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CERCLA Preemption of State Law Claims

Bringing or Surviving Preemption Challenges to Maximize Contribution Protection

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CERCLA Preemption of State Law Claims

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Overview

- A Preemption Primer
- What Does CERCLA Say About Preemption?
- What Do the Courts Say About Preemption?
  - Statute of Limitations
  - Non-CERCLA Substances
  - Non-CERCLA Costs
  - Non-NCP Cleanups
  - Contribution Claims
- Question & Answer

A Preemption Primer

- Preemption arises from the federal-state structure of our government
  - arises whenever concurrent federal and state laws speak to the same issue
- Supreme Court recognizes many varieties of preemption
  - the Supremacy Clause, Art. VI, § 2 of the Constitution
  - typically the issue is not whether Congress has power to preempt, but whether it intended to do so
  - discerning legislative intent can be quite challenging

A Preemption Primer (cont'd)

- Increasingly important in CERCLA litigation
  - Growing uncertainty over availability of federal claims under § 107 and/or § 113
  - So plaintiffs are more likely than ever to include state-law claims in their complaints, putting preemption in play
- So it's vital to understand the rules
- Our goal today is to raise issues, not to take sides
  - "In CERCLA litigation, sooner or later we're all plaintiffs and we're all defendants."

A Preemption Primer (cont'd)

- Congress's purpose is "the ultimate touchstone"
  - *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)
- A second "touchstone" is the "assumption that the historic police powers of the States were not to be superseded ... unless that was the clear and manifest purpose of Congress"
  - *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)
- Explicit preemption of some laws is not a bar to implied preemption of other laws.
  - *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)

Varieties of Preemption

- Express preemption of state law
  - Example # 1: If the CPSC issues a flammability standard for a fabric, then "no State or political subdivision . . . may establish or continue in effect a flammability standard . . . for such fabric . . . unless the State or political subdivision standard . . . is identical to the Federal standard . . ."
    - *Flammable Fabrics Act,* 15 U.S.C. § 1203(a)

Varieties of Preemption (cont'd)

- Express preemption of state law (cont'd)
  - Example # 2: If the FDA regulates the safety of a medical device, then "[n]o state or political subdivision . . . may establish or continue in effect with respect to a device intended for human use any requirement – (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which related to the safety or effectiveness of the device . . . ."
    - *Medical Device Amendments to the Food Drug and Cosmetic Act* , 21 U.S.C. § 360k(a)

Varieties of Preemption (cont'd)

- Implied or "field" preemption of state law
  - arises where a scheme of federal regulation is "so pervasive" as to suggest that Congress "left no room for the States to supplement it"
    - *Fidelity Fed. Sav. & Loan Assn. v. De La Cuesta,* 458 U.S. 141, 153 (1982) (due-on-sale practices of federal savings and loan institutions)
  - e.g., safety aspects of nuclear power plants
    - *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n,* 461 U.S. 190 (1983)

Varieties of Preemption (cont'd)

- Conflict preemption of state law – 2 types
  - *Hillsborough v. Automated Medical*, 471 U.S. 707 (1985)
- Type 1: "compliance with both federal and state regulations is a physical impossibility"
  - "Impossibility" can be read broadly.
    - *Example: State tort law requires drug manufacturers to relabel their products, but FDA regulations prohibit independently changing these labels. Compliance with both regimes is "impossible." Pliva v. Mensing, 131 S. Ct. 2567 (2011).*
  - The Court found impossibility even though manufacturers could have sought (but did not seek) FDA assistance in strengthening the labels.
    - *See also Mutual Pharm. Co. v. Bartlett, 133 S. Ct. 2466 (2013).*

Varieties of Preemption (cont'd)

Conflict preemption of state law (cont'd)

- Type 2: "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."
  - But see *Wyeth v. Levine*, 555 U.S. at 588 (Thomas, J., concurring): "Pre-emption analysis should not be a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict."

Examples of Conflict Preemption

- State law prohibits national banks from selling insurance.
  - Preempted by federal law allowing national banks in small towns to sell insurance.
- State law imposes procedural requirements to discourage arbitration of small-dollar value disputes.
  - Preempted by Federal Arbitration Act, which liberally favors arbitration, regardless of the amount disputed.

Which Theories Matter Most for CERCLA?

- Express preemption
  - CERCLA contains several express preemption provisions that address discrete issues, e.g., no double recovery
  - No express preemption on most issues
- Implied or "field" preemption
  - Courts agree CERCLA does not preempt the field
- Conflict preemption – this is where the action is
  - When does state law stand as an "obstacle" to accomplishing the goals of CERCLA?

Approaches to CERCLA Preemption

- Two diametrically opposed analytical filters:
  - Narrow view: CERCLA doesn't preempt even inconsistent state laws (given limited express preemption).
  - Broad view: Inconsistent state laws are *prima facie* "obstacles" to the federal goal that cleanups should be governed by the NCP and states seeking to take response action should seek EPA approval.

What Does CERCLA Say About Preemption?

- Congress knew how to preempt state law:
  - § 112(e): no state-law waiver or claims-splitting doctrines apply to claims against the Trust Fund
  - § 114(b): no double recovery of removal costs or NRDs
  - § 114(c): no state taxation for claims subject to CERCLA (repealed in 1986)
  - § 114(d): no duplicative state financial responsibility requirements
  - § 309: no shorter state accrual date for state-law claims for personal injury/property damage from exposure to hazardous substances

What Does CERCLA Say About Preemption? (cont'd)

- Congress also knew how to preserve state law:
  - § 107(n) preserves state-law claims against fiduciaries
  - § 108(d)(2) preserves state-law liability of guarantors
  - **§ 113(f)(1) preserves state-law contribution claims**
  - § 119(a) preserves state-law claims against response action contractors
  - § 120(a)(4) preserves state-law cleanup and enforcement standards for cases involving Federal facilities
  - **§ 302(d) preserves state-law liability for releases of hazardous substances**
  - § 310(h) citizen suit provision preserves all state-law rights

What Does CERCLA Say About Preemption? (cont'd)

- § 105(a) says all response actions "shall . . . be in accordance with" the NCP
  - Suggests that the NCP is the federal template for all response actions
- § 104(d) allows states to apply for EPA approval to take response action at sites within their borders
  - Suggests that absent such approval, state response actions are not part of CERCLA at all

What Do the Courts Say About Preemption?

- Most CERCLA preemption cases do not involve an obvious conflict or lack of conflict
- Instead of “impossibility,” the issue is whether state law is an “obstacle” to achieving CERCLA’s goals
- Most reported decisions involve contribution claims under § 107, § 113

CERCLA's Goals

- What about the "touchstone" of Congressional purpose when the legislative history is (to put it mildly) unclear?
- Judicial response focuses on the twin goals of CERCLA
  - Encouraging cleanups
  - Ensuring the polluter pays
- Note that these goals can easily be used to argue either for or against preemption of state law
- The case law is "wildly inconsistent, if not incoherent"
  - 16 N.Y.U. Env'tl L.J. 225,263 (2008)

Structure of CERCLA Preemption Cases

- Before considering specifics, ask 2 questions:
  - Who is asserting the state law claim? Is it the State? A PRP that has performed a cleanup?
  - Is the relief sought under state law more generous, less generous, or the same as, the relief available under CERCLA?

Issue-by-Issue Preemption Analysis

- Warm-Up Issues:
  - (1) local zoning ordinance
  - (2) NJ Spill Act directives
- Statutes of Limitations
- Non-CERCLA Substances
- Non-CERCLA Costs
- Inconsistency with NCP
- Contribution Claims

Preemption Applied – Off to An Easy Start

- Zoning ordinance: an easy case of conflict preemption:
  - *U.S. v. Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996)
  - ROD by EPA and Colorado Dept. of Health chooses on-site remedy for remediation of contamination.
  - Denver ordinances prohibit maintenance of hazardous waste in areas zoned for industrial use; city issued cease and desist order, but conceded it was "impossible" for PRP to comply with EPA's remedial order and city ordinances.
- Result: zoning ordinances preempted

Off to An Easy Start (cont'd)

- NJ Spill Act enforcement: easy case of no preemption
  - *Manor Care, Inc. v. Yaskin*, 950 F.2d 122 (3d Cir. 1991) (Alito, J.). Holds that New Jersey DEP directives under the Spill Act, including that defendants pay the State's 10% share, not preempted.
  - "Congress did not intend for CERCLA remedies to preempt complementary state remedies." *Id.* at 127.
  - "[I]f CERCLA's remedies preempted state remedies for recovering costs of hazardous waste cleanups, § 114(b) would make no sense at all." *Id.*

Preemption Issue 1: Statutes of Limitation

- CERCLA prescribes distinct limitation periods, each with its own distinctive "trigger" event, for 3 types of claims filed in federal court:
  - 3-year statute of limitation for natural resource damages claims (§ 113(g)(1));
  - 3-year or 6-year statute of limitation for cost recovery claims (§ 113(g)(2)); and
  - 3-year statute of limitation for contribution claims (§ 113(g)(3))

Statutes of Limitation (cont'd)

- For tort cases filed in federal or state court based on exposure to hazardous substances, CERCLA preempts state statutes of limitations that do not run from the date of discovery ("knew or should have known")
  - In effect, a federally mandated "discovery" trigger
- Circuit split: does § 309 also preempt statutes of repose?
  - **YES:** *Waldburger v. CTS* Corp., No. 12-1290 (4th Cir. July 10, 2013); *McDonald v. Sun*, 549 F.3d 774 (9th Cir. 2008).
  - **NO:** *Burlington & N. Santa Fe Ry. Co. v. Poole*, 419 F.3d 355 (5th Cir. 2005)

Statutes of Limitation (cont'd)

- The CERCLA statute of limitations may apply even when there is no CERCLA claim.
  - *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139 (9th Cir. 2003).
  - Plaintiff must still show a "release" contributed to the injury. *Barnes ex rel. Estate of Barnes v. Koppers, Inc.*, 534 F.3d 357, 365 (5th Cir. 2008).

Statutes of Limitation (cont'd)

- What about a longer state limitations period?
  - *Boeing* suggests this is not a problem in tort cases.
  - Implication is that even a 10-year statute of limitations would not be preempted.
- What about different state limitations periods for cost recovery?
  - Isolated dicta about preemption of state limitations periods (*Union Pac. R.R. Co. v. Reilly Indus., Inc.*, 215 F.3d 830 (8th Cir. 2000)), but nothing dispositive.

Preemption Issue 2: Non-CERCLA Substances

- CERCLA excludes petroleum from coverage as a hazardous substance (§ 101(14)(f))
- Many states' environmental laws allow recovery of costs for addressing petroleum contamination
  - *e.g.*, New Jersey Spill Act, New York Navigation Law
- Most courts hold CERCLA does not preempt cost recovery under state law for petroleum contamination
  - *Coastline Terminals of Conn. v. USX Corp.*, 156 F. Supp. 2d 203, 209 (D. Conn. 2001) (Connecticut law); *Volunteers of Am. Of W. N.Y. v. Heinrich*, 90 F. Supp. 2d 252, 258-59 (W.D.N.Y. 2000) (New York Navigation Law)

It Gets A Little Trickier: Preemption Issue 3: Non-CERCLA Costs

- Attorney's fees
  - Normally not recoverable by private litigants as CERCLA response costs (*KeyTronic Corp. v. U.S.*, 511 U.S. 809 (1994))
    - *EPA can recover these only as "enforcement costs"*
  - But may be recoverable under state law (*Control Data v. S.C.S.C. Corp.*, 53 F.3d 903 (8th Cir. 1995) (reversing award of fees under CERCLA, but not MERLA)
  - Possible limits on whether municipal ordinance may allow recovery of attorney's fees (*Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002))

Non-CERCLA Costs (cont'd)

- "Non-CERCLA costs"
  - A state may seek CERCLA costs under federal and state law (*Manor Care*), e.g., NJDEP uses Spill Act to seek its 10% CERCLA cost share of remedial action
  - What if a state seeks non-CERCLA costs?
- "Non-response costs," e.g., economic redevelopment
  - Cases split on whether such costs are recoverable under CERCLA: Compare *G.J. Leasing, Inc. v. Union Electric Co.*, 54 F.3d 379 (7th Cir. 1995) with *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001)
  - What if state law allows recovery of such costs?

It Gets A Little Trickier: Preemption Issue 4: Non-NCP Cleanups

- National Contingency Plan is fundamental to CERCLA
- § 105(a) says all response actions "shall . . . be in accordance with" the NCP
  - Suggests NCP is the federal template for all response actions
- *Union Pac. R.R. Co. v. Reilly Indus., Inc.*, 215 F.3d 830 (2000) (CERCLA claims properly dismissed where plaintiff failed to substantially comply with NCP's public participation and comment requirements)
  - MERLA claim dismissed on other grounds

Non-NCP Cleanups (cont'd)

- Can costs be awarded under state law, even if there is no compliance with NCP?
  - *New York v. Hickey's Carting, Inc.*, 380 F. Supp. 2d 108, 116 (E.D.N.Y. 2005) (because "common law remedies will never include a requirement that the costs sought were incurred consistent with the NCP," finding a conflict "would be akin to field preemption by CERCLA of state common law claims").
  - *But see County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1517 n.3 (10th Cir. 1991) (dicta) ("it would be incongruous for federal law to bar private recovery unless there has been substantial compliance with the NCP, but then permit recovery under a contribution theory through mere compliance with less demanding state regulations").

Non-NCP Cleanups (cont'd)

- What about state laws that set more stringent requirements for a cleanup?
  - 6th Circuit view: CERCLA doesn't preempt more stringent state standards.
    - *U.S. v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1454 (6th Cir. 1991): "CERCLA sets only a floor, not a ceiling, for environmental protection. Those state laws which establish more stringent environmental standards are not preempted by CERCLA."*
    - *But once a consent decree is entered, the state cannot interfere; if it wants a more stringent cleanup, it must "spend its own money." Id. at 1458.*

Non-NCP Cleanups (cont'd)

- 9th Circuit view: CERCLA preempts more, not less stringent, local regulations.
  - *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 952 (9th Cir. 2002): "MERLO's provisions dealing with cleanup procedures are preempted by CERCLA only to the extent that they permit Lodi to order use of procedures more stringent than the NCP."
  - *But see* footnote 26: "Our holding here concerns cleanup procedures promulgated by municipalities and other local government entities."

Preemption Issue 5: Contribution

- CERCLA § 113(f)(1):
  - "Any person may seek contribution from any other person who is liable or potentially liable under [§ 107(a)] …. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. ... Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§ 106 or § 107]."

Contribution and Preemption

- Pre-*Aviall* case law holding that common law contribution claims are preempted by § 113(f):
  - *In re Reading Corp.*, 115 F.3d 1111, 1117 (3d Cir. 1997) ("Permitting independent common law remedies would create a path around the statutory settlement scheme, raising an obstacle to the intent of Congress.")
  - *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998) ("[I]nstituting common law restitution and indemnification actions in state court would bypass this carefully crafted settlement system, creating an actual conflict . . . between CERCLA and state common law causes of action.")

Preemption After *Atlantic Research*

- Second Circuit adheres to *Bedford Affiliates* in *Niagara Mohawk v. Chevron*, 596 F.3d 112 (2d Cir. 2010).
  - Private plaintiff pursued both § 107 and § 113 claims, although § 107 claim was dismissed.
  - State law contribution, indemnification and unjust enrichment claims preempted to the extent these costs fall within CERCLA.
- Courts elsewhere routinely cite *Bedford Affiliates* and *Reading* to dismiss contribution claims when there is a § 113(f) claim

Problems Applying Contribution Preemption

Case	**State of New York v. West Side Corp.**, 790 F. Supp. 2d 13 (E.D.N.Y. 2011)	**MPM Silicones, LLC v. Union Carbide Corp.,** 2013 WL 1106739 (N.D.N.Y. Mar, 18, 2013)	**Solvent Chem. Co. v. E.I. DuPont de Nemours & Co.,** 242 F. Supp. 2d 196 (W.D.N.Y. 2002)	**State of New York v. Next Millennium Realty,** 2008 WL 1958002 (E.D.N.Y. May 2, 2008)
Plaintiff	State	Current owner	Former owner	PRP
Claims	CERCLA § 107, state law nuisance, restitution, and indemnification	CERCLA § 107, state law restitution, indemnification, and contribution	CERCLA § 113, state law contribution	CERCLA § 107, state law indemnification and contribution
Pre-empted?	**No**	**No**	**No**	**Yes**

Recap of Contribution and Preemption

- In many ways, the cases simply can't be reconciled.
  - The case law is "wildly inconsistent, if not incoherent"
  - Preemption is possible even without a § 113(f) claim.
- Given the confusion about when and how private plaintiffs may seek contribution under CERCLA, there is practical value in pursuing state law claims as possible alternative theories of recovery
- Defendants will have ample incentive to oppose such theories, arguing that § 113(f) preempts state law contribution claims

Other Preemption Issues

- § 114(b)'s bar on double recovery of removal costs
  - Courts generally agree it preempts the "collateral source" rule under state law
  - Application to allocation issues
- Federal jurisdiction over state law claims relating to EPA orders

Closing Thoughts on the Case Law

- Anticipate preemption issues whenever there are potential state-law claims
  - Even in the Second Circuit, the preemption landscape continues to shift
- Patience is a virtue
  - Preemption arguments generally are more effective at summary judgment than at the pleading stage
- Remember the malleable, twin goals of CERCLA
  - Very few cases address §§ 104 and 105, so many issues remain open for creative lawyering

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