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Landowners Can Seek a Cleaner Cleanup in State Court

US Supreme Court Says Superfund Statute Allows Landowners to Seek Additional Remediation in State Court, but Delays Additional Work

On April 20, 2020, the United States Supreme Court issued its long-awaited decision allowing 98 private landowners in Montana to pursue a restoration damages claim against Atlantic Richfield Co. (as successor to the Anaconda Copper Mining Co.) based on Montana common law nuisance, trespass, and strict liability claims. *Atlantic Richfield Co. v. Christian, et al*, slip op., 590 U.S. ___ (April 20, 2020). After giving with one hand however, Chief Justice Roberts (writing for the Court) took with the other, and held that on remand, if the landowners persuade a Montana jury of their entitlement to restoration damages, absent EPA's consent, they still may not use that right until after EPA's approved cleanup is completed and the site is delisted from the NPL.

Atlantic Richfield v. Christian is one of only a handful of Superfund cases that have ever reached the U.S. Supreme Court. Accordingly, it will be mined and dissected for points of precedence, interpretation, and impact for years to come. In the near term, however, three questions appear to have clear answers:

- State courts may hear common law tort claims involving Superfund sites, and so can federal courts sitting in diversity or when asked to consider state law claims attached to federal litigation.
- Statutory defenses under the Superfund law, including "innocent landowner," "contiguous property owner," or expiration of a statute of limitations, will not relieve a "potentially responsible party" of that PRP status, and the statute's requirements are fully applicable to current owners of contaminated property.

- Even when a PRP succeeds on a state law claim involving a site undergoing cleanup work authorized by EPA, if that claim allows or requires the performance of additional remediation or cleanup work, such work cannot begin without EPA's approval or the site's delisting, if it is on the NPL.

BACKGROUND

The site at issue in *Atlantic Richfield v. Christian* is the former Anaconda Copper smelter in Butte, Montana, which includes approximately 300 square miles of surrounding property impacted by the smelter's operations. The smelter ran intermittently from 1884 to 1980. Cleanup efforts began in 1983, are projected to continue through at least 2025, and have cost $450 million thus far.

The landowners filed suit in state court in 2008, and survived summary judgment on their restoration claims before both the Montana trial and Montana Supreme courts. The U.S. Supreme Court accepted certiorari of the case based on the Montana Supreme Court's decision.

At the state court level, Atlantic Richfield opposed the landowners' attempt to create a $50 to $58 million restoration trust fund. This fund would be used to pay for soil excavation and removal work at the landowners' properties which was both more stringent and more extensive than that required by the cleanup plan approved by EPA, plus installation of a shallow groundwater barrier remedy deemed wholly unnecessary by EPA.

In opposing the landowners' claims, Atlantic Richfield asserted that the interaction of Sections 113(b) and 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, a/k/a Superfund, a/k/a the Act), stripped the Montana courts of jurisdiction. 42 U.S.C. §§ 9613(b) & 9613(h). On certiorari, the U.S. Supreme Court disagreed, and remanded the action back to the Montana courts.

MONTANA CLAIMS CAN STAY IN MONTANA COURTS

The first of Atlantic Richfield's arguments addressed by the U.S. Supreme Court was that federal courts have exclusive jurisdiction over all cleanup work associated with a Superfund site. This argument failed.[1] The Court held that CERCLA

> "does not strip the Montana courts of jurisdiction over this lawsuit. It deprives state courts of jurisdiction over claims brought under the Act. But it does not displace state court jurisdiction over claims brought under other sources of law." *Atlantic Richfield v. Christian,* slip op. at 9.

In so holding, the Court placed particular emphasis on Section 113(b), which provides that "the United States district courts shall have exclusive original jurisdiction overall controversies arising under this chapter." 42 U.S. C. § 9613(b). The Court determined that "arising under" means exactly what it says: claims "arising under" the Superfund statute belong exclusively in federal court, but state tort law claims do not "arise under" CERCLA and therefore may be heard in state court. *Id.* at 9-10.

Atlantic Richfield attempted to counter this interpretation with the text of Section 113(h), which says that

> "No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following: [list of five types of actions allowed under CERCLA, none of which applied to the parties.]" 42 U.S.C. § 9613(h).

The Court rejected this argument, observing that

> "There is no textual basis for Atlantic Richfield's argument that Congress precluded *state* courts from hearing a category of cases in §113(b) by stripping federal courts of jurisdiction over those cases in §113(h). And if that were Congress's goal, it would be hard to imagine a more oblique way of achieving it." *Atlantic Richfield v. Christian*, slip op. at 10-11.

The Court then went through a third text-based analysis, this time concentrating on the federal courts' retention of jurisdiction under Section 113(h) to hear state law claims in diversity cases, and the corresponding unreasonableness of Congress allowing state law claims to proceed in federal court but not in state court. *Id.* at 11. The Court also discussed the presumption of concurrent state and federal court

jurisdiction for most federal claims, and rejected the theory that Congress would strip state courts of jurisdiction over state law claims without ever mentioning those same state courts in the supposedly-divesting statute. *Id.* at 11-12.

Finally, the Court addressed a textual argument raised by amicus party the U.S. Department of Justice (acting for the U.S. Environmental Protection Agency), which rested on the exceptions set out at the beginning of Section 113(b): "Except as provided in subsections (a) and (h) of this section. . . ." And again, the Court rejected this interpretation of the statute, holding that the interrelationship between the exception in Section 113(b) and the jurisdictional limits set out in Section 113(h) will divest federal courts of the ability to hear claims otherwise available under Section 113(b) only if the action presents an actual challenge to a Superfund cleanup plan. *Id.* at 12-13.

RESTORATION DAMAGES ARE DISALLOWED, ABSENT EPA APPROVAL

This result was not, however, a complete win for the landowners. The Montana courts had determined that the landowners' requested restoration work was not subject to the CERCLA Section 122(e)(6) prohibition against a PRP commencing such work without EPA approval. The Montana courts reached this result by finding that the landowners were not PRPs. The U.S. Supreme Court disagreed.[2]

First, the Court found that the landowners fell squarely within the definition of a "covered person" under Section 107(a), because they were the current owners of real property included within the boundaries of a "facility" (i.e., a site). *Id.* at 14. The landowners responded that they could not be considered "owners" under the statute because the time allowed to sue them under the Superfund statutes of limitation had expired.

The Court rejected this argument as conflating PRP status with liability for response costs. The two concepts are separate and distinct. CERCLA allows even "innocent" parties to have responsibility for contaminated sites, because CERCLA is intended to be a "comprehensive" response to hazardous waste pollution.

> "Section 122(e)(6) is one of several tools in the Act that ensure the careful development of a single EPA-led cleanup effort rather than tens of thousands of competing individual ones.

> Yet under the landowners' interpretation, property owners would be free to dig up arsenic-infected soil and build trenches to redirect lead-contaminated groundwater without even notifying EPA, so long as they have not been sued within six years of commencement of the cleanup. We doubt Congress provided such a fragile remedy for such a serious problem. And we suspect most other landowners would not be too pleased if Congress required EPA to sue each and every one of them just to ensure an orderly cleanup of toxic waste in their neighborhood. A straight-forward reading of the text avoids such anomalies." *Id*. at 15 (footnote omitted).

Accordingly, because the landowners were PRPs, any cleanup plan (including the landowners' restoration work) required EPA approval.

The landowners (aided by Justice Gorsuch in dissent), attempted six other arguments to avoid this EPA-must-approve-cleanups result, all of which failed.

1. "Potentially responsible parties" under Section 122(e) and "covered persons" under Section 107(a) are two different things, and being a PRP does not mean that the landowners have responsibility as current owners under Section 107(a). The Court rejected this proposition based on a textual analysis. *Id*. at 16.
2. Interpreting Section 122(e)(6) to restrict the landowners' rights to independent cleanups "creates a permanent easement on their land, forever requiring them 'to get permission from EPA in Washington if they want to dig out part of their backyard to put in a sandbox for their grandchildren.'" According to the Court, "the grandchildren of Montana can rest easy: The Act does nothing of the sort." *Id*. (citation omitted).
3. The landowners cannot be PRPs because EPA did not give them notice of settlement negotiations as required by Section 122(e)(1). Not so, says the Court. "[E]ven if EPA ran afoul of §122(e)(1) by not providing the landowners notice of settlement negotiations, that does not change the landowners' status as potentially responsible parties." *Id*. at 18.
4. Inclusion of the "potentially responsible party" language within the settlement provisions of Section 122(e)(6) means that PRP status is only relevant in the settlement context and not to liability status under Section 107(a). The Court noted that "Congress, we are reminded, does not 'hide elephants in mouse-holes.'" *Id*. (citation omitted). But the Court did not view Section 122 as just a

mouse-hole.

> "[S]ubsection (e) is an important component of §122. It establishes a reticulated scheme of notices, proposals, and counterproposals for the settlement negotiation process. §9622(e). And the subsection places a moratorium on EPA remedial actions while negotiations are under way. §9622(e)(2)(A). It is far from surprising to find an analogous provision restricting potentially responsible parties from taking remedial actions in the same subsection." *Id*. at 19.

5. CERCLA's reservation of rights clause allows states to impose greater cleanup requirements than EPA (42 U.S.C. §9614(a)), along with its state common law savings clause (42 U.S.C. §9652(d)), and third-party non-impairment of rights clause (42 U.S.C. §9659(h)), all mean that Congress did not intend to preempt state law and render the landowners subject to the Section 122(e)(6) remedy approval requirement. To which the Court responded: "Interpreting the Act's saving clauses to erase the clear mandate of §122(e)(6) would allow the Act 'to destroy itself.'" *Id*.
6. Likewise, "[i]t is not 'paternalistic central planning' but instead the 'spirit of cooperative federalism [that] run[s] throughout CERCLA and its regulations'" when Congress requires that cleanup plans comply with ARARs, follow public notice and comment procedures, and defers EPA involvement in favor of a state if the state is already handling remediation of a site. *Id*. at 20 (citations omitted.)

NO CONTIGUOUS PROPERTY OWNER DEFENSE

Finally, the landowners argued that they were protected from PRP status by the "contiguous property owner" defense found in CERCLA Section 107(q). 42 U.S.C. §9607(q).

The Court agreed that in general, contiguous property owners are not considered to be "owners" under Section 107(q), and that the landowners' properties were contaminated by hazardous substances originating from off-parcel locations (for example, the smelter). According to the Court, however, the inquiry does not stop there. To claim the contiguous property owner defense, the landowners must prove that they meet all eight pre- and post-requisite elements of the defense, including that they "'did not know or have reason to know that the property was or could be

contaminated by a release or threatened release of one or more hazardous sub stances. §9607(q)(1)(A)(viii)(II).'" *Id*. at 21.

The landowners could not "clear this high bar." *Id.* Not only did they take title to their properties after the smelter's 585-foot high smoke stack was built and widely visible, but many of their property deeds were subject to smoke and tailings easements dating to the early 1900s. Additionally, Section 9607(q)(1)(A)(iv) requires that a contiguous property owner provide EPA and anyone performing cleanup work with full cooperation, assistance, and access. DOJ claimed that the landowners' restoration plan would dig up soil previously capped in place at their individual properties. "If that is true, the landowners' plan would soon trigger a lack of cooperation between EPA and the landowners. At that point, the landowners would no longer qualify as contiguous landowners and we would be back to square one." *Id*.

The Court remanded the case back to Montana for further proceedings consistent with the Court's opinion.

SO WHAT DOES ALL THIS MEAN?

- Parties performing cleanup work at Superfund sites where landowners disagree with EPA's remedial decisions need to be aware that the disgruntled owner is now more likely to seek common law damages, including trespass, nuisance, and strict liability (the three claims involved in the Court's opinion), either in an independent state court action or as additional claims within a federal CERCLA lawsuit.
- Such state law claims may proceed without being blocked by CERCLA Section 113(h) so long as the landowner only asks for money damages and not performance of a new or different remedy.
- If the landowner is seeking such an alternate remedy, they should have to either obtain EPA's approval of that alternate remedy or wait to implement it until the original, approved remedy is complete and, if the site is on the NPL, EPA delists it pursuant to Section §9605(a)(8)(B) and 40 CFR §300.425(e).

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[1] Justice Alito dissented from this part of the opinion, stating that it was neither necessary nor prudent to decide whether state courts have jurisdiction over the landowners claims until the landowners seek EPA approval of their restoration plans or the Montana courts reject the landowners' restoration damages claim. *Atlantic Richfield v. Christian,* slip op., Alito dissent at 1.

[2] Justices Gorsuch and Thomas dissented from the Court's ruling holding the landowners subject to the EPA remedy approval requirements of Section 122(e)(6).