

Oregon's Statute of Repose May Block Common Law Environmental Claims

By Michael A. Nesteroff

Oregon's 10-year statute of repose may now play a bigger role in environmental lawsuits in the wake of the U.S. Supreme Court's ruling that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), commonly known as Superfund, does not supersede a state statute of repose for bringing trespass, nuisance or negligence claims.

The Court ruled in *CTS Corp. v. Waldburger* that a provision in CERCLA preempting statutes of limitations in some situations does not apply to a statute of repose that bars bringing a tort suit more than 10 years after the last culpable act of the defendant. The property in the *CTS* case is located in North Carolina and had been an electronics plant from 1959 to 1985. Residents discovered solvent contamination 24 years after CTS Corporation sold the property. The residents sued CTS under CERCLA and, because CERCLA only provides recovery of investigation and cleanup costs, the plaintiffs also brought state law claims seeking monetary damages for lost property value and present and future medical costs. The district court dismissed the residents' state law claims on the ground that CERCLA's preemption of state statutes of limitations did not apply to a statute of repose and, because the claims arose more than 10 years before filing, they should be barred without regard to whether the plaintiffs knew or should have known about the contamination before then. The Fourth Circuit reversed the decision, but the U.S. Supreme Court overruled that reversal.

The Court's 7-2 decision distinguished between statutes of limitations, which create a time limit for bringing a lawsuit based on the date when the damage becomes apparent or reasonably ought to have become apparent, and statutes of repose, which set an outer limit on the right to bring a civil action. The latter is not dependent upon any discovery of the injury, but acts as a "cutoff" or absolute bar to bringing a claim. The Court said Congress did not intend to cover statutes of repose when it adopted amendments to CERCLA pre-empting statutes of limitations, particularly because Congress was aware that CERCLA does not provide a complete framework for recovery of all damages caused by environmental contamination.

Oregon is one of the few states that have a generally-applicable statute of repose that could be used to bar state law claims for trespass, nuisance or negligence in an environmental lawsuit. ORS 12.115 provides: "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." The ruling in *CTS* means that a 2008 Ninth Circuit decision, *McDonald v. Sun Oil Company*, which had held that CERCLA preempted Oregon's 10-year statute of repose, is no longer good law. Similarly, a 1994 case, *Buggsi, Inc. v. Chevron USA, Inc.*, in which an Oregon federal district court judge ruled that CERCLA preempted the Oregon statute of repose and did not bar the plaintiff's state law claims for trespass, nuisance and common law negligence, no longer is applicable. Under the new *CTS* decision, the state law negligence-based claims in both of those cases probably would not survive a statute of repose challenge. *CTS* effectively breathes new life into Oregon's statute of repose in environmental cases. For claims older than 10 years, the statute of repose is likely to be raised in opposition to the typical common law environmental claims that often are pleaded in addition to the statutory claims.

While the *CTS* decision is important for claims in Oregon, it is not likely to have a similar effect on lawsuits in Washington because that state does not have a generally-applicable statute of repose. Washington's statutes of repose are narrow — applying only to construction claims and medical malpractice. The ruling, however, may prompt Washington and other state legislatures to consider adopting or broadening their statutes of repose to encompass the types of negligent injuries to person(s) or property that are found in many environmental cases.



Michael A. Nesteroff

Mike is chair of Lane Powell's Sustainability and Climate Change Team, where he also serves as the principal contributor to the Firm's Sustainability & Climate Change Reporter blog. Mike concentrates his practice on environmental, real estate, and commercial litigation and advice. He can be reached by phone at 206.223.6242 or email him at nesteroffm@lanepowell.com. Follow Mike on Twitter @MikeNesteroff.

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