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## WASHINGTON SUPREME COURT DISMISSES CHALLENGE TO "SUPERFUND" LAW (*Washington Dep't of Ecology v. Asarco, Inc.*)

The Supreme Court of the State of Washington ruled that a preemptive challenge to the constitutionality of Washington's Model Toxics Control Act (MTCA) was not justiciable. In so ruling, the Court reversed a lower court ruling that found that the MTCA violated Asarco, Inc.'s due process rights as well as the Takings Clause of the U.S. Constitution. However, the Court suggested that the constitutional issues may be raised anew in the trial court after a factual record had been developed that would demonstrate the economic impact of the MTCA on Asarco.

The Washington Legal Foundation (WLF) had filed a brief with the Washington Supreme Court urging it to uphold a landmark trial court ruling that struck down on constitutional grounds a cleanup remediation order against Asarco. The order was issued under the MTCA against Asarco for emissions from a smelting plant that was shut down over 80 years ago. Because the MTCA is modeled after the federal Superfund law, the Comprehensive, Environmental Response Compensation and Liability Act (CERCLA), a decision upholding the trial court would have had enormous ramifications nationwide.

In *Washington Dep't of Ecology v. Asarco, Inc.*, the state agency notified Asarco that the levels of arsenic and lead in soil on and surrounding the location where its smelting facility once operated exceeded new levels set by the MTCA in 1988. Remediation costs greater than \$78 million were being assessed on the basis of strict, joint and several liability, even though Asarco's emissions constituted only 30 percent of amount to be remediated. The agency set the cleanup target level to be 20 parts per million (ppm) for arsenic which is the natural background level.

County health officials tested residents living near the long-abandoned site but found no elevated levels of arsenic or lead. There have never been any complaints against the company from its operations or emissions either during its operations from 1904 to 1912, or afterwards. The alleged "risk" of injury was a truly hypothetical one that Asarco could not have foreseen decades ago. Accordingly, the trial court voided the offsite remediation order on the grounds that applying it to Asarco retroactively violated the Due Process and the Takings Clauses of the U.S. Constitution as interpreted by the U.S. Supreme Court in its 1998 decision in *Eastern Enterprises v. Apfel*.

In reversing the trial court, the Supreme Court noted that although this was an "as applied" challenge to the MTCA, "nothing has been applied." In short, the Court ruled that the case was not ripe for review. The Court, in *dicta*, also suggested that it did not think that Asarco's due process and takings claims were valid.

In a strong dissent, Justice Sanders agreed with WLF's arguments that the MTCA violated the Due Process and the Takings Clauses. With respect to the ripeness issue, Justice Sanders stated that since Asarco had filed a declaratory judgment action, the lawsuit is ripe "if there is practical likelihood of a future controversy" under the statute. Justice Sanders cited ample precedent showing that similar suits brought under other statutes were found to be justiciable.

As for the Takings Clause challenge, Justice Sanders agreed with WLF that requiring a company to spend money to comply with a regulation could constitute a "taking" of property, countering the notion by the majority that a "takings" case can only involve the taking of real or personal property, but not money. Justice Sanders relied to a great extent on WLF's litigation in its IOLTA cases, specifically citing U.S. Court of Appeals Judge Alex Kozinski's dissent in *Washington Legal Foundation v. Legal Found. of Washington* for the proposition that taking the interest on a client's funds which are in lawyer's trust account is property subject to the Takings Clause.

WLF's arguments in this case are similar to ones it made in *Alcan Aluminum Co. v. United States*, a case challenging the federal Superfund Law. That case will be heard before the U.S. Court of Appeals for the Second Circuit in the next several weeks.

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