four of the seven members of the majority, however, did not join in this view. Justice Antonin Scalia wrote a concurrence (joined by Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito) affirming that ordinary rules of statutory construction should apply to express preemption provisions and, under those rules, § 9658 preempted only statutes of limitation, not statutes of repose.[21]

Bryant v. United States—North Carolina's Attempt to Retroactively Repeal Its Statute of Repose Fails. Following the *Waldburger* opinion, the Eleventh Circuit in *Bryant v. United States* continued the North Carolina statute-of-repose saga. *Bryant* involved a Federal Tort Claims Act[22] complaint against the federal government brought in multidistrict litigation alleging that the plaintiffs suffered personal injuries from toxic exposures while living at the Camp Lejeune Marine base in North Carolina. The United States moved to dismiss the claims as barred by North Carolina's 10-year statute of repose. The district court denied the motion, finding that § 9658 preempts state statutes of repose. The district court also rejected the plaintiffs' argument that the North Carolina statute of repose contained a latent-disease exception allowing a plaintiff to bring a claim where disease resulting from exposure to a hazardous substance does not manifest until many years later. The district court, however, certified an interlocutory appeal to the Eleventh Circuit.

The Supreme Court decided *Waldburger* while the appeal was pending, concluding that § 9658 does not preempt statutes of repose. The Eleventh Circuit, therefore, reversed the district courts' ruling on the preemption issue. The court, however, also examined the issue of whether the North Carolina statute of repose contained a latent disease exception. When the plaintiffs originally filed suit, the North Carolina statute stated that '' 'no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to a cause of action.' ''[23] The Eleventh Circuit held that the plain text was unambiguous, did not contain a latent-disease exception and the court would not read one into it.

Following *Waldburger*, however, the North Carolina legislature amended § 1-52(16) to provide that the 10-year statute of repose shall not '' 'bar an action for personal injury, or property damages caused or contributed to by . . . the consumption, exposure, or use of water supplied from groundwater contaminated by a hazardous substance.' ''[24] The amendments applied to any matter '' 'filed, arising, or pending' on or after June 20, 2014,'' and the *Bryant* litigation was ''pending.'' The U.S. argued that the statute could not be applied retroactively, citing state precedent that a ''statute may be

[10] *Id.* at 2180 (quoting Senate Committee on Environment & Public Works, Superfund Section 301(e) Study Group, Injuries and Damages from Hazardous Wastes—Analysis & Improvement of Legal Remedies, 97th Cong., 2d Sess., pt.1 at 256 (Comm. Print 1982)).
[11] *Id.* at 2186.
[12] *Id.* at 2182.
[13] *Id.*
[14] *Id.* at 2182-83.
[15] *Id.* at 2187.
[16] *Id.* at 2183.
[17] *Id.* at 2187 (quoting 42 U.S.C. § 9658(b)(2)).
[18] *Id.* at 2183 (quotations omitted).
[19] *Id.* at 2188 (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77, 2008 BL 276717 (2008)).
[20] *Id.* at 2189 (quoting *Altria Grp.*, 555 U.S. at 77).
[21] *Id.* at 2189.
[22] 28 U.S.C. § 2671 *et seq.*
[23] *Bryant*, 2014 BL 286518, at *2 (quoting N.C. GEN. STAT. ANN. § 1-52(16)).
[24] *Id.* (quoting N.C. GEN. STAT. ANN. § 130A-26.3).

applied retroactively 'only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis.' ''[25] The Eleventh Circuit agreed, finding that a statute of repose ''is a substantive limit on a plaintiff's right to file an action,'' and the North Carolina Legislature ''may not enlarge the plaintiffs' claim by statute because to do so would be to divest the Government of a vested right.'' In concluding that § 1-52(16)'s amendments were prospective only, the court also dismissed the plaintiff's argument that the amendment was a mere clarification, which could be retroactive under North Carolina law, and not an ''altering'' amendment that cannot be retroactive.[26] Despite the efforts of the North Carolina state Legislature, the plaintiffs' claims remained barred.

Waldburger May Have Limited Effects on Statutes of Repose Outside of North Carolina. Although almost all states have statutes of repose, most are limited to very specific claims. The vast preponderance of states have statutes of repose for injuries arising from improvements to real property, but these statutes typically apply to claims against contractors who design, build or renovate property and thus are unlikely to apply to environmental contamination claims.[27] Other than North Carolina, only four other states have ''generalized'' personal injury and property damage statutes of repose that would apply to environmental contamination claims.[28] In addition, Alabama has a common law rule of repose that bars personal injury and property damage actions brought more than 20 years after the complained-of act, which also could apply to hazardous substance claims.[29]

Nearly half of the states, however, have repose statutes that govern product liability actions.[30] Although the statutes govern causes of action relating to allegedly defective products, at least one court has applied the statute to an environmental case. In *Burlington N. & Santa Fe R.R. Co.*, the court applied product liability statutes of repose to dismiss a case against a tank manufacturer where a ruptured chemical storage tank (i.e., the claimed defective product) leaked a hazardous contaminant into the environment.[31] Although product liability statutes may not apply to cases involving dumping of hazardous wastes or direct releases from manufacturing processes, where the argument can be made that a ''product defect'' caused environmental harm, these statutes may block plaintiffs' claims.

Conclusion. Although defendants won a round (and for the U.S. government with respect to Camp Lejeune, a very important round) in *Waldburger* and *Bryant*, the impact on environmental contamination cases is likely to be limited. First, most states have adopted a discovery rule that mirrors § 9658's FRCD in some form, meaning that preemption questions may never arise. Second, *Waldburger*'s green light to apply statutes of repose without fear of preemption is likely to be limited to those few states with statutes as expansively worded as North Carolina's pre-amendment statute. Defendants faced with environmental contamination claims where it can be successfully argued that a defective product caused the contamination also could seek refuge in product liability statutes of repose, thus extending *Waldburger*'s potential reach. The Supreme Court's *Waldburger* opinion also is relevant because, although Justice Kennedy's opinion cited a general ''presumption against preemption,'' four of the seven members of the majority did not join that section. Although the court ruled against federal preemption in this case, the presumption against preemption remains on shaky ground.

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[25] *Id.* at *3 (quoting *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468 (N.C. 1980)).

[26] Although the North Carolina legislature referred to the amendments as ''clarifying,'' the Eleventh Circuit looked beyond the labeling and held that the original statute was unambiguous and there was nothing to clarify. The amended statute, by contrast, ''contains a brand new exception for groundwater claims. This is not a case where the General Assembly merely failed to address a particular point—whether groundwater contamination claims fall under the statute of repose—only to address it later. . . . [T]he General Assembly created a substantively distinct exception from whole cloth.'' *Id.* at *5.

[27] *See, e.g.*, FLA. STAT. ANN. § 95.11(3)(c) (''An action founded on the design, planning, or construction of an improvement to real property . . . must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.'').

[28] *See* CONN. GEN. STAT. ANN. § 52-584 (''No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, . . . may be brought more than three years from the date of the act or omission complained of . . . .''); KAN. STAT. ANN. § 60-513(b) (''in no event shall an action [for trespass or injury to the rights of another] be commenced more than 10 years beyond the time of the act giving rise to the cause of action''); OR. REV. STAT. ANN. § 12.115(1) (''In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of.''); 12 VT. STAT. ANN. § 518(a) (''An action to recover for ionizing radiation injury or injury from other noxious agents medically recognized as having a prolonged latent development shall be commenced . . . in no event more than twenty years from the date of the last occurrence to which the injury is attributed.'').

[29] *See Abrams v. Ciba Specialty Chems. Corp.*, 659 F. Supp. 2d 1225, 1226-27, 70 ERC 2067, 2009 BL 210886 (S.D. Ala. 2009) (for claims alleging DDT contamination of real property, holding pre-*Waldburger* that Alabama's common law repose rule is preempted by § 9658).

[30] *See, e.g.*, CONN. GEN. STAT. ANN. § 52-577a(a); TENN. CODE ANN. § 29-28-103(a). Note that some statutes contain an exception for asbestos exposure. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-577a(e); TENN. CODE. ANN. § 29-28-103(b).

[31] *See Burlington N. & Santa Fe R.R. Co.*, 419 F.3d at 358 (applying Texas's product liability repose statute to environmental contamination from a ruptured storage tank).

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