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CTS Corp. v. Waldburger

Guest Editor: Roger Bernhardt
Professor of Law
Golden Gate University School of Law

Fellow DIRTers: A few months ago, the United States Supreme Court decided that the limitations period preemption of CERCLA §309 does not apply to state statutes of repose (rather than of limitations). But this help – or hurts – only if practitioners know what kind of statutes are operative in their own jurisdictions. This column was an attempt by me to figure that for California.

According to the US SCt 2014 decision in *CTS v. Waldburger*, the time period for bringing a private cause of action for toxic torts is or is not preempted by CERCLA depending on whether it was set by a local statute of limitations or local statute of repose. That ruling triggered this column in the California CEB Real Property Law Reporter as to which kind of rule we have. (It probably offers no help to anybody elsewhere.

PRIVATE CLEAN-UP CAUSES OF ACTION AND FEDERAL PREEMPTION

Introduction

The biggest problem that California practitioners will have with the new decision by the United States Supreme Court in *CTS Corp. v. Waldburger* (2014) ___ US ___, 134 S Ct 2175, is that it comes out of North Carolina. It gives no California reference for its holding that §309 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USC §9258) preempts state statutes of limitations that apply to common law actions by private individuals for toxic torts and replaces their normal triggering event (the date the cause of action accrues) with a "federally required commencement date" starting when "the plaintiff knew (or reasonably should have known)" that his personal injuries or property damage were caused by the defendant's release of hazardous substances, but is subject to an express exception for time limits based on state *statutes of repose* rather than on *statutes of limitations*, according to the majority opinion (joined in by all but Justices Ginsburg and Breyer). Which do we have in California: limitations or repose periods?

The high court's actual decision meant that a North Carolina statute that provided "no cause of action shall accrue more than ten years from the last act or omission of the defendant giving rise to the cause of action" amounted to a statute of repose (depending as it did on the last culpable act of the defendant rather than on the accrual of the cause of action for the plaintiff), and was therefore *not* preempted by CERCLA's replacement discovery rule. Since the defendant had sold the land (and therefore stopped doing

anything on it) in 1987, more than 10 years before the plaintiff's lawsuit was filed in 2011, it did not matter that the plaintiffs had only learned in 2009 that their well water was contaminated (when the Environmental Protection Agency (EPA) informed them of that fact). Their action was barred despite their delayed discovery.

Before this decision came down, many thought the rule had been construed the other way. The Ninth Circuit had held but a few years earlier that CERCLA §309 (42 USC §9658) preempted statutes of repose as well as statutes of limitations. *McDonald v. Sun Oil Co.* (9th Cir 2008) 548 F3d 774, 779. But now that the Supreme Court has spoken, state statutes of repose start to do their job whenever the state's statutory language says they start, regardless of how much later contamination is discovered. That distinction sends California counsel back to local law books to find out how to measure how much time is left, if any, in toxic tort litigation.

What Is the California Time Period?

While the California Carpenter-Presley-Tanner Hazardous Substance Account Act requires that cost recovery actions be commenced within 3 years "after completion of the removal or remedial action has been certified by the department" [of Toxic Substance Control] (Health & S C §25360.4), that time period is for actions brought by the government for clean-up recovery, not for tort actions brought by private individuals, so I doubt that CERCLA's preemption of actions for "personal injuries or property damages" applies to it at all. Thus, the trigger for governmental action in California probably remains the Health & S C §25360.4 standard of departmental certification of completed remedial action, rather than the federal substitute of when the contamination was first discovered. (I also suspect that, in any event, the federal trigger would always come first, because discovery inevitably precedes clean-up.) This nonpreemption probably is also true for the 5-year period of CCP §338.1 (which explicitly starts with discovery by the California EPA). So, owners subject to clean-up actions brought by the government probably do not need to reconsider their limitations defense strategy.

Code of Civil Procedure §338(b) is much more on point, imposing a 3-year limit for bringing an action for "trespass upon or injury to real property." Other subsections of the statute dealing with water (§338(i)) and air (§338(k)) have explicit discovery triggers, but all of them deal with private personal injury or property damage actions and seem written as statutes of limitations, which makes them ostensibly subject to the preemption of CERCLA §309 (42 USC §9658).

What effect this will have on toxic tort litigation is more complicated. The plaintiffs in *Waldburger* brought a "state law nuisance action" against former owners for having polluted the property. In California, the time period for a nuisance action depends on whether it is regarded as permanent or continuing: If a nuisance is permanent (*i.e.,* not abatable), then the CCP §338(b) 3-year period commences as of the time it was first

created. On the other hand, if the nuisance is a continuing one, then every repetition of it creates a new wrong, entitling the plaintiff to recover for the last 3 years of harm to its property, regardless of when the defendant started (or perhaps even stopped, if the contamination is still spreading), and probably regardless of when the plaintiff discovered the harm. *Mangini v. Aerojet-General Corp.* (1991) 230 CA3d 1125, 1142, reported at 14 CEB RPLR 312 (Nov. 1991). Compare *Mangini* with *Wilshire Westwood Assocs. v. Atlantic Richfield Co.* (1993) 20 CA4th 732, 744, reported at 17 CEB RPLR 75 (Feb. 1994).

These California cases should mean that CERCLA will preempt California statutes of limitations in lawsuits involving permanent nuisances, but probably has no effect on those cases based instead on a continuing nuisance doctrine. The initial creation date of a permanent nuisance would be replaced with the date of its discovery, whereas the ongoing harm of a continuing nuisance could well outlast its initial discovery. The same outcome also may be true for a plaintiff's related theory of trespass, at least under *Mangini,* 230 CA3d at 1141.

On the other hand, the preemption by CERCLA should not apply to CCP §337.15(a)(2), which provides essentially as follows (leaving out some of its cluttering language): "No action may be brought to recover damages from any person who performs construction of an improvement to real property more than 10 years after the substantial completion of the improvement for [i]njury to property [from] any latent deficiency" in the construction. That section is clearly written as a statute of repose, much like the North Carolina statute considered by the Supreme Court in *Waldburger*. Not only is it *not* federally preempted, but locally it also trumps competing statutes of limitations, acting as a cap on how long a plaintiff has to sue, regardless of otherwise applicable limitations periods. *Chevron U.S.A. Inc. v. Superior Court* (1994) 44 CA4th 1009, 1018. If a plaintiff's claim is considered shielded by the protective umbrella of §337.15, then a defendant who more than 10 years ago substantially completed an improvement that polluted is immune from liability, regardless of whether its behavior constituted a continuing nuisance or trespass or when it was first discovered by the plaintiff, as long as it is considered a "latent defect" coming within §337.15.

Nuisances and Trespasses by Prior Owners

Both CERCLA and the Carpenter-Presley-Tanner Hazardous Substance Account Act purport not to preempt private causes of action over and above the statutory rights of contribution and cost recovery. 42 USC §9614(a)–(c); see Health & S C §25366. But that does not mean that any such common law causes of action do exist. Can former owners of contaminated property be held liable to current owners for nuisance, trespass, or negligence?

A question not asked by the Supreme Court in *Waldburger* was how a former owner of a piece of property could ever be liable to the current owner of the same land for a

nuisance, given that our common understanding of nuisance is that it results from an offensive use of *neighboring* lands, *i.e.,* one owner has suffered from acts committed by another—an adjacent owner. See *Hydro-Manufacturing v. Kayser-Roth Corp.* (RI 1994) 640 A2d 950, 957 (owner precluded from pursuing private nuisance action against predecessor-in-interest). The previous owner of the same property, who may have polluted but then sold the property and physically left the land, hardly seems to qualify as a neighbor. The same conceptual obstacle besets trespass liability. But in California, the Third District Court of Appeal in *Mangini* rejected that limitation (230 CA3d at 1141). Because that opinion has been endorsed by the Fifth District (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 CA4th 334, 345, reported at 17 CEB RPLR 27 (Jan. 1994)) and by the Second District (*KFC W., Inc. v. Meghrig* (1994) 23 CA4th 1167, 1182, reported at 17 CEB RPLR 230 (July 1994)), it appears to be pretty solid California law. Former owners may be guilty of having committed a nuisance or a trespass by contaminating their land and then walking away from it, and then the time periods discussed previously are applicable. Even intermediate owners who were not themselves polluters might face exposure under CC §3483. ("Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefor in the same manner as the one who first created it.") A recovery of damages for nuisance may well be preferable to one for statutory contribution in terms of reimbursing the plaintiff for his personal injuries, diminished property value, and other costs or damages.

Negligence

It is clear that a landowner who did know of the pollution when she purchased may sue her seller (and maybe also the seller's seller) for misrepresentation, if there was intentional or negligent misrepresentation or concealment about it. Our Real Estate Transfer Disclosure Statement requires a seller to disclose if he is "aware" of any "environmental hazard" on his property (CC §1102.6) and our Hazardous Substance Account Act mandates disclosures to any buyer or lessee by any owner who "knows, or has reasonable cause to believe" that a release occurred. Health & S C §25359.7. But what about the seller who did not know that the underground fuel tank he had long ago installed had since sprung a leak, or about the seller who did not even know that there was a tank underground because it had been put there so long ago by a predecessor? Have those former owners breached duties of care to their buyers?

I am not sure that any California appellate court has yet explicitly addressed this issue. *Mangini* assumed that a negligence theory might lie, but did not get into my questions by virtue of holding that the buyer had reason to suspect pollution more than 3 years earlier, meaning that CCP §338(b) had already run. *Mangini*, 230 CA3d at 1152. *Newhall* held that polluting, which had occurred back in the 1950's, had even back then violated various statutory prohibitions against discharging waste into state waters, justifying treating it as negligence per se action (under Evid C §669), but then went on to treat the

plaintiff's negligence claims (careless polluting?) as negligent misrepresentation claims instead (not disclosing the polluting). *Newhall*, 19 CA4th at 351.

Was it negligent for a landowner to pollute his property 100 years ago, when there were no clean air, water, and land laws? Absence of any negligence is no defense when the government is ordering the clean-up, because our Superfund rules impose strict liability for merely being an owner or operator of contaminated land (42 USC §9607) (although that is subject to a narrow and complicated exception for "innocent" landowners who did not know or have reason to know of the earlier pollution)—but is that also true when the suit is brought by a nongovernmental private owner? The authors of the Toxic Torts Practice Guide opine that

> An action for negligence is inappropriate because prior owners of property do not owe a remote purchaser a duty to maintain property or to refrain from activity that may harm property. CERCLA provides for contribution protection. Therefore, extending common law negligence doctrine to create a duty running from a predecessor in interest to a remote purchaser is unwarranted.

O'Reilly & Gottlieb, Toxic Torts Practice Guide §6.6 (2014 ed). California does not hold former owners liable for leaving their land in dangerous condition once they have sold it, on the ground that they aren't permitted to reenter later on to cure things. See *Lewis v. Chevron U.S.A, Inc.* (2004) 119 CA4th 690, 692, reported at 27 CEB RPLR 130 (Sept. 2004) (no liability for personal injury from defective copper water pipe that burst). Does that principle apply only to dangerous conditions that were nontoxic? Another court has opined that polluting by a landowner *before* there were any statutes prohibiting such pollution is not negligence. *Beck Dev. Co. v. Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1207, reported at 19 CEB RPLR 161 (July 1996). But when the polluting occurred after those environmental statutes came into effect, the result may be different.

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