

CTS v. Waldburger:
A Trend Toward Strict Construction of CERCLA?

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Statutes of repose are different from statutes of limitations.¹ Such a simple statement of the law should not require a ruling by the Supreme Court of the United States. Yet the Supreme Court addressed the differences between statutes of repose and statutes of limitations in *CTS Corp. v. Waldburger*.² The issue in that case was not whether the two periods that can limit a plaintiff's ability to bring a suit were different, but rather how Congress addressed the two periods in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).³ In deciding that CERCLA does not preempt state statutes of repose, the Court conducted a thorough analysis of the different purposes of the two limiting periods, but wholly ignored the purpose of CERCLA. This article will address the Court's holding in *CTS* in the context of other cases interpreting CERCLA and will demonstrate a trend away from liberal construction of the Act based on the Act's purposes to a narrower interpretation which ignores the Act's purposes.

I. EXAMINING *CTS v. WALDBURGER* OUTSIDE OF CERCLA

In 2011, a nuisance action was filed against CTS Corporation (CTS) in the United States District Court for the Western District of North Carolina.⁴ The plaintiffs sought damages for reclamation and remediation resulting from exposure of their properties to trichloroethylene and cis-1, 2-dichloroethane.⁵ The plaintiffs alleged the contamination was caused by

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¹ *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182–85 (2014).

² *Id.*

³ *Id.* at 2180.

⁴ *Id.* at 2181.

⁵ *Id.*

CTS.⁶ CTS operated an electronics plant in Asheville, North Carolina, from 1959 to 1985.⁷ CTS stored trichloroethylene and cis-1, 2-dichloroethane at the plant, which was used to manufacture and dispose of electronic parts.⁸ CTS sold the property in 1987, which was eventually purchased by the plaintiffs in the suit.⁹

Before trial, CTS moved to dismiss the case, claiming the suit was barred by North Carolina law.¹⁰ At the time of the suit, North Carolina had a statute of repose that limited a plaintiff's ability to bring an action for damage to property within ten years after the last culpable act of the defendant.¹¹ Finding CTS's last culpable act occurred in 1987, the district court dismissed the case.¹² After the Court of Appeals for the Fourth Circuit reversed the decision of the district court, the Supreme Court of the United States granted certiorari because of conflicting decisions regarding whether CERCLA preempted state statutes of repose.¹³

The issue before the Court was whether Congress preempted the application of state statutes of repose to actions for personal injury or property damages resulting from exposure to hazardous substances.¹⁴ The particular provision in question was 42 U.S.C. § 9658.¹⁵ The statute reads in part:

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (citing N.C. GEN. STAT. § 1-52(16) (2013)).

¹² *Id.*

¹³ *See id.* at 2181–82.

¹⁴ *Id.* at 2180.

¹⁵ *Id.* at 2184.

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commencement date in lieu of the date specified in such State statute.¹⁶

The Court noted that the statute unambiguously applied to statutes of limitations.¹⁷

Justice Kennedy, writing for the majority, began by addressing the similarities and differences between statutes of limitations and statutes of repose, noting, “[t]he outcome of the case turns on whether § 9658 makes a distinction between state-enacted statutes of limitations and statutes of repose.”¹⁸ Statutes of limitations and statutes of repose are similar in that both “can operate to bar a plaintiff’s suit,” and both are dependent on time.¹⁹ The primary differences between the two periods lie in when the periods begin to run and the purposes behind enacting the periods.²⁰

The Court’s analysis of the differences between statutes of limitations and statutes of repose is well reasoned and well supported. The Court relied on legal definitions throughout various time periods and even addressed how Congress has not been precise with its use of the terms.²¹ One important distinction expressed by the Court that is particularly relevant to the application of § 9658 to state statutes of repose is the fact that statutes of limitations are subject to equitable tolling, while statutes of repose are not.²² This distinction is relevant because § 9658 creates a discovery rule, establishing a federally required commencement date based on when the plaintiff discovered the injury.²³

Having established the conceptual difference between statutes of limitations and statutes of repose, the Court then set out to show why this distinction requires an interpretation of § 9658 that does not apply to statutes of repose.²⁴ First, the Court noted how the statute only referred to

¹⁶ 42 U.S.C. § 9658 (2014).

¹⁷ *CTS*, 134 S. Ct. at 2180.

¹⁸ *Id.* at 2182.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See id.* at 2182–88.

²² *Id.* at 2183.

²³ 42 U.S.C. § 9658(a)(4)(A) (2014) (“[T]he term ‘federally required commencement date’ means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.”).

²⁴ *See CTS*, 134 S. Ct. at 2187.

the term “statute of limitations” and never to “statute of repose.”²⁵ Noting historical confusion of the terms did not make this use of language dispositive, the Court then focused its attention on a 1982 Study Group Report.²⁶

The report, which was mandated in the original language of CERCLA in 1980, discussed barriers to common law and statutory remedies for harm done through the release of hazardous substances.²⁷ The report recommended that states implement discovery rules to toll statutes of limitation until the plaintiff discovered the injury caused by the release of hazardous substances.²⁸ The report further recommended the repeal of statutes of repose that could have the same effect as statutes of limitations in limiting a plaintiff’s ability to bring a claim.²⁹ Instead of waiting on the states, Congress amended CERCLA in 1986 and added § 9658.³⁰

The Court reasoned that because the 1982 Report was able to differentiate between statutes of limitations and statutes of repose, Congress was likewise able to differentiate between the two periods.³¹ The Court therefore saw Congress’s lack of express mention of statutes of repose as purposeful, tending to show that Congress only intended for § 9658 to preempt state statutes of limitations.³²

Finally, the Court looked to the text of § 9658, specifically subsection (b)(2), in an effort to determine what period Congress sought to address.³³ That subsection presupposes the presence of a civil action and therefore relates to when a civil action accrues.³⁴ Statutes of repose do not relate to when a civil action may accrue, but rather focus on the action of a defendant.³⁵ Therefore, the Court reasoned that when Congress only spoke

²⁵ *Id.* at 2185.

²⁶ *Id.* at 2185–86.

²⁷ *Id.* at 2180–81.

²⁸ *Id.* at 2181.

²⁹ *Id.*

³⁰ *Id.*

³¹ *See id.* at 2186.

³² *See id.*

³³ *Id.* at 2187. Section (b)(2) reads: “The term ‘applicable limitations period’ means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.” 42 U.S.C. § 9658(b)(2) (2014).

³⁴ *CTS*, 134 S. Ct. at 2187.

³⁵ *See id.*

of periods relating to when a civil action may accrue, Congress was only speaking toward statutes of limitations.³⁶

It is hard to argue with the logic followed by the Court in its decision when looking at the case outside the context of the purposes behind CERCLA. Statutes of limitations and statutes of repose are certainly different, and the language used by Congress in § 9658 does tend to relate more strongly to statutes of limitations than statutes of repose. While the logic of the opinion may be void of scrutiny, the de-emphasis the Court places on CERCLA's purposes certainly is not.

II. EXAMINING *CTS v. WALDBURGER* IN LIGHT OF CERCLA

The majority opinion in *CTS* spends only four paragraphs addressing the purposes of CERCLA and the impact they have on the case.³⁷ In one paragraph, the Court summarily dismissed the approach taken by the Fourth Circuit that emphasized the remedial nature of CERCLA.³⁸ According to the Fourth Circuit, the statute should be read broadly because of the remedial nature of the Act.³⁹ The Court scoffed at this by stating, “almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem.”⁴⁰ According to the Court, the statutory language is the primary source of legislative intent, and any interpretation of a statute must start with its text.⁴¹

While the Court is correct that the proper analysis should be couched in the statutory language, the Court ignored a reasonable interpretation of the statute that could have more appropriately fallen within the purposes of CERCLA. In her dissent, Justice Ginsberg noted how the federally required commencement date under § 9658 can displace the earlier date state law prescribes.⁴² Under § 9658(b)(4), “the term ‘federally required commencement date’ means the date the plaintiff knew (or reasonably should have known) that the . . . injury . . . [was] caused . . . by the hazardous substance.”⁴³ This date was intended by Congress to “apply ‘in

³⁶ *See id.*

³⁷ *Id.* at 2180, 2185, 2188.

³⁸ *Id.* at 2185.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 2190 (Ginsburg, J., dissenting).

⁴³ 42 U.S.C. § 9658(b)(4) (2014).

lieu of” the earlier commencement date set by the state.⁴⁴ Therefore, § 9658 could be interpreted in a way that does not differentiate between statutes of limitations and statutes of repose in a way that is consistent with the purposes of CERCLA.

In ignoring this interpretation, the majority shifted emphasis away from CERCLA’s purposes by discussing how CERCLA’s true purposes are not implicated in this case.⁴⁵ In the beginning of the opinion, the Court set out the purposes of CERCLA as “[promoting] ‘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.’”⁴⁶ The case before the Court in *CTS*, however, did not deal with imposing response costs on potentially responsible parties, but rather dealt with a private cause of action for damages to property.⁴⁷ The Court made note of this distinction in stating: “CERCLA, it must be remembered, does not provide a complete remedial framework,” and “[t]he statute does not provide a general cause of action for all harm caused by toxic contaminants.”⁴⁸

It may be important to note that a remedial framework was considered when CERCLA was being drafted.⁴⁹ One early version of CERCLA included provisions that would provide liability for personal injury.⁵⁰ The provisions relating to a federal cause of action for personal injury were dropped, but not without protest, as one Senator remarked:

Under this bill, if a toxic waste discharge injures both a tree and a person, the tree’s owner, if it is a government, can promptly recover from the fund for the cost of repairing damage, but the person cannot. In effect, at least as to the superfund, it is all right to kill people, but not trees.⁵¹

⁴⁴ *CTS*, 134 S. Ct. at 2190 (Ginsburg, J., dissenting).

⁴⁵ *See id.* at 2188.

⁴⁶ *Id.* at 2180. (citing *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009)) (it may not be coincidental that the first case cited by the Court was another case that narrowly interpreted CERCLA).

⁴⁷ *Id.* at 2181.

⁴⁸ *Id.* at 2188.

⁴⁹ *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 6 (1982).

⁵⁰ *Id.* at 7.

⁵¹ *Id.* at 26.

Had it not been for the short time period over which CERCLA was drafted and enacted, the provisions creating a federal cause of action for personal injury and property damage may have become part of the Act.⁵² Therefore, while the Court in *CTS* may be correct in noting that the primary purpose of CERCLA relates to the recovery of response costs, to say that protecting individuals from personal injury and property damage is not also a purpose underlying CERCLA is counter to the Act's legislative history.

Those not familiar with CERCLA and how courts have approached interpreting the Act may see no problem with the approach taken by the Supreme Court in narrowly construing the Act. If one were to only look at *CTS* in isolation, then the approach taken by the Court might not be all that surprising. However, analyzing the decision in *CTS* in light of other CERCLA decisions could alter those perceptions.

III. PLACING *CTS V. WALDBURGER* IN THE CONTEXT OF OTHER CERCLA DECISIONS

In order to fully understand the basis for the Court's approach in *CTS* and understand how *CTS* fits in with other CERCLA decisions, a review of CERCLA jurisprudence is necessary. A review of all the federal circuit and Supreme Court decisions interpreting CERCLA is beyond the scope of this article. Therefore, this article will briefly address the drafting of CERCLA and three Supreme Court cases which demonstrate the Court's trend away from a purpose based approach to CERCLA to a more literal construction approach.

Before addressing the cases interpreting CERCLA, it is worthwhile to make brief note of CERCLA's history. Understanding how CERCLA was enacted can help one understand why some courts have favored liberal construction of CERCLA. CERCLA was passed by a lame-duck Congress very hastily in order to get the Act passed before President Reagan took office.⁵³ The hurry to pass the law has often been used to explain the poor drafting of the Act.⁵⁴ Because of the poor drafting, some early courts were reluctant to follow the ordinary canons of construction.⁵⁵ One court dispelled the use of canons of construction in CERCLA interpretation by

⁵² See *id.* at 26, 34.

⁵³ John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1405-06 (1997).

⁵⁴ *Id.* at 1405.

⁵⁵ *Id.* at 1406.

stating: “Because of the inartful crafting of CERCLA . . . reliance solely upon general canons of statutory construction must be more tempered than usual.”⁵⁶ This led some courts to place greater emphasis on the remedial nature of CERCLA and interpret the Act broadly.⁵⁷

In 1998, the Supreme Court decided the case of *United States v. Bestfoods*.⁵⁸ In *Bestfoods*, the Court faced a question of whether a parent corporation could be found liable for the release of hazardous substances at a facility owned and operated by a subsidiary corporation.⁵⁹ The United States sought to recover response costs from CPC International Inc., because its subsidiary corporation, Ott Chemical Co., was defunct at the time of the suit.⁶⁰ The District Court for the Western District of Michigan held that a parent corporation could be held liable for the actions of its subsidiary corporation if the parent corporation exercised control over the subsidiary corporation’s business.⁶¹ The Court of Appeals for the Sixth Circuit reversed in part, holding that a parent corporation can only be held liable under CERCLA if the corporate veil could be pierced under state law.⁶²

The Supreme Court rejected the holdings of both the District Court and the Court of Appeals.⁶³ First, the Court looked to CERCLA and found no provisions that sought to rewrite the well-settled law of corporate veil piercing.⁶⁴ The Court interpreted the meaning of the term “operator” under CERCLA, because liability under CERCLA can be found for a person who operates a facility.⁶⁵ The Act itself provided the Court with very little guidance as to the meaning of the term.⁶⁶ The Court was therefore left with following the ordinary meaning of the term.⁶⁷

⁵⁶ *Id.* at 1406 (citing *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 93 (3d Cir. 1994)).

⁵⁷ *See id.* at 1411.

⁵⁸ 524 U.S. 51 (1998).

⁵⁹ *Id.* at 55.

⁶⁰ *Id.* at 56–57.

⁶¹ *Id.* at 58–59.

⁶² *Id.* at 59–60.

⁶³ *Id.* at 60.

⁶⁴ *Id.* at 62.

⁶⁵ *Id.* at 65.

⁶⁶ *Id.* at 66. Under CERCLA, “owner or operator means . . . any person owning or operating such facility.” 42 U.S.C. § 9601(20)(A)(ii) (2014).

⁶⁷ *Bestfoods*, 524 U.S. at 66.

In developing the meaning of the term “operator” from its ordinary meaning, the Court made specific reference to the purposes of the Act in stating: “To sharpen the definition for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”⁶⁸

The Court was mindful of the purposes of the Act when developing its definition of operating and was keen to ensure that the Act’s purposes were met through the definition created by the Court.

Ultimately, the Court set forth a test for parent corporation liability, placing the emphasis on whether the parent corporation operates the facility, not on whether the parent operates the subsidiary.⁶⁹ Such a holding does not run afoul of corporate law limiting liability of parent corporations but still meets the purpose of holding responsible parties liable for response costs.⁷⁰ The Court understood the shortcomings of CERCLA’s drafting in fashioning a rule based not primarily on interpretations of the words of CERCLA, but rather on the purposes of the Act.⁷¹

In 2007, the Supreme Court was faced with an issue of CERCLA procedure.⁷² In *United States v. Atlantic Research Corporation*, the Court had to determine if and how a potentially responsible party could recover response costs from other potentially responsible parties.⁷³ Atlantic Research leased property from the Department of Defense and used the property to retrofit rocket motors for the United States.⁷⁴ Through its

⁶⁸ *Id.* at 66–67.

⁶⁹ *Id.* at 68.

⁷⁰ While Congress did not express the purposes of CERCLA in the act itself, courts have interpreted the act’s purposes as:

First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

⁷¹ See *Bestfoods*, 524 U.S. at 56 (the Court made specific reference to CERCLA’s poor drafting as a reason behind the necessity of the Court’s review).

⁷² *United States v. Atl. Research Corp.*, 551 U.S. 128, 131 (2007).

⁷³ *Id.*

⁷⁴ *Id.* at 133.

operations, Atlantic Research caused the release of hazardous substances into the soil and groundwater at the site.⁷⁵ Atlantic Research incurred response costs cleaning up the site and sought recovery from the United States by filing suit under §§ 107(a) and 113(f) of CERCLA.⁷⁶

Section 107 of CERCLA sets forth the different potentially responsible parties who are liable for response costs and also establishes who may bring an action to recover those response costs.⁷⁷ Section 113 of CERCLA allows potentially responsible parties the ability to seek contribution from other potentially responsible parties.⁷⁸ In a prior case dealing with the relationship between the two sections, the Court held that a private party could not seek contribution until a party was sued under § 106 or § 107(a).⁷⁹ Based on *Cooper Industries*, the District Court for the Western District of Arkansas dismissed Atlantic Research's suit under § 107(a).⁸⁰ The Court of Appeals for the Eighth Circuit reversed, holding that a potentially responsible party could bring a suit under § 107(a).⁸¹

The Supreme Court was faced with construing the meaning of the term "other persons" under § 107(a)(4)(B).⁸² In holding that the term "other persons" can include potentially responsible parties, the Court based this decision primarily on the fact that the previous subsection dealt with the United States Government, a State, or Indian tribe, so the use of "other persons" in the following subsection should clearly mean any person that is not the United States Government, a State, or Indian tribe.⁸³

While this may look like a simple case of statutory construction, the Court supported its decision by focusing on how the holding could further the purposes of CERCLA.⁸⁴ Since the definition of potentially responsible parties is very broad, if the Court were to decide that a potentially

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 42 U.S.C. § 9607(a)(4) (2014). The section states that the responsible party may be liable for "(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan." *Id.*

⁷⁸ 42 U.S.C. § 9613(f)(1) (2014).

⁷⁹ *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 161 (2004).

⁸⁰ *Atl. Research*, 551 U.S. at 133–34.

⁸¹ *Id.* at 134.

⁸² *Id.*

⁸³ *Id.* at 135–36.

⁸⁴ *See id.* at 136.

responsible party would not be able to seek response costs from other potentially responsible parties, then very few response cost recovery actions would be brought under CERCLA.⁸⁵ The Court went so far as to say the number of possible plaintiffs would be reduced “to almost zero.”⁸⁶ By adopting an interpretation of CERCLA that would greatly reduce a plaintiff’s ability to seek response costs, the Court would fasten an interpretation that would be counter to the purpose of CERCLA of holding potentially responsible parties liable for cleaning up contaminated sites. Therefore, the decision in *Atlantic Research Corp.* certainly supported the underlying principles of CERCLA.

In the 2009 case of *Burlington Northern & Santa Fe Railway Company v. United States*, the Supreme Court shifted course, focusing on the language of CERCLA and discarding its purposes.⁸⁷ The Court was faced with a question about arranger liability, an essential category of potentially responsible parties under CERCLA.⁸⁸ Brown & Bryant, Inc. (B&B) operated an agricultural chemical distribution business, and often purchased chemicals from Shell Oil Company (Shell).⁸⁹ B&B originally purchased its chemicals from Shell in 55-gallon drums, but Shell thought it was more profitable to require its distributors to purchase the chemicals in bulk and therefore forced B&B to purchase the chemicals in bulk, requiring deliveries from large tanker trucks.⁹⁰ During the process of transferring the chemicals from the tanker trucks and into B&B’s storage tanks, chemicals frequently leaked and spilled, contaminating the soil and eventually the groundwater under the facility.⁹¹ Shell was aware of the frequent leaks and spills at B&B and other facilities to the point where Shell took steps to limit the frequency of the spills.⁹²

After the California Department of Toxic Substance Control and the Environmental Protection Agency investigated the site, the United States spent more than \$8 million to respond to the contamination.⁹³ The government also forced Burlington Northern and Santa Fe Railway

⁸⁵ *Id.* at 136–37.

⁸⁶ *Id.* at 137.

⁸⁷ *See* 556 U.S. 599 (2009).

⁸⁸ *Id.* at 602.

⁸⁹ *Id.*

⁹⁰ *Id.* at 603.

⁹¹ *Id.* at 603–04.

⁹² *Id.* at 604.

⁹³ *Id.* at 604–05.

Company and Union Pacific Railroad Company, who owned a small portion of the contaminated land, to incur more than \$3 million in response costs.⁹⁴ In the CERCLA cost recovery action, the United States sought to recover costs from Shell and the Railroads.⁹⁵ Both the District Court for the Eastern District of California and the Court of Appeals for the Ninth Circuit found Shell to be a potentially responsible party liable for the response costs.⁹⁶

The Supreme Court disagreed, holding that Shell was not liable for any response costs.⁹⁷ The Court's decision was based on its interpretation of § 107(a) of CERCLA, which defines the four categories of potentially responsible parties.⁹⁸ At issue in *Burlington Northern* was the arranger liability category.⁹⁹ This category consists of:

any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.¹⁰⁰

This category can be simplified as consisting of any person that “arrange[s] for disposal . . . of hazardous substances.”¹⁰¹

Since the term “arrange” is not defined in CERCLA, the Court looked to the ordinary meaning of the term, noting, “In common parlance, the word ‘arrange’ implies action directed to a specific purpose.”¹⁰² This meaning adopted by the Court requires an intent to dispose.¹⁰³ The concept of intent is one that is foreign to CERCLA, as CERCLA liability is based on strict liability.¹⁰⁴ By reading an intent requirement into arranger liability, the

⁹⁴ *Id.* at 605.

⁹⁵ *Id.*

⁹⁶ *Id.* at 605–07.

⁹⁷ *Id.* at 613.

⁹⁸ *Id.* at 608–09 (citing 42 U.S.C. § 9607(a) (2014)).

⁹⁹ *Id.*

¹⁰⁰ 42 U.S.C. § 9607(a)(3) (2014).

¹⁰¹ *Burlington N.*, 556 U.S. at 609 (alteration in original).

¹⁰² *Id.* at 610–11.

¹⁰³ *Id.*

¹⁰⁴ *See* 42 U.S.C. § 9607 (2014).

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Court introduced a fact intensive inquiry that significantly limits the application of CERCLA.

In looking at the specific facts of *Burlington Northern*, one would be hard pressed to believe that Shell was not in any way responsible for the release of hazardous substances at the facility. Shell had actual knowledge of the spills and leaks, which were the result of Shell exercising control over the facility.¹⁰⁵ Despite the majority opinion specifically expressing the purpose of CERCLA “to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination,” the Court ruled in such a way that did not ensure a responsible party was held responsible for the contamination.¹⁰⁶

Instead of following the policy underlying CERCLA, the Court went a different direction.¹⁰⁷ Although not expressed in the opinion, the policy underlying the Court’s decision in *Burlington Northern* may have been in protecting businesses who engage in the sale of useful products.¹⁰⁸ This approach, which is very fact intensive, has led to some inconsistent results in later cases dealing with arranger liability.¹⁰⁹

It was uncertain at the time the case was decided whether *Burlington Northern* was simply an outlier among other CERCLA cases or whether the Court was taking a new direction.¹¹⁰ Now that the Supreme Court has decided *CTS*, *Burlington Northern* in retrospect takes on new meaning. Since the Court has now handed down two pro-business CERCLA decisions that are focused more on strict construction rather than underlying policy, one can surmise that the attitude of the Court has shifted. Where once the courts would give Congress the benefit of the doubt through liberal construction of CERCLA, many courts now follow a course of stricter interpretation.

¹⁰⁵ See *Burlington N.*, 556 U.S. at 622 (Ginsburg, J., dissenting).

¹⁰⁶ *Id.* at 602.

¹⁰⁷ See *id.* at 622 (Ginsburg, J., dissenting); Rachel K. Evans, Comment, *Burlington Northern & Santa Fe Railway Co. v. United States*, 34 HARV. ENVTL. L. REV. 311, 313 (2010).

¹⁰⁸ See Evans, *supra* note 107, at 313.

¹⁰⁹ Greg DeGulis & Sarah Gable, *Burlington Northern: CERCLA and Its Ever-Changing, Unpredictable Landscape*, NAT. RESOURCES & ENV’T, Spring 2014, at 40, 40.

¹¹⁰ See generally *id.* (discussing how the Court changed CERCLA analysis in a manner that has led to inconsistency); Evans, *supra* note 107, at 313, 318 (discussing how the Court shifted away from how other courts handled CERCLA analysis).

IV. LIFE AFTER *CTS* V. *WALDBURGER*

In looking solely at the issue presented in *CTS*, whether CERCLA preempts state statutes of repose, the effects of the Supreme Court's decision may be minimal in the grand scheme of common law actions for personal injury and property damage. The decision is only relevant in states that impose statutes of repose for such actions. At the time of this article, only Connecticut, Kansas, and Oregon have statutes of repose that limit a plaintiff's ability to bring a cause of action for damage to property.¹¹¹ Other states affected by the decision would include Alabama, which has a common-law rule of repose, and Texas, which has a statute of repose relating to product liability that was previously held by the Fifth Circuit to not be preempted by CERCLA.¹¹²

North Carolina, whose statute of repose was the subject of *CTS*, quickly amended its statute of repose after the Supreme Court decided *CTS*.¹¹³ North Carolina added an exception to the ten-year statute of repose for any "action for personal injury, or property damages caused or contributed to by groundwater contaminated by a hazardous substance, pollutant, or contaminant"¹¹⁴ In passing the amendment, the North Carolina General Assembly made specific mention of *CTS* in stating, "The General Assembly finds that the Supreme Court's decision is inconsistent with the legislature's intentions and the legislature's understanding of federal law at the time that certain actions were filed."¹¹⁵

It is unclear how other states will react to the Supreme Court's decision. The states that currently have statutes of repose may choose to amend their statutes, as North Carolina did.¹¹⁶ Other states, now with clear guidance from the Supreme Court, may choose to enact statutes of repose to limit actions for personal and property damage caused by the release of

¹¹¹ CONN. GEN. STAT. § 52-584 (2013) (three year statute of repose); KAN. STAT. ANN. § 60-513b (2005) (ten year statute of repose); OR. REV. STAT. § 12.115 (2011) (ten year statute of repose).

¹¹² See *Abrams v. Ciba Specialty Chems. Corp.*, 659 F. Supp. 2d 1225, 1228–40 (S.D. Ala. 2009) (discussing Alabama's 20-year common-law rule of repose); TEX. CIV. PRAC. & REM. CODE ANN. § 16.012 (West 2012); *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 365 (5th Cir. 2005).

¹¹³ S.B. 574, 2014 Gen. Assemb., Reg. Sess., 2014 N.C. Sess. Laws 2014–17 (passed only 11 days after *CTS* was decided).

¹¹⁴ N.C. GEN. STAT. § 130A-26.3 (2013).

¹¹⁵ S.B. 574, 2014 Gen. Assemb., Reg. Sess., 2014 N.C. Sess. Laws 2014–17.

¹¹⁶ *Id.*

hazardous substances. Congress may choose to act and amend CERCLA to preempt state statutes of repose. In fact, a bill has been introduced to do just that.¹¹⁷ Being that the issue of federal preemption for statutes of repose under CERCLA may not be seen as a priority by Congress, it may take some time for this amendment to be passed.

One form of statute of repose that may be affected by the Supreme Court's decision in *CTS* is the limitation on actions arising out of improvements to real property. Nearly every state has some form of statute of repose limiting actions related to improvements to real property.¹¹⁸ These periods generally begin when construction on real property is completed and may typically run between seven to twelve years.¹¹⁹ These statutes of repose vary greatly in their construction.¹²⁰ Whether the real property improvement statute of repose will affect environmental claims is a matter of state law interpretation and will depend on the construction of the particular statute.¹²¹ Knowing that state law statutes of repose are not preempted by CERCLA may affect how state courts interpret their own statutes of repose as to whether the statutes of repose affect environmental claims.

CTS has already begun to raise concerns in areas of the law besides CERCLA. In *National Credit Union Administration Board v. Nomura Home Equity Loan, Inc.*, the Court of Appeals for the Tenth Circuit was forced to reconsider its prior opinion in light of the Supreme Court's holding in *CTS*.¹²² The court was faced with deciding if the time frame for the National Credit Union Administration to bring claims under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989

¹¹⁷S. 2542, 113th Cong. § 1 (2014) (introduced June 26, 2014, referred to the Committee on Environment and Public Works); H.R. 4993, 113th Cong. § 1 (2014) (introduced June 26, 2014, referred to Committee on Energy and Commerce, the Committees on Transportation and Infrastructure, and the Judiciary).

¹¹⁸See, e.g., MASS. GEN. LAWS ch. 260, § 2B (2004); N.J. STAT. ANN. § 2A:14-1.1 (West 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 16.009 (West 2002).

¹¹⁹Andrew A. Ferrer, *Excuses, Excuses: The Application of Statutes of Repose to Environmentally-Related Injuries*, 33 B.C. ENVTL. AFF. L. REV. 345, 356 (2006).

¹²⁰*Id.* at 357.

¹²¹*Id.* at 359–611; see also *Town of Weymouth v. James J. Welch & Co.*, No. CIV.A. 90-985-A, 1996 WL 680082, at *2-5 (Mass. Super. Ct. Nov. 19, 1996); *Pitney Bowes, Inc. v. Baker Indus.*, 649 A.2d 1325, 1327–28 (N.J. Super. Ct. App. Div. 1994); *Shields v. Shell Oil Co.*, 604 N.W.2d 719, 722, 724–27 (Mich. Ct. App. 1999), *rev'd on other grounds*, 621 N.W.2d 215 (Mich. 2000).

¹²²764 F.3d 1199, 1203 (10th Cir. 2014).

preempted state statutes of repose.¹²³ The court conducted an in depth analysis of *CTS*, comparing § 9658 of CERCLA to the provisions Extender Statute under the Financial Institutions Reform, Recovery, and Enforcement Act.¹²⁴ After looking at the reasons why the Supreme Court ruled in *CTS* and how the Extender Statute differed from § 9658, the court ultimately held that *CTS* did not alter the court's original opinion that the Extender Statute did preempt state statutes of repose.¹²⁵

CTS has also been used by some lower courts in determining whether a statute is a statute of limitations or a statute of repose.¹²⁶ In *Dykema Excavators, Inc. v. Blue Cross & Blue Shield Of Mich.*, the District Court for the Eastern District of Michigan used *CTS* to determine if a provision in Employee Retirement Income Security Act of 1974 (ERISA) was a statute of limitations or a statute of repose by looking at whether the statute was subject to tolling.¹²⁷ A similar analysis was conducted by the Court of Appeals for the Fourth Circuit in *Prasad v. Holder*, which used *CTS* in deciding whether a provision of the Immigration and Nationality Act was as statute of limitations or a statute of repose.¹²⁸ These two cases demonstrate that although *CTS* may be detrimental to plaintiffs seeking recovery for personal injury or property damage resulting from a release of hazardous substances, the opinion can prove helpful to courts in differentiating between statutes of limitations and statutes of repose.

Perhaps what is more profound than how states and Congress address the specific issue of statutes of repose is the issue of how courts will interpret CERCLA moving forward. As previously mentioned, the Supreme Court has now delivered two CERCLA opinions that are the result of narrow interpretations of the Act's text.¹²⁹ In early CERCLA opinions, the courts may have been giving Congress the benefit of the doubt for its shoddy drafting of CERCLA. Now that more than thirty years have passed since CERCLA has been enacted and Congress has amended the Act several times, the courts may be more reluctant to read CERCLA as broadly

¹²³ *Id.*

¹²⁴ *Id.* at 1205–18.

¹²⁵ *Id.* at 1217–18.

¹²⁶ See, e.g., *Prasad v. Holder*, 776 F.3d 222, 226–27 (4th Cir. 2015); *Dykema Excavators, Inc. v. Blue Cross & Blue Shield of Mich.*, 77 F. Supp. 3d 646, 653–55 (E.D. Mich. 2015).

¹²⁷ *Dykema*, 77 F. Supp. 3d at 653–55.

¹²⁸ *Prasad*, 776 F.3d at 226–27.

¹²⁹ See *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014); *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009).

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as in the past. This conclusion may have been drawn after the Supreme Court decided *Burlington Northern*. Now that the Court has followed on the path of narrow interpretation through *CTS*, true evidence of a shift in judicial philosophy can be seen. Moving forward, practitioners should not ignore these two cases as mere outliers, but rather anticipate similar results from the Court in the future.

V. CONCLUSION

Looking at Supreme Court decisions in a vacuum can often lead to limited and oversimplified conclusions. The case of *CTS v. Waldburger* is a prime example of how proper context of multiple Supreme Court decisions can lead to different perceptions.¹³⁰ In isolation, *CTS* appears to be a simple case of statutory construction relating to two very well understood legal concepts: statutes of limitations and statutes of repose. In light of other Supreme Court decisions interpreting CERCLA, *CTS* may be a sign of the Court's new attitude toward CERCLA, with the Court moving away from the era of liberal construction into an era of narrow construction. It may still be too early to adequately analyze if the Supreme Court has made such a shift, but *CTS* can stand as evidence of the trend.

¹³⁰ See *CTS*, 134 S. Ct. at 2175.