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CERCLA's Jurisdictional Bar To Medical Monitoring Claims

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Law360, New York (August 18, 2017, 1:42 PM EDT) -- Medical monitoring claims against the United States Department of the Navy have recently foundered on the shoals of the Comprehensive Environmental Response, Compensation, and Liability Act's jurisdictional rules.[1] In August 2016, plaintiffs sued the Navy in Pennsylvania state court asserting claims under Pennsylvania's Hazardous Sites Cleanup Act (HSCA) for medical monitoring and other injunctive relief based on alleged water contamination exposure from two nearby U.S. military facilities. These facilities have been listed as federal Superfund sites since 1989 and 1995, and the CERCLA investigation and cleanup activities are ongoing at both locations.

The Navy removed the lawsuit to the Eastern District of Pennsylvania under 42 U.S.C. § 1442 and then moved to dismiss for lack of subject matter jurisdiction under CERCLA. The district court, Judge Gerald J. Pappert presiding, granted the Navy's motion. The court first held that the medical monitoring claim was a "challenge" to the ongoing CERCLA cleanup, which divests the federal courts of jurisdiction under 29 U.S.C. § 9613(h).[2] The court then held that because subpart (b) of Section 9613 gives federal courts exclusive jurisdiction over disputes arising under CERCLA, the case had to be dismissed instead of remanded to state court.[3]

The court's holding that the medical monitoring claim presents a "challenge" to a CERCLA cleanup forms the linchpin of this result. Before Giovanni v. U.S. Department of the Navy, few federal courts had directly addressed the question of whether a state law medical monitoring claim could challenge an ongoing CERCLA removal or remedial action under Section 9613(h). Yet, of those few decisions — all more than 20 years old — most held that medical monitoring claims are not the sort of challenge that can deprive federal courts of jurisdiction. Giovanni breaks ranks, and if affirmed on the pending appeal, sets the Third Circuit on course to split with the Ninth Circuit.

In passing Section 9613(h) as part of the 1986 Superfund Amendments and Reauthorization Act, Congress sought to prevent litigation that would delay the prompt cleanup of hazardous wastes that threatened public health.[4] To that end, Section 9613(h), despite having some exceptions and limitations, generally strips federal courts of jurisdiction "to review any challenges to removal or remedial action selected under" CERCLA's primary response provision (Section 9604) until remediation of the site is complete.[5] Since CERCLA remediation can last for decades — the sites in Giovanni are

examples — and remedial actions can sometimes cause irreparable harm, Section 9613(h)'s "blunt withdrawal of jurisdiction"[6] has the potential to occasionally produce a harsh result. In Boarhead Corp. v. Erickson, for example, the plaintiff sued to force the U.S. Environmental Protection Agency to assess the impact of its cleanup plan on Native American remains and artifacts at the site.[7] Though it recognized that "delayed review may mean no effective review at all" given the possible irreparable harm to the site's historical value, the Third Circuit held that the federal courts were powerless to prevent the cleanup from proceeding.[8]

Whether a plaintiff can avoid exclusion from the courts hinges on whether the plaintiff's claim constitutes a "challenge" to an ongoing cleanup. In Boarhead, the plaintiff's attempt to stop the EPA from proceeding with its plan was obviously such a challenge, but application of Section 9613(h) can be less clear where the remedy sought might affect or supplement the cleanup without directly stopping or altering it. The general standards for identifying a "challenge" ask if the suit "interferes with," "impacts" or "calls into question," the cleanup plan,[9] though such language in essence substitutes another set of general terms for the original statutory text. The D.C. Circuit has further offered that "it may be necessary to assess the nexus between the nature of the suit and the CERCLA cleanup: the more closely related, the clearer it will be that the suit is a 'challenge.'"[10] And not every lawsuit that might result in the diversion of resources from a cleanup action (e.g., enforcing minimum wage laws) is a "challenge" under Section 9613(h).[11]

This brings us to the medical monitoring claim at issue in Giovanni. Medical monitoring typically requires the liable party to reimburse the plaintiffs' costs for future medical exams and diagnostic testing. Medical monitoring is a controversial remedy; it has not been accepted in all states,[12] but it is available in Pennsylvania as a common law tort or under the HSCA.[13]

In deciding whether it was a "challenge" to the ongoing Superfund cleanup, the Giovanni court focused on medical monitoring's place within the spectrum of activities comprising the "removal or remedial action." The court's rationale seems to be that if medical monitoring is an option for a removal or remedial action, then it is up to the EPA and the parties crafting the cleanup plan to include it or not. An interloper's attempt to insert medical monitoring as a new component of the remedial action or to run in parallel with studies contemplated by the plan would therefore "challenge" the cleanup. The court found support in the statutory definitions of "removal," which includes "actions … necessary to prevent, minimize, or mitigate damage to the public health," and "remedial action," which includes "any monitoring … required to … protect the public health."[14] Indeed, Section 9604 specifically empowers the Agency for Toxic Substances and Disease Registry to "initiate a health surveillance program," including "periodic medical testing … to screen for diseases."[15] The court also pointed out that the plaintiffs' attempt to impose medical monitoring liability would require it to resolve a "dispute about who is responsible for the hazardous site and who is responsible for its costs,"[16] which the Third Circuit previously explained was contrary to Congress's intent for section 9613(h).[17]

Giovanni rejects three decisions from outside the Third Circuit holding that medical monitoring claims are not challenges within the meaning of Section 9613(h): Durfey v. E.I. DuPont De Nemours & Co.,[18] Yslava v. Hughes Aircraft Co.,[19] and Stepp v. Monsanto Research Corp.[20] The Giovanni court criticized these cases for illogically concluding that medical monitoring was outside the scope of "removal or remedial action" because it is not recoverable as a CERCLA "response cost."[21]

In Durfey, the Ninth Circuit used the same underlying rationale as the Giovanni court: "if medical monitoring were a 'removal' or 'remedial' action, then medical monitoring claims would 'challenge' 'removal' or 'remedial' actions and would be barred by CERCLA § 113(h) until completion of the cleanup

activities."[22] But instead of analyzing the statutory definitions of "removal" and "remedial action," the Ninth Circuit asked if medical monitoring is included within the meaning of "response" for which costs are recoverable under Section 9607. If it is not a "response" cost, then the Ninth Circuit reasoned it must not be a "removal" or "remedial action," and thus not a "challenge." The opinion only briefly discusses whether medical monitoring challenges an ongoing cleanup, concluding without elaboration that medical monitoring was not directly related to "establishing the effects on and dangers to human health" at the site, which was one of the goals of the cleanup.[23]

The district court in Yslava followed the same response-cost logic as Durfey,[24] but also provided more analysis of the impact of medical monitoring on the cleanup. The court observed that a medical monitoring program funded by the responsible party would not delay or interfere with the cleanup activities.[25]

Stepp relied primarily on its conclusion that in seeking medical monitoring, the plaintiffs were not asking the court to review the remediation plan.[26] The Stepp court added that Section 9613(h) applies only to claims under federal law, not state law, but it appears that the weight of authority is contrary.[27] In Redland Soccer Club Inc. v. Department of the Army of the U.S., the Middle District of Pennsylvania invoked 9613(h) to dismiss state law claims under the same statute at issue in Giovanni.[28] Furthermore, the jurisdictional bar of Section 9613(h) explicitly applies to actions under state law "which is applicable or relevant and appropriate under section 9621 … (relating to cleanup standards)."[29] Other Circuits seem to find that 9613(h) encompasses any state law action that could qualify as a challenge to a CERCLA cleanup.[30]

In each of these medical monitoring decisions, including Giovanni, a factual analysis of whether medical monitoring interferes with an ongoing cleanup seems to be a secondary concern, to the extent that it is undertaken at all. Durfey, Yslava and Giovanni instead focus most of their attention on whether medical monitoring is, by statutory definition, a component of a CERCLA "removal" or "remedial action," and then syllogistically reach their holding from that premise. According to Giovanni, medical monitoring is included within the meaning of "removal" or "remedial action." In Durfey and its progeny, it is not.

Giovanni is pending appeal to the Third Circuit. The Third Circuit may therefore be on course to split with the Ninth Circuit if it affirms the district court's ruling that it lacked jurisdiction under Section 9613(h), or, if it reverses the district court, add to the weight of the pre-Giovanni authorities finding that medical monitoring lawsuits do not challenge ongoing CERCLA cleanups.

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[1] Giovanni v. U.S. Department of the Navy, No. 16-4873, 2017 WL 2880749 (E.D. Pa. July 6, 2017).

[2] Id., at *5.

[3] Id., at *7.

[4] See, 132 Cong. Rec. 28,441 (Oct. 3, 1986) (Sen. Thurmond).

[5] Clinton Cty. Comm'rs v. U.S. E.P.A., 116 F.3d 1018, 1022-23 (3d Cir. 1997).

[6] North Shore Gas Co. v. U.S. E.P.A., 930 F.2d 1239, 1244 (7th Cir. 1990).

[7] Boarhead Corp. v. Erickson, 923 F.2d 1011, 1014-15 (3d Cir. 1991).

[8] Id., at 1021-22.

[9] See, El Paso Natural Gas Co. v. U.S., 750 F.3d 863, 880 (D.C. Cir. 2014); Cannon v. Gates, 538 F.3d 1328, 1335 (10th Cir. 2008); Broward Gardens Tenants Ass'n v. U.S. E.P.A., 311 F.3d 1066, 1072 (11th Cir. 2002); McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 329 (9th Cir. 1995).

[10] El Paso Natural Gas, 750 F.3d at 880.

[11] MESS, 47 F.3d at 330.

[12] E.g., Henry v. Dow Chemical Co., 701 N.W.2d 684 (Mich. 2005).

[13] Giovanni, 2017 WL 2880749, at *4 n.5.

[14] Id. at *4 (citing 42 U.S.C. § 9601(23) and (24)).

[15] 42 U.S.C. § 9604(i)(9).

[16] Giovanni, 2017 WL 2880749, at *4 (internal quotation marks and citations omitted).

[17] Boarhead, 923 F.2d at 1019.

[18] 59 F.3d 121 (9th Cir. 1995).

[19] 845 F. Supp. 705 (D. Ariz. 1993).

[20] No. C-3-91-468, 1993 WL 1367349 (S.D. Ohio Sept. 30, 1993).

[21] Giovanni, 2017 WL 2880749, at *5.

[22] Durfey, 59 F.3d at 125.

[23] Id. at 126.

[24] Yslava, 845 F. Supp. at 709.

[25] Id. at 710.

[26] Stepp, 1993 WL 1367349 at *3.

[27] Id.

[28] Redland Soccer Club Inc. v. Dep't of the Army of the U.S., 801 F. Supp. 1432, 1436 (M.D. Pa. 1992).

[29] 42 U.S.C. 9613(h).

[30] See New Mexico v. General Elec. Co., 467 F.3d 1223, 1249 (10th Cir. 2006); Fort Ord Toxics Project Inc. v. Cal. E.P.A., 189 F.3d 828, 831 (9th Cir. 1999).
