Legal Backgrounder

Vol. 29 No. 20 July 11, 2014

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

# *CTS Corp. v. Waldburger*: How Will Judges and State Lawmakers Respond to High Court's Statute of Repose Ruling?

by Daniel M. Steinway

On June 9, 2014, the U.S. Supreme Court held in *CTS Corp. v. Waldburger* ("*CTS Corp.*")[1] that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA")[2] does not pre-empt state statutes of repose that apply to state-law tort actions for personal injury or property damage caused by contamination or pollution. In 1980, Congress enacted CERCLA 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."[3] To effectuate these purposes, CERCLA established a broad remedial and liability scheme by which the United States, individual States and private parties may file a CERCLA action to recover the costs to clean up contaminated sites from the responsible parties.[4]

While CERCLA specifically provides a federal cause of action for the recovery of environmental cleanup costs from the liable parties, this statute does not provide a federal cause of action for the recovery of damages from personal injuries or property damage arising from contamination. Instead, given the existing myriad of available state-law tort causes of action, CERCLA merely contains a provision that expressly pre-empts statutes of limitation applicable to state-law tort actions for personal injury or property damage arising from contamination.[5] However, the question remained until the Supreme Court's decision in *CTS Corp.*, whether this CERCLA provision also pre-empts state statutes of *repose* applicable to such tort actions. And now that the Supreme Court has answered that question, ruling that CERCLA does not pre-empt such statutes of repose, the next question is what will be the impact of this decision—in the courts and in the state legislatures.

**CERCLA Pre-empts State Statutes of Limitation for State-Law Tort Actions Related to Environmental Contamination or Pollution**. All states have enacted one or two types of statutes—statutes of limitation and/or statutes of repose—whose purpose is to limit the time period during which a plaintiff may file a tort action under that state's law against another party to recover damages for personal injuries or property damages. In both types of statutes, once the specified time period has run, the statute operates to bar the tort action. A statute of limitation, which all states have enacted, imposes a specified time limit, such as

---

[1] --- S. Ct. ---, No. 13-339, 2014 WL 2560466 (June 9, 2014).
[2] 42 U.S.C. § 9601 *et seq.*
[3] *Burlington N. and Santa Fe Ry. Co.*, 556 U.S. 599, 602 (2009) (quoting *Consol. Edison Co. v. UGI Util., Inc.*, 423 F.3d 90, 95 (2d Cir. 2005)).
[4] 42 U.S.C. §§ 9607(a); 9613(f).
[5] *CTS Corp.*, 2014 WL 2560466, at *3.

---

**Daniel M. Steinway** is a partner in the Environmental Department at the law firm of Baker Botts LLP in Washington, D.C. He would like to thank Michael McGovern and Martha S. Thomsen for their contributions to this article.

three, five or ten years, on filing the action that begins to run when the tort claim "accrues." While some state statutes of limitation define this time period at the point when the injury actually occurred, the vast majority of these statutes incorporate some form of "discovery rule," which provides that the claim does not accrue until the plaintiff knew or reasonably should have known that he or she suffered a harm, such as personal injury or property damage, caused by the contamination or pollution.[6] In contrast, a statute of repose, which only a handful of states have enacted, also imposes a specified time limit for filing the action, but the time period for these types of statutes commences on the date of the last culpable act or omission of the defendant, rather than from the date when the claim accrues.[7] Given this, a statute of repose may operate to bar a tort action even if the defendant's alleged tortious conduct ceased years before the plaintiff even "discovered" the injury or damages.[8] For example, it may bar recovery in cases where the injury, such as cancer, has a long latency period, or where the damages result from groundwater contamination that took many years to migrate to the plaintiff's property.

It has been well established that section 9658 of CERCLA expressly pre-empts statutes of limitation applicable to state-law tort actions for personal injury or property damage arising from pollution or contamination to the extent that these statutes do not incorporate a discovery rule.[9] However, whether section 9658 also pre-empts state statutes of repose has generated disagreement among the federal circuit courts of appeals over the past several years,[10] prompting the Supreme Court to grant the petition for writ of *certiorari* in *CTS Corp.* and resolve the split among the circuits on this issue.

**The Supreme Court Holds CERCLA Does Not Pre-empt State Statutes of Repose**. Writing for a 7-2 majority, Justice Kennedy in *CTS Corp.* concluded that CERCLA section 9658 does not pre-empt state statutes of repose applicable to state-law tort actions.[11]

In this case, CTS Corporation ("CTS") operated an electronics plant in Asheville, North Carolina until 1985. In 1987 CTS sold the property. In 2009, the plaintiffs—including subsequent and adjacent landowners—found out their well water had allegedly been contaminated by CTS's operation of its electronics plant. Based on this discovery, the plaintiffs brought a state-law nuisance action against CTS in 2011 in federal district court in North Carolina alleging property damage from the contamination. While CTS raised no defense that the action was time-barred by any statute of limitation, CTS sought to dismiss the action, arguing that the action was barred by North Carolina's statute of repose, which "prevents subjecting a defendant to a tort suit brought more than 10 years after the last culpable act of the defendant."[12] Given that under this statute the last culpable act by CTS occurred no later than when the company sold the property in 1987 (24 years before plaintiffs filed their action) the district court granted CTS's motion to dismiss. On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed, ruling that section 9658 of CERCLA was "ambiguous" and an interpretation in favor of pre-emption was preferable given CERCLA's remedial purpose.[13]

---

[6] *See generally Gabelli v. Sec. & Exch. Comm'n*, 133 S. Ct. 1216, 1221 (2013) (discussing the operation of the discovery rule).
[7] *See CTS Corp.*, 2014 WL 2560466, at *5.
[8] *Id.* at *10.
[9] *Id*. at *3.
[10] The U.S. Court of Appeals for the Fifth Circuit held that a Texas products-liability statute of repose was not pre-empted by CERCLA section 9568. *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005). Meanwhile, the U.S. Courts of Appeals for the Fourth Circuit and the Ninth Circuit each held that certain statutes of repose were pre-empted by CERCLA section 9568. *Waldburger v. CTS Corp.*, 723 F.3d 434, 444 (4th Cir. 2013), *rev'd by CTS Corp.*, 2014 WL 2560466, at *3; *McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008), *abrogated by CTS Corp.*, 2014 WL 2560466, at *3.
[11] 2014 WL 2560466, at *3.
[12] *Id.* at *4 (citing N.C. Gen. Stat. Ann. § 1-52(16)).
[13] *Id.*

 

The Supreme Court agreed that section 9658 undoubtedly "pre-empts state statutes of limitation that are in conflict with its terms," but concluded that statutes of repose were not so pre-empted.[14] In the majority opinion,[15] Justice Kennedy first distinguished statutes of limitation and statutes of repose, stating that statutes of limitation are designed to encourage plaintiffs to pursue claims diligently and are triggered by the accrual of a claim, but statutes of repose do not depend on the accrual of a claim. Instead, Justice Kennedy further stated that statutes of repose run from the date of the "last culpable act or omission of the defendant," and represent a legislative judgment that a defendant should be free from liability after a certain number of years.[16] Based on these principles and a textual analysis of section 9658 of CERCLA, the Supreme Court concluded that the scope of pre-emption under section 9658 was limited to statutes of limitation, and did not affect the operation of state statutes of repose.[17]

**The Impact of this Ruling in the Courts**. The *CTS Corp.* decision is likely to have a significant impact in both pending and future court cases where an applicable statute of repose may provide an affirmative defense. Any defendants that may avail themselves of an affirmative defense based on a statute of repose, such as the one at issue in *CTS Corp.*, will certainly do so because the benefits of a dismissal of the tort action on this basis are two-fold: first, dismissal of the action early in the litigation avoids the substantial transactional costs from protracted and potentially complex litigation; and second, the statute-of-repose defense bars the plaintiff's claim in its entirety, ensuring that the defendant will not be subject to potentially astronomical damages, particularly in the case of a class-action lawsuit.

In fact, swift action by defendants asserting a statute-of-repose defense has already begun. For example, the day the *CTS Corp.* decision was issued, the U.S. Department of Justice ("DOJ") filed a notice of supplemental authority urging the U.S. Court of Appeals for the Eleventh Circuit to enter judgment for the United States in *Bryant v. United States*, No. 12-15424 (11th Cir.) ("*Bryant*") in light of the Supreme Court's decision. The *Bryant* plaintiffs, who were former residents of Camp Lejeune, a U.S. Marine Corps base in North Carolina, filed a state-based tort action alleging that as many as a half million Marines and their families were exposed to toxic substances more than two decades ago, and in the intervening period many developed cancer and other diseases as a result of exposure to contamination at the base.[18] While DOJ had previously raised North Carolina's statute of repose as an affirmative defense, the *CTS Corp.* decision prompted them to renew the defense, but this time unfettered by the CERCLA pre-emption issue.[19]

**The Response of State Legislatures Remains an Open Question**. On the one hand, it now makes more sense than ever for state legislatures to enact similar statutes of repose applicable to their state-law tort actions related to historical contamination for several compelling reasons. First, in *CTS Corp.* the Supreme Court confirmed that these types of statutes of repose are not pre-empted by CERCLA and therefore are both valid and permissible. Second, North Carolina's statute of repose at issue in the *CTS Corp.* case is

14 *Id.* at *3.

15 Justice Kennedy delivered the opinion of the Court except as to Part II-D, in which he concluded that the presumption against pre-emption provided his analysis with additional support. *Id.* at *11-12. Justice Scalia, writing for the Chief Justice, Justice Thomas, and Justice Alito, concurred in the judgment and in the other portions of the opinion, but disagreed with the notion that "express pre-emption provisions must be construed narrowly . . .". *Id.* at *12 (Scalia, J., concurring in part and concurring in the judgment).

16 *Id.* at *5.

17 *Id.* at *3, 5-11.

18 *See* Brief of Appellees/Cross-Appellants (Bryant *et al.*), *Bryant*, Case No. 12-15424 (February 11, 2013).

19 *See* Order, *In re Camp Lejeune, North Carolina Water Contamination*, Case No. 1:11-md-02218-TWT *et al*., at 4 and 23 (N.D. Ga. Sept. 29, 2011); *see also* Supplemental Authority filed by Appellant-Cross Appellee (U.S.), *Bryant*, Case No. 12-15424 (11th Cir. June 9, 2014).


ISBN 1056 3059

hardly an anomaly, as three other states[20]—Connecticut, Kansas, and Oregon—have similarly broad statutes of repose that limit a variety of tort actions.[21] Third, the Supreme Court's decision should also embolden state legislators to seriously consider similar statutes of repose because the Court noted that statutes of repose embody the justifiable notion that at some point a person or business should be free from any further liability for decades-old contamination. Fourth, from a policy perspective, these types of statutes of repose provide businesses in that state with certainty that after a specific period of time they will be free from any future potential tort-based liability for any historical contamination at specific facilities or sites, allowing them to fully write off and retire any further potential liabilities at such facilities or sites, as well as with respect to any related transactions.[22]

However, state legislators may also take into account countervailing considerations in determining whether to enact these types of statutes of repose. In particular, the legislature may consider the possibility that many citizens of the state may oppose such a statute—a circumstance that is likely to be more prevalent in states where well-publicized, class-action tort litigation is ongoing. For example, North Carolina lawmakers have already enacted legislation to limit the statute of repose at issue in *CTS Corp.* and *Bryant*—after the DOJ's action discussed above—in order to allow much-publicized, class-action lawsuits related to historic contamination in and around Asheville and Camp Lejeune areas in North Carolina to proceed.[23] Consequently, at this juncture it remains an open question whether other state legislatures will act aggressively to enact broad statutes of repose in the aftermath of the *CTS Corp.* decision.

[20] In addition, Alabama has a "rule of repose [that] is a creature of common law, not one of legislative enactment. *Abrams v. Ciba Specialty Chemicals Corp.*, 659 F. Supp. 2d 1225, 1228 (S.D. Ala. 2009).

[21] *See CTS Corp.*, 2014 WL 2560466, at *14 n. * (Ginsburg, J., dissenting) (listing the current state statutes of repose). Many other states have more narrow statutes of repose that only limit certain types of action, such as product liability or property-improvement suits. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-552 (statute of repose for claims related to the improvement of real property); Neb. Rev. Stat. § 25-224 (statute of repose for product liability actions).

[22] *See CTS Corp.*, 2014 WL 2560466, at *5-6 (discussing the purpose behind statutes of repose).

[23] 2014 N.C. Sess. Laws 2014-17 (approved June 20, 2014). The full legislative history of this session law is available at http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=s574&submitButton=Go.

  ISBN 1056 3059