

High Court Superfund Case Could Limit Private Cleanup Suits

By Juan Carlos Rodriguez

Law360 (June 10, 2019, 10:26 PM EDT) -- The U.S. Supreme Court could short-circuit a Montana ruling that has the potential to expose companies to unexpected Superfund site cleanup costs beyond those they agree to in deals with the federal government.

The court granted review Monday of the Montana Supreme Court's decision upholding a lower state court's ruling that residents can sue BP America Ltd. unit Atlantic Richfield Co. for costs related to cleaning up their properties, even though the company already settled with the U.S. Environmental Protection Agency over the site. While the Montana high court would allow the claim to proceed to trial, Arco is hoping the justices reverse that decision.

Three questions from the Montana Supreme Court ruling will be reviewed by the justices, including whether, as Arco contends, the residents' claims are preempted by the Comprehensive Environmental Response, Compensation and Liability Act. The residents' "restoration damages" claims are intended under Montana law to compensate parties if other settlements don't provide "full compensation" for their losses.

Not every state permits restoration damages claims, and as the U.S. Office of the Solicitor General noted in its amicus brief, no federal court of appeals or other state court of last resort has addressed whether CERCLA preempts that specific type of claim, so the high court will be breaking ground on the question.

But plaintiffs in states that allow such claims have pursued damages allegedly outside CERCLA's scope for years with varying degrees of success, said Mark Schneider, a partner at Perkins Coie LLP and chair of the firm's energy and environmental litigation practice. He said the justices' decision to grant review means they think there's at least something to double-check in the Montana case, and their ruling will clarify when those types of claims will be allowed, if not narrow the options for plaintiffs.

"It's a very significant issue that will affect many lawsuits virtually throughout the country," Schneider said.

The justices will also review whether the residents' lawsuit presents a challenge to the EPA's cleanup plan, in which case CERCLA would block the action. The residents have claimed the damages they're seeking would not interfere with the EPA's plan, and Montana's high court agreed.

If the restoration damages are eventually awarded to the plaintiffs, the money will be held in a trust and

spent on the landowners' efforts to remove the arsenic pollution on their properties, the residents said in their reply brief. But that would mean remediation beyond what the EPA ordered, including trying to achieve a much lower level of arsenic, the removal of more topsoil, and the digging of underground trenches and barriers.

"The notion that private parties can, plot by plot, institute their own cleanup actions, is troubling," said Peter Gray, a partner at Crowell & Moring LLP. "How would EPA even track that? Or would they, in their discretion, do nothing? That leaves Arco in a very unpleasant position, I would think."

The third question for the justices is whether the plaintiffs in the Montana case are "potentially responsible parties" as defined under CERCLA, which would mean they must get EPA authorization before proceeding with any remediation. Gray said the section of the law at issue is "pretty obscure," and the solicitor general's office said the EPA isn't a party to the case or bound by the Montana Supreme Court's finding in the potentially responsible parties issue.

The solicitor general's office told the high court in its brief it agrees with Arco's position that the Montana courts are wrong on all three questions, but advised the justices to let the residents' lawsuit play out in state court first. Gray said they may have been motivated to take the case in spite of that advice because they saw the potential for a waste of court resources.

"Why should they force Arco to go through all of this misery if it's all founded on improper constructions of CERCLA?" he said. "I view [the court taking the case] as favorable to Arco."

David Mandelbaum, a partner at Greenberg Traurig LLP and co-chair of the firm's environmental practice, said the case has big implications any way it turns out. He said if the residents win, it would invigorate plaintiffs to bring state law damages claims if they are neighbors of Superfund sites.

"That may affect the way parties negotiate settlements, deal with remedy selection and worry about making a record that they're somehow leaving some impact," he said. "You'd be a lot more sensitive to that if you knew that there was a high likelihood of a toxic tort case."

On the other hand, if the justices side with Arco, private cases like the Montana plaintiffs' will be harder to pursue and could impact whether a company decides to settle under CERCLA or another state regime.

"It might in some instances shift whether you wanted to have your cleanup done under CERCLA or under state voluntary response statute because you could be more confident of finality if you got it under CERCLA," Mandelbaum said.

--Additional reporting by Michael Phillis.