

## Case could remove toxic tort claim hurdle

By Jesse Lueders

*Published in the Daily Journal, May 1, 2014*

In popular conceptions of civil law, it's hard to find a more sympathetic case than a toxic tort suit, or a less popular rule than a statute of limitations. Toxic torts call to mind movies like "Erin Brockovich" and "A Civil Action," which pit sympathetic plaintiffs suffering cancer and other serious health problems against large corporate defendants who have negligently or willfully polluted the environment in the pursuit of profits. People tend to view statutes of limitations with distaste, as an unfair trick of legal technicality, a lawyer's ruse for preventing justice.

*CTS Corp. v. Waldburger*, No. 13-339, recently heard before the U.S. Supreme Court, combines both of these captivating elements, and could mean that some of the most severely injured toxic tort plaintiffs will be least able to recover for their injuries. At issue is whether Section 309 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) preempts state "statutes of repose" in tort actions for injuries caused by hazardous waste, or only "statutes of limitations," as worded in the statute. Statutes of repose set time limitations for a plaintiff to bring suit by reference to the defendant's actions (rather than the plaintiff's injury or awareness of injury, which typically commence a statute of limitations). North Carolina, the site of the nuisance claims in *Waldburger*, maintains a 10-year statute of repose that commences on the date of a defendant's last act or omission which gives rise to the plaintiff's cause of action.

*Waldburger* concerns soil and groundwater contamination traced to a retired manufacturing facility. Neighbors to the facility site brought a nuisance suit against the former owners of the facility after discovering industrial carcinogens in their groundwater. The district court held that Section 309 did not preempt North Carolina's statute of repose, and dismissed the case — the defendants had sold the facility over 25 years ago. The 4th U.S. Circuit Court of Appeals reversed, finding that Section 309 preempted statutes of limitations and statutes of repose alike.

Section 309 replaces the commencement date for state limitations periods with a uniform federal commencement date. The federal commencement date follows the “discovery rule” popularized in the second half of the 20th century — thus, it begins when plaintiffs know (or reasonably should know) that they have been injured and that their injuries were caused by hazardous waste. Section 309 was enacted in 1986 in response to a study commissioned under CERCLA, which identified limitations periods expiring before the discovery of harm as a barrier to plaintiff recovery for latent injuries commonly associated with hazardous contamination.

Section 309 does not explicitly reference statutes of repose. On its face, it applies to “the applicable limitations period ... as specified in the State statute of limitations or under common law.” The question of whether Section 309 preempts statutes of repose remains unresolved in the federal courts: the 5th Circuit has held that it does not, while the 9th Circuit — and the 4th Circuit below in *Waldburger* — has held that it does.

The debate at the Supreme Court has focused heavily on Congress’ intent in enacting Section 309. The petitioner (defendant below) points to the CERCLA study upon which Section 309 was based, which identified both statutes of limitations and statutes of repose as barriers to plaintiff recovery, arguing that Congress having addressed only statutes of limitations is evidence of its intent to preserve statutes of repose. According to the petitioner, the two periods are fundamentally distinct: Statutes of limitations provide a procedural incentive to plaintiffs to bring claims expediently, while statutes of repose create a substantive limit to plaintiffs’ rights. By referencing statutes of limitations specifically, the petitioner says, Congress meant to preempt the former but preserve the latter. (The solicitor general’s office made similar arguments as *amicus* and in separate oral argument.)

Respondents argue that Congress intended to remove state time bars to plaintiffs seeking recovery for latent injury, regardless of the form of the bar. They point to the underlying concern of the CERCLA study, that plaintiffs suffering long-latency injuries should not lose their causes of action before the injury could be discovered, and legislative history saying Congress intended Section 309 to address this problem in particular. In this context, say respondents, preempting statutes of limitations but not statutes of repose would make no sense. Further, respondents say,

in 1986, statutes of repose were still considered statutes of limitations, and thus a rule naming statutes of limitations would apply just as well to statutes of repose. They point out that although the CERCLA study identified statutes of repose by name, it did so only under a general heading titled “Statutes of Limitations.”

At oral argument, the court was skeptical that Congress had deliberately considered the distinction between statutes of repose and statutes of limitations. Justice Antonin Scalia, admitting that he himself had not previously been aware of statutes of repose as distinct from statutes of limitations, challenged petitioner’s claims that Congress had known the difference when it wrote the statute. Justice Elena Kagan at one point told petitioner’s counsel that he was asking the court to imagine “a very legally sophisticated Congress”; she likewise seemed doubtful of respondents’ accounts of Congress’ intent. Several justices pointed out the awkwardness in determining or applying Section 309’s “applicable commencement date” for multiple time bars.

Lacking confidence in Congress’ intentional drafting, the court seemed inclined to use other tools to determine the statute’s application. Several justices endorsed plain language readings. Scalia seemed inclined to read Section 309 not to preempt statutes of repose, on account of Section 309 naming only a single limitations “period” rather than multiple periods as might contemplate statutes of repose beside. Justices Sonia Sotomayor and Kagan looked to the word “applicable” as a way out of this problem. Others seemed compelled by policy arguments; Justice Samuel Alito appeared particularly concerned by the notion of a cause of action with no clear end.

Justice Anthony Kennedy, often looked to as a deciding vote in environmental cases, noted that the distinction of statutes of repose was also new to him, but appeared equivocal on the merits. Justice Stephen Breyer joined Justice Clarence Thomas as silent observer. Argument ended without clear indication of how the court will resolve the case.

A finding for the petitioner could have serious and unpleasant consequences. Although only four states currently have statutes of repose clearly applicable to hazardous waste claims, toxic tort

plaintiffs in those states could lose all rights to recover for latent injuries. Further, other states might enact such limitations in a “race to the bottom” to attract industry and jobs.

A few military families will probably feel the greatest immediate impact of such a finding. A group of retired Marines and their families currently have claims pending in the 11th Circuit that are vulnerable to the state law at issue in *Waldburger*. These plaintiffs lived at Camp Lejeune, a North Carolina Marine Corps base, during massive groundwater contamination occurring over several decades. They have suffered cancer, birth defects, and other serious health problems. Their case has attracted significant attention to *Waldburger* (Erin Brockovich herself attended the arguments). It was also the motivation for several of the *Waldburger* amici, including the solicitor general in support of the petitioner, and the Camp Lejeune Marines in support of the respondents.

And if the court finds for the respondents, the result for toxic tort plaintiffs will be at best a cold comfort. The *Waldburger* respondents and other plaintiffs will still face the same high hurdles in bringing latent injury claims, including difficulties tracing long-lost evidence, high expenses, and no guarantee of success.

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