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CERCLA Will Not Save a Toxic Tort Claim which is Barred by a State Statute of Repose

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Ealier today, June 9, 2014, the United States Supreme Court handed down its decision in *CTS Corp. v. Waldburger*, *et al.,* slip op. No. 13–339 (U.S., 6-9-2014). Reversing the Fourth Circuit, the Supreme Court held that the Superfund law's preemption of state statutes of limitation for personal injury or property damage claims does not apply to state statutes of repose. Not every state has such a statute on the books, but for those that do, this may provide an additional shield for defendants, and an additional hurdle for plaintiffs.

Plaintiffs in the *CTS v. Waldburger* case were on-site and adjacent property owners who claimed they had been damaged by TCE and DCE contamination in groundwater from real estate formerly owned by CTS Corp. CTS sold the property in 1987; EPA informed the plaintiffs in 2009 that CTS was the source of the groundwater contamination; and they sued in 2011. North Carolina has a three year statute of limitations which applied to plaintiffs' claims for environmental "reclamation," remediation, and money damages. North Carolina also has a statue of repose, however, which provides that "'[N]o 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.'" Slip op. at 4, quoting N. C. Gen. Stat. Ann. §1–52(16). CTS asserted that because its "last act" must have occurred at or before the 1987 sale of the property, the 10 year statute of repose had extinguished plaintiffs' claims — 14 years before they were filed.

The Supreme Court engaged in its now-usual textual examination of the actual words Congress used in Section 309 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9658, entitled "State statutes of limitations for hazardous substance cases." The Court first found that the statutory language expressly preempts any state "statute of limitations" which accrues earlier than the "federally required commencement date" and requires use of the federal commencement date instead, which is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." Slip op. at 8-9.

The Court then decided that Congress' use of the phrase "statutes of limitation" does not extend to also encompass "statutes of repose." Statutes of limitation are intended to encourage a plaintiff's timely filing of a claim for damages once the injury and the likely cause of harm are known. In contrast, statutes of repose are intended to create finality, and are triggered by the last act or omission of a defendant which caused the harm or injury. A statute of limitations defines the time period within which a claim may be brought, while a statute of repose mandates that no cause of action exists after a certain definite period of time. *See* slip op. at 14-15. Therefore, in states with codified statutes of repose, it is possible for a personal injury or property damage claim based in hazardous substance exposure to expire before it ever accrues.

What does this mean for parties enmeshed in hazardous substance exposure litigation? First, this decision has no effect on federal Superfund site cost recovery or contribution claims – the decision only applies to state-law based claims for personal injury or property damage from hazardous substances: classic toxic-tort litigation. Second, check your applicable state law; less than half the states have enacted statutes of repose for tort actions. For example, Kansas has a 10-year statute of repose, but other mid-western states do not.

And of course, if you find yourself in need of an analysis of CERCLA, state statute of limitations or repose, please contact one of the members of the Spencer Fane Environmental Practice Group.

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