

## Solving the CERCLA Statute of Limitations and Preemption Puzzles

Lessons From Recent Decisions for Timing in Superfund and Environmental Litigation

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# **Solving the CERCLA Statute of Limitations and Preemption Puzzles**

Lessons From Recent Decisions for Timing in Superfund and Environmental Litigation

**February 5, 2014**

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# Overview

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# Major Points: CERCLA Claims

- Nuanced distinctions in site facts and consent orders compel major differences in litigation and settlement strategies.
- There are different requirements for a cause of action under 42 U.S.C. § 9607 (§ 107) and § 9613 (§ 113).
- Different statutes of limitations apply to § 107 cost recovery and § 113 contribution actions.
- Different statutes of limitation apply to a § 107 removal action and a § 107 remedial action.

# CERCLA's Federal Accrual Date for Tort Claims

- CERCLA § 309 also controls state accrual of tort claims related to hazardous substances
- “Federally Recognized Commencement Date” sets accrual when plaintiff knew of harm and its cause
- Preempts contrary state law
- Supreme Court to decide this term whether it also preempts state statutes of repose

# CERCLA Basics

- CERCLA § 107(a) cost recovery claim:
  - Elements of a *prima facie* case = 1) release, 2) from a facility, 3) caused response costs, 4) consistent with NCP, and 5) defendants are responsible parties under §107 (e.g. owner, operator, arranger).
- CERCLA §113(f) contribution claim:
  - Contribution from PRP potentially liable under §107.
  - For response costs exceeding equitable share
    - During or after litigation under §106 or §107, or
    - Judicially or administratively approved settlement with EPA or a State.

# History of CERCLA Limitations Periods

- Original Superfund Act had only a 3-year limit for making claims against the Fund. § 112(d)
    - In early cases courts applied this 3-year limit to damages claims, or held that there was no limit for such claims . . . and everything in between.
  - The 1986 Superfund Amendments and Reauthorization Act (“SARA”) added § 113(g) and § 309 for different types of actions.
    - SARA limitations periods and discovery rule were applied prospectively only from October 17, 1986.
- ❖ **Practice tip: *Pre-SARA CERCLA SoL cases are unreliable.***

# § 107 Cost Recovery Claim

- An initial action for cost recovery under § 107 must be brought:
  - 3 years after completion of removal action. § 9613 (g)(2)(A)
  - 6 years after initiation of physical on-site construction of remedial action. § 9613 (g)(2)(B)
  - If remedial action is initiated within 3 years of removal, then costs of removal can be recovered in suit for costs of remedial action. § 9613 (g)(2)(B)
  - If a declaratory judgment for future costs is entered in initial action, a subsequent suit for additional costs must be commenced within 3 years of completion of original response action. *Id.*
- Focus on type of cleanup

## § 113 Contribution Claim

- Contribution suit under § 113 must be filed no more than 3 years after the date of:
  1. A judgment for response costs.
  2. An administrative order for *de minimus* settlement under § 9622(g)
  3. An administrative order for cost recovery settlement under § 9622(h)
  4. A judicially approved settlement under § 9622(h)
- Focus on what was settled and how.
- Silent on SoL for actions other than these four

# §107 Cost Recovery or §113 Contribution?

- A PRP can bring a § 107 claim to recover costs voluntarily incurred to clean up a site. *U.S. v. Atlantic Research Corp.*, 551 U.S. 128 (2007)
  - § 113 not the exclusive cause of action
  - Footnote 6: What about costs a party was compelled to incur under a consent decree, after suit under § 106 or § 107? *Id.* at 139, n.6
- What action is available, and which SoL, applies when:
  - PRP voluntarily reimburses another party for response costs?
  - ACO with State does not resolve CERCLA liability?
  - Costs are incurred after a UAO by EPA required the work?

## § 107 or § 113? (Cont.)

- Appellate Courts have unanimously held that a PRP compelled to incur costs under a consent decree or administrative settlement is limited to a § 113 claim.
  - Has a PRP resolved its liability for some or all of a response action?
  - Arising from common liability stemming from a §107 action?
  - If so, a claim for cost recovery under §107 is not available.
- ❖ **Practice tip: carefully review the language of a settlement agreement.**
  - A disclaimer of liability or settlement conditioned upon future action may not “resolve” liability for a §113 claim. See *Bernstein v. Bankert*, 733 F.3d 190 (7<sup>th</sup> Cir. 2013).

# Removal Costs for §107 Claim

## “Removal” defined in § 9601(23)

- Short term, temporary
- Can be a series of actions, including:
  - Monitoring, assessing, evaluating
  - Securing the site with fencing
  - Providing alternative water supplies.
- Can include the RI/FS process, with triggering event being EPA’s issuance of the ROD. *See U.S. v. Davis*, 882 F. Supp. 1217 (D.RI 1995); *Pneumo Abex Corp. v Bessemer & Lake Erie R.R.*, 936 F. Supp. 1250 (E.D. VA 1996).
- Claim must be filed within 3 years of completion of removal.



# Remedial Costs for § 107 Claim

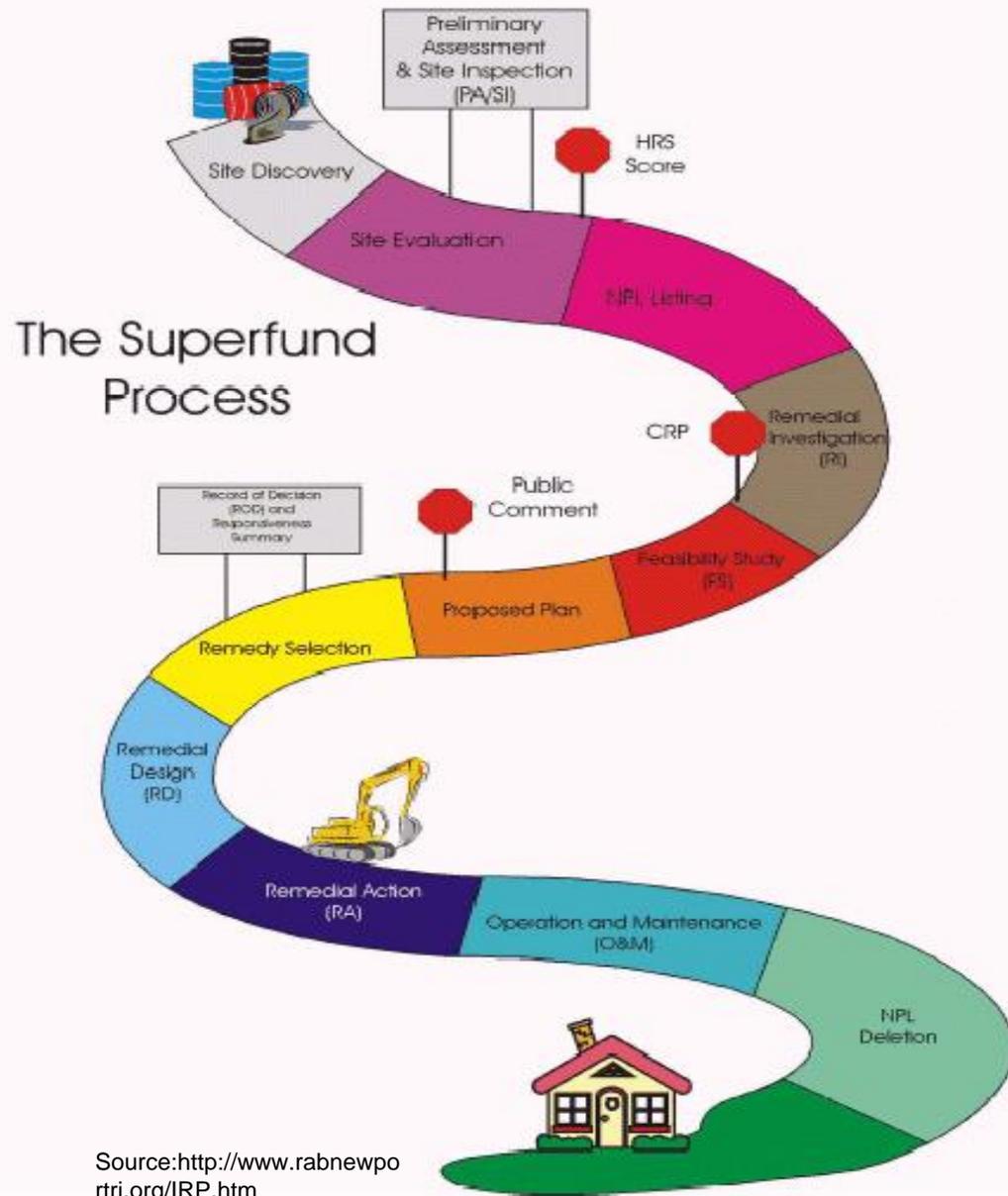
## “Remedial” defined in § 9601(24)

- Long-term, permanent solutions
- Claim must be filed within 6 years of start of construction
- Actions at the location of the release, including:
  - Perimeter protection using dikes, trenches
  - Dredging or excavations
  - Repair or replacement of leaking containers
  - Collection of leachate and runoff
  - Provision of alternative water supplies
  - Offsite transport and onsite storage of contaminated materials



# Process -Removal or Remedial?

- RI/FS is part of the removal process. *Kelley v. E.I. DuPont de Nemours and Co.*, 17 F.3d 836 (6th Cir. 1994).
- Approval of final RA plan triggered SoL for remedial action. *California v. Neville Chemical Co.*, 358 F.3d 661 (9th Cir. 2004).
- Adoption of removal measures in RA plan triggers 3 year SoL. *New York v. Next Millenium Realty*, 732 F.3d 117 (2d Cir. 2013).



# Activity - Removal or Remedial?

- Determined as a matter of law, and can be basis for summary judgment. *American Premier Underwriters Inc. v. General Elec. Co.*, 866 F. Supp. 2d 883 (S.D. Ohio 2012).
- Installing fences to limit access, prior to RA Plan is removal, but installing electrical pole and water lines for night lighting, dust control and steam cleaning triggered remedial 6-yr. SoL. *California v. Hyampom Lumber Co.* 903 F. Supp. 1389 (ED Cal, 1995).
- Installing a steel fence to limit access prior to laying clay cap was remedial because it was first item listed in subsequent closure plan. *Union Carbide Corp. v. Thiokol Corp.*, 890 F. Supp. 1035(SD Ga, 1994).
- Installing plugs in under ground openings is removal. *Colorado v. Sunoco, Inc.*, 337 F.3d 1233 (10th Cir. 2003).

# CERCLA and Toxic Torts

- CERCLA focuses on site clean-ups
- Section 309 of CERCLA addresses private tort suits for personal injury and property damages – toxic tort
- Establishes a national “discovery rule” for accrual of the cause of action
- Trumps state accrual rules that would create a shorter period

# *Waldburger*. What is the Reach of CERCLA Preemption?

- Supreme Court will decide this term in *Waldburger v. CTS Corp.* whether preemption of state accrual rules extends to statutes of repose (SOR)
- Statutes of repose set a strict time limit on claims, regardless of when plaintiffs discover
- Statutes of repose set from objective point, such as a spill or leak

# CERCLA FRCD

- Federally-Recognized Commencement Date, CERCLA § 309, 42 USC 9658 (1986)
  - Federal preemption of state law to require a “discovery rule” that allows plaintiffs more time to bring environmental tort claims
  - Applies to state law actions for damages from exposure to any pollutant released into the environment
  - FRCD: Date plaintiff knew (or reasonably should have known) that damages were caused by the hazardous substance concerned
  - If state commencement (accrual) date is shorter than federal date, federal date applies
  - Doesn’t set forth limitations time period, only accrual date.

# Circuit Split on CERCLA Preemption

- Constitutional
  - *Frier v. Westinghouse*, 303 F.3d 176 (2d Cir. 2002)
- Preempts statutes of repose
  - *Waldburger*, 723 F.3d 434 (4<sup>th</sup> Cir. 2013)
  - *McDonald v. Sun Oil*, 548 F.3d 774 (9th Cir. 2008)
  - *Abrams v. Ciba*, 659 F. Supp. 2d 1225 (S.D. Ala. 2008)
  - *In re Camp Lejeune*, 2011 U.S. Dist. LEXIS 155687 (N.D. Ga. Sept. 29, 2011)
- Doesn't preempt to statutes of repose
  - *Burlington v. Poole*, 419 F.3d 355 (5th Cir. 2005)

# *Waldburger*: Nuisance Suit Regarding Groundwater

- WDNC Trial Court
  - Granted Fed. R. Civ. P. 12(b)(6) motion to dismiss, 2012 U.S. Dist. LEXIS 13727 because claim brought over 10 years (SOR) after contamination
- 4th Circuit, 723 F.3d 434 (2013)
  - U.S. Amicus **favoring** preemption of SOR
  - Court reversed dismissal and remanded to trial court; SOR preempted
- US Supreme Court to hear this spring

# Plaintiffs' Case

- Intent-driven statutory interpretation
  - CERCLA is an ambiguous statute
- Statute is “ambiguous” re whether “limitations” includes “statute of repose”
- CERCLA should be interpreted to effectuate Congress’s intent
  - Promote environmental clean up by providing a remedy for injured property owners

# Defendant's Case

- Narrow statutory interpretation
  - Plain language governs
- Presumption against preemption
- Statute of limitations means statute of limitations
  - Statute of limitations substantively differ from statutes of repose
  - Congress did not intend to address statutes of repose
- Restricting FRCD will promote CERCLA cleanup policy

## Impact of *Waldburger*

- New ground on statutory interpretation principles?
  - No “liberal interpretation for remedial statutes”?
- Supreme Court likely to reverse Fourth Circuit; renewed interest in state statutes of repose to limit enviro torts?
- Regardless, most tort claims brought promptly

# Difficult CERCLA Questions

- What happens if a remedy is disturbed, e.g. a capped site dug up, and another removal or remedial action occurs?
- Can there be more than one cost recovery suit for removal costs at the same site?
- What if a previously remediated site is reopened to address a new remedial standard, after prior cost recovery actions?
- If initiation of construction of a remedy triggers the SoL, what if a new area of contamination is found after the SoL expires?
- Can each OU be the basis for different suits for response costs if work described in the ACOs overlaps?
- Can there be more than one “facility” at a site, and thus more than one action for response costs?
- Can you seek § 113 contribution for costs that were not connected with the same trigger of that § 113 action?