Updates

The U.S. Supreme Court stepped into the long-simmering debate about the rights of residential homeowners affected by Superfund response actions, ruling that they are indeed bound by the federal statute's ban against potentially responsible parties taking additional, unauthorized remedial actions.

The case, *Atlantic Research Company v. Christian et al.*, 590 U.S. ___ (April 20, 2020), arose out of remedial action of historic hazardous substances releases from the former Anaconda smelter site in Butte, Montana.

The releases impacted surface soils at nearby residences, and the U.S. Environmental Protection Agency (EPA) selected a response action that called for surface soil containing excess levels of lead and arsenic to be excavated and removed, with soil impacted below those risk-based goals left in place and capped. Though that is standard practice for soil cleanups under the Comprehensive Environmental Response, Compensation and Liability Act

(CERCLA), 42 U.S.C. §§ 9601 *et seq*, the homeowners were unhappy with the selected cleanup goals. In 2008, 98 of them filed suit in Montana state court under a variety of common law theories.

It is undisputed that CERCLA creates a cause of action for recovery of cleanup costs that must be filed in federal courts, while preserving the rights of affected parties to pursue non-conflicting common law claims against polluters. It is likewise clear that CERCLA precludes federal courts from entertaining collateral attacks on EPA-approved remedies and bars potentially responsible parties (PRPs) from disrupting EPA's ongoing efforts at Superfund sites by taking unauthorized actions.

What has been greatly disputed is how these CERCLA provisions should apply to owners of homes within Superfund sites, given CERCLA's broad definition of such sites to include "all areas where hazardous substances have come to be located." In this update, we review the facts and holdings of Christian, discuss key takeaways, and consider the practical implications of the holding on residential cleanups generally.

Facts

Anaconda Copper Company mined copper in the Butte area from 1884 until its stock was acquired in 1977 by Atlantic Richfield Company (ARCO). As Anaconda's corporate successor, ARCO is liable for necessary remediation. Since the site was listed on the federal National Priorities List in 1983, under EPA supervision ARCO has spent more than $450 million cleaning up some 300 square miles affected by the former smelter's stack emissions. Part of the cleanup work required by EPA, selected after the usual study and public comment process, has included removing hundreds of thousands of cubic yards of soil from residential yards and pasture fields.

The residential landowners within the Superfund site sued ARCO in Montana state court for common law nuisance, trespass, and strict liability—seeking at least $50 million in restoration costs to return their properties to their original condition. Like many states and Restatement (Second) of Torts § 929 (1978), Montana allows homeowners affected by contamination to recover the costs of restoring their personal homes even if the restoration costs exceed the value of the property. And the homeowners sought a declaration that ARCO was liable for the costs of removing impacted soil that EPA agreed could be safely left in place.

ARCO moved for summary judgment on the restoration damages claim, arguing that CERCLA precluded the Montana courts from hearing the case and also that, as PRPs, the homeowner plaintiffs were prohibited from taking additional cleanup action without EPA approval. After the Montana Supreme Court disagreed on both counts, the U.S. Supreme Court granted *certiorari* to address the following:

1. Whether state courts are barred from entertaining common-law claims for restorations that are inconsistent with an EPA-selected remedy by the prohibition against collateral attacks on remedial action decisions established under CERCLA § 113(h), 42 U.S.C. § 9613 (h)
2. Whether CERCLA preempts such conflicting state-law claims
3. Whether residential homeowners within the broadly defined reach of a Superfund site are PRPs subject to the CERCLA Section § 122(e)(6) prohibition against engaging in remedial action without EPA approval

The United States filed an amicus brief agreeing with ARCO that a state-law claim for restoration damages is a "challenge" to EPA's remedial plan over which the federal courts have exclusive jurisdiction pursuant to CERCLA § 113(b). The agency likewise agreed that CERCLA preempts the landowners' claims and, further, that as PRPs the homeowners could not take remedial action without agency approval.

Holdings

Addressing the jurisdictional issues, the Court held that while CERCLA provides for exclusive federal jurisdiction over claims brought under the statute itself, it does not wholly displace state-court jurisdiction over common law claims for restoration damages. The Court reasoned that CERCLA § 113(b) "deprives state courts of jurisdiction over claims brought under [CERCLA]. But it does not displace state court jurisdiction over claims brought under other sources of law." The Court further ruled that the Section 113(h) bar against federal courts entertaining challenges to remedies did not by itself limit state-court jurisdiction. The Court opined: "Atlantic Richfield remains potentially liable under state law for compensatory damages, including loss of use and enjoyment of property, diminution of value, incidental and consequential damages, and annoyance and discomfort."

After declining to limit the jurisdiction of state courts to entertain restoration claims, however, the Court's next ruling made it unlikely that homeowners could accrue such claims. Section 122(e)(6) of CERCLA prohibits PRPs from undertaking "any remedial action" absent EPA approval at any facility where EPA or a PRP acting under an administrative order or consent decree "has initiated a remedial investigation and feasibility study." Disagreeing with the Montana Supreme Court, the Court ruled that the landowners were PRPs and, as such, were prohibited from taking remedial action without EPA approval.

The Court's majority rejected Justice Neil Gorsuch's contention that their interpretation violated CERCLA's "saving clauses"—which provide that CERCLA does not preempt liability or requirements under state law. On the contrary, the majority held that interpreting CERCLA's savings clauses to erase the clear mandate of §122(e)(6) would allow CERCLA "to destroy itself." And the Court noted that Atlantic Richfield remains potentially liable under state law for damages, including costs from the landowners' own remediation beyond that required under CERCLA—so long as the landowners first obtain EPA approval of that remedial work. But the Court assumed that the landowners' proposed plan, which required additional costly soil removal to achieve heightened cleanup goals, was inconsistent with the EPA-selected remedy—which the EPA had already determined to be protective of human health and the environment.

Key Takeaways

- The Court's interpretation of CERCLA should reduce the litigation leverage of homeowners over industrial parties remediating residential yards under CERCLA. While it did not rule that common-law tort claims are preempted, the Court effectively limited the relief available for restoration claims in circumstances where the cost of restoration exceeds the value of the property. Obtaining EPA preapproval for additional remediation—which the Court established as a precondition to obtaining monetary relief—is likely to be difficult.
- Ironically, as the dissent warned, the ability of EPA to effectively foreclose restoration relief against PRPs may increase the agency's own litigation risk. Nothing in CERCLA precludes the government from takings claims when CERCLA is invoked to impose use restrictions.
- The decision underscores yet again the role the administrative record can play in subsequent tort litigation. EPA does not approve remedial actions unless it determines that they are protective of human health and the environment. The *Christian* opinion will give targets of tort claims additional support for the argument that removing all traces of contamination is not necessary to eliminate liability for common law damages.

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