CLIENT ALERT

Preemption or Pandora's Box: The Supreme Court Agrees to Review the CERCLA Federal/State Divide

Jun.13.2019

On June 10, in a case that could have a significant impact on CERCLA cleanup efforts across the country, the U.S. Supreme Court granted *certiorari* in *Atlantic Richfield Company v. Christian*, a Montana Supreme Court case involving state law claims related to environmental contamination at a Superfund site. By agreeing to hear the case, the Court appears set to resolve the conflict between the Montana Supreme Court and various federal circuits over whether CERCLA preempts or bars private landowners from bringing common law claims for environmental remediation of sites undergoing cleanup under CERCLA. Specifically, the Court will consider:

> (1) Whether a common-law claim for restoration seeking cleanup remedies that conflict with EPA-ordered remedies is a 'challenge' to EPA's cleanup jurisdictionally barred by § 113 of CERCLA;
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> (2)Whether a landowner at a Superfund site is a 'potentially responsible party' that must seek EPA's approval under CERCLA § 122(e)(6) before engaging in remedial action, even if EPA has never ordered the landowner to pay for a cleanup; and
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> (3) Whether CERCLA preempts state common-law claims for restoration that seek cleanup remedies that conflict with EPA-ordered remedies.

Petition for Writ of Certiorari, 2, *Atlantic Richfield v. Christian*, (U.S. Apr. 27, 2018) (No. 17-1498).

Underlying the state/federal preemption fight is a case involving remediation of the Anaconda Smelter Superfund site in Montana, an old copper processing facility. Atlantic Richfield Co. (ARCO) has been working with EPA since 1983 to remediate arsenic contamination at the site; cleanup efforts continue today. In 2008, a group of private landowners sued ARCO in Montana state court, seeking state-law "restoration damages" for cleanup activities beyond those that the EPA had ordered under CERCLA. In particular, the plaintiffs wanted (1) soil arsenic levels reduced to 30 times lower than EPA's target, (2) 33 percent more top soil removed than EPA ordered, and (3) several thousand feet of underground trenches built, which the EPA had considered but ultimately decided against due to concerns that the trenches might actually cause increased contamination. After the trial court held that CERCLA did not preempt the plaintiffs' claims ARCO petitioned the Montana Supreme Court for a grant of supervisory control.

ARCO pressed three arguments as to why federal law preempts plaintiffs' restoration claims, each of which the Montana Supreme Court rejected. First, ARCO argued that the restoration claim constituted a "challenge" to EPA's remedy, rendering it jurisdictionally barred by CERCLA § 113. Section 113(b) gives federal courts "exclusive original jurisdiction over all controversies arising under" CERCLA. 42 U.S.C. § 9613(b). Section 113(h), in turn, bars federal courts from reviewing "any challenges" to ongoing removal or remedial action chosen by EPA, subject to limited exceptions. 42 U.S.C. § 9613(h). As such, ARCO argues,

CERCLA bars restoration claims in all cases because they necessarily seek some remediation either in opposition or addition to EPA's response plan, thus unavoidably challenging the plan. The Montana Supreme Court rejected this argument, holding that a state tort remedy that specifies a cleanup different than that selected by EPA is not a "challenge" unless it "would stop, delay, or change the work EPA is doing." *Atl. Richfield Co. v. Montana Second Judicial Dist. Court*, 2017 MT 324, ¶ 15. According to the court, the restoration in this case would not challenge EPA's remedy because the property owners themselves would perform the restoration after EPA's remediation activities had concluded on their property.

ARCO next argued that because landowners are "potentially responsible parties" (PRPs) under CERCLA, the plaintiffs were barred from undertaking any remedial action—a requirement of pursuing restoration damages—without EPA authorization, which they lacked. 42 U.S.C. § 9622(e)(6). In response, and despite the fact that 42 U.S.C. § 9607 seemingly broadly states that all landowners are PRPs, the court held that the land owners were not PRPs because they had never been treated as such nor had there been any judicial or agency finding that they were PRPs since the property was designated a Superfund site over three decades prior.

Finally, ARCO argued that CERCLA preempted the plaintiffs' restoration claim because it would conflict with EPA's remedial plan, usurping EPA's exclusive statutory authority and frustrating the goals of CERCLA. The court concluded that CERCLA did not preempt the plaintiffs' claims, pointing to the savings clauses in CERCLA § 114(a) and § 152(d), holding that they categorically preserved the plaintiffs' ability to bring state-law restoration claims.

The Montana Supreme Court's decision was a departure from most federal case law. It is difficult to understate the potential consequences *Atlantic Richfield* could have on CERCLA cases and actors if the U.S. Supreme Court affirms. In an amicus brief, the U.S. Chamber of Commerce warned that affirming the Montana court's decision would "destroy[] the stability CERCLA promises to the business community." Brief for the U.S. Chamber of Commerce as Amicus Curiae, 4, *Atlantic Richfield v. Christian*, (U.S. May. 31, 2018) (17-1498). A win for the plaintiffs could open the door for private individuals to select and pursue their own remedies at Superfund sites around the country, despite any existing remedial plans or settlement agreements, potentially exposing defendant companies to a whole new set of unforeseen costs. ARCO has spent 36 years and $470 million dollars working to comply with EPA's remedial plan and clean up the Anaconda Smelter site. Nonetheless, it might suddenly find itself on the hook for many more years of remediation, and countless more companies who have been complying with CERCLA in good faith could face a new Pandora's box of cost and uncertainty.

That said, it is notable that the Court granted review against the recommendation of the Solicitor General, who thought that review was premature, even though he agreed that the Montana court erred. Thus there are at least four Justices who strongly believe that review (and perhaps reversal) is warranted.

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