McDonald v. Sun Oil: The Ninth Circuit's Constitutionally Questionable Expansion of CERCLA's Toxic Tort Discovery Rule

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When Congress enacted the Superfund Amendments and Reauthorization Act (SARA) in 1986,[1] it included a provision to address what was perceived as a significant shortcoming in state law. Many states' statutes of limitation at the time began to run when a plaintiff was first injured, whether or not the plaintiff was aware of the injury or its cause.[2] In the case of a long-latency disease, allegedly caused by past exposure to hazardous substances, the limitation period could expire long before the plaintiff was aware that he or she even had a claim.[3]

Congress sought to address this shortcoming by using SARA to add a federal "discovery rule" to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.[4] The new provision added to CERCLA, in §309, ensured that state statutes of limitation would not begin to run until "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."[5] This federally required commencement date ensured that a plaintiff allegedly injured by exposure to hazardous substances would not be procedurally barred from bringing a claim before the plaintiff was aware of his or her injury and its cause.

Section 309, however, does not explicitly address state-law rules of repose. Rules of repose, like statutes of limitation, set a time limit within which a plaintiff can bring a claim. Unlike procedural statutes of limitation, though, rules of repose are considered the "substantive doctrine of the State, eliminating a cause of action, irrespective of its date of accrual."[6]

On November 19, 2008, the U.S. Court of Appeals for the Ninth Circuit issued an opinion in *McDonald v. Sun Oil Co.*,[7] holding that the federal discovery rule in CERCLA §309 preempted Oregon's statute of repose for negligent injury to person or property. The Ninth Circuit's opinion, reviving a plaintiff's claims that otherwise would have been barred, conflicts with the only other circuit court to have addressed this issue.[8] In holding that CERCLA §309 preempts a substantive state rule of repose, the court's opinion raises serious constitutional questions about due process for defendants and the revival of long extinct claims.

I. Rules of Repose

Rules of repose are similar to statutes of limitation, but serve a distinct purpose. A statute of limitation extinguishes an injured party's right to sue once a cause of action accrues (in other words, it imposes a limit on the amount of time a plaintiff has to sue once he or she is injured by a tortious act), while a rule of repose extinguishes the right to sue after a period of time following the completion of an allegedly tortious act, regardless of whether a plaintiff has been injured or a plaintiff's injury is manifest.[9] The rule of repose is thus broader than a statue of limitations: "While a statute of limitations generally is procedural and extinguishes the remedy rather than the right, . . . repose is substantive and extinguishes both the remedy and the actual action."[10]

Most states have repose statutes covering a broad range of actions that can implicate injury from hazardous substances within the scope of CERCLA §309, including actions for injury occurring after completion of improvement to realty,[11]

1. Pub. L. No. 99-499, 100 Stat. 1613 (1986).
2. *See, e.g.*, N.Y. Civ. Prac. Law §214 (1970); Pa. Const. Stat. Ann. §5524 (1985).
3. *See, e.g.*, Ross v. Johns-Manville Corp., 766 F.2d 823 (3d Cir. 1985); Steinhardt v. Johns-Manville Corp., 430 N.E.2d 1297 (N.Y. 1981).
4. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
5. 42 U.S.C. §9658.
6. Moore v. Liberty Nat'l Ins. Co., 108 F. Supp. 2d 1266, 1274 (N.D. Ala. 2000).
7. No. 06-35683 39 ELR 20283 (9th Cir. Nov. 19, 2008).
8. That case, *Burlington Northern & Santa Fe Railway Co. v. Skinner Tank Co.,* 419 F.3d 355 (5th Cir. 2005), is discussed further, *infra*.
9. *See, e.g.*, P. Stolz Family Ltd. Partnership v. Daum, 355 F.3d 92, 102 (2d Cir. 2004); Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1217-18 (11th Cir. 2001).
10. 51 Am. Jur. 2d *Limitation of Actions* §32 (2000).
11. *See* Alaska Stat. §09.10.055 (10-year limit); A.R.S. §12-552 (8-year limit); A.C.A. §16-56-112 (4-year limit); Cal. C.C.P. §337.15 (10-year limit); C.R.S. §13-80-104 (6-year limit); Conn. Gen. Stat. §52-584a (7-year limit); 10 Del. Code. Ann. §8127 (6-year limit); D.C. Stat. §12-310 (10-year limit); Fla. Stat. §95.11 (10-year limit); Ga. Code §9-3-51 (8-year limit); Haw. Rev.

actions for negligent injury to the person or property of another,[12] and products liability actions against a manufacturer or seller of a product.[13]

These "[s]tatutes of repose are motivated by 'considerations of the economic best interest of the public as a whole and are . . . based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.'"[14] As such, rules of repose are "based solely upon the passage of time . . . and [are] not based upon concepts of accrual, notice or discovery—concepts that are applicable to statutes of limitation."[15] A statute of repose creates a "right not to be sued," rather than a "right to sue," and establishes "a substantive right to be free from liability after a legislatively determined period."[16]

II. CERCLA §309 Preemption of State Statutes of Repose

For many years after CERCLA §309 was enacted, courts were able to avoid answering the difficult question of whether the provision preempted state repose statutes as well as statutes of limitation. Courts dodged the issue by finding that the plaintiff's cause of action was not covered by CERCLA §309, making it unnecessary to reach the question of whether preemption would occur. For example, in *Covalt v. Carey Canada Inc.*,[17] a plaintiff who was exposed to asbestos brought a product liability action against the supplier of the asbestos. The supplier moved for summary judgment on the grounds that Indiana's 10-year statute of repose for product liability actions had expired. The district court denied the motion and the defendant appealed. The U.S. Court of Appeals for the Seventh Circuit reversed, finding that CERCLA §309 did not apply to the plaintiff's claim because the asbestos had not been "released into the environment from a facility."[18]

Eventually, though, courts were presented with cases that forced them to decide whether CERCLA §309 preempted state statutes of repose. Courts are now split on whether §309 applies to state statutes of repose. District courts in Oregon,[19] California,[20] and Kansas[21] have determined that §309 does preempt state statutes of repose, while the U.S. District Court for the Southern District of Alabama[22] and the South Dakota Supreme Court[23] determined that preemption does not apply.

In 2005, the U.S. Court of Appeals for the Fifth Circuit became the first circuit to directly address the application of CERCLA §309 to state statutes of repose. In *Burlington Northern & Santa Fe Railway Co. v. Skinner Tank Co.*,[24] the Fifth Circuit considered whether CERCLA §309's discovery rule applied to Texas' 15-year statute of repose for products liability claims against manufacturers. The court focused on the plain language of the statute and determined that §309 "does not extend to statutes of repose" like the Texas statute because it only mentions statutes of limitation—the language Congress used simply does not include statutes of repose.[25] Because "the differences between statutes of limitations and statutes of repose are substantive, not merely semantic," the court was bound by the plain language of the statute unless Congress had expressed a contrary intent.[26] Finding none, the court held that CERCLA §309 did not preempt Texas' statute of repose for products liability claims.

III. *McDonald v. Sun Oil Co.*: The Ninth Circuit Weighs In

Three years after *Burlington Northern*, the Ninth Circuit rejected the Fifth Circuit's analysis and extended §309's dis-

Stat. §657-8 (10-year limit); Idaho Code Ann. §5-241 (6-year limit); 735 Ill. Comp. Stat. 5/13-214 (10-year limit); Ind. Code §32-30-1-5 (10-year limit); Iowa Code §614.1 (15-year limit); Kan. Stat. Ann. §60-513 (10-year limit); La. Rev. Stat. 9:2772 (5-year limit); Md. Code Ann., Cts. & Jud. Proc. §5-108 (20-year limit); Mass. Gen. Laws Ann. ch 260 §2B (6-year limit); Mich. Comp. Laws Ann. §600.5839 (10-year limit); Minn. Stat. §541.051 (10-year limit); Miss. Code Ann. §15-1-41 (6-year limit); Mo. Rev. Stat. §516.097 (10-year limit); Neb. Rev. Stat. §25-223 (10-year limit); Nev. Rev. Stat. §11.203, 11.204 (10-year limit); N.H. Rev. Stat. §508:4-b (8-year limit); N.J. Stat. Ann. §2A:14-1.1 (10-year limit); N.C. Gen. Stat. §1-50 (6-year limit); N.D. Cent. Code §28-01-44 (10-year limit); 42 Pa. Cons. Stat. §5536 (12-year limit); R.I. Gen. Laws §9-1-29 (10-year limit); S.C. Code Ann. Regs. §15-3-640 (8-year limit); S.D. Codified Laws 15-2A-3 (10-year limit); Tenn. Code Ann. §28-3-202 (4-year limit); Tex. Civ. Prac. & Rem. Code Ann. §16.008 (10-year limit); Utah Code Ann. §78B-2-225 (9-year limit); Va. Code Ann. §8.01-250 (5-year limit); Wash. Rev. Code §§4.16.300, 4.16.310 (6-year limit); Wis. Stat. §893.89 (10-year limit); Wyo. Stat. Ann. §1-3-111 (10-year limit).

12. *See, e.g.*, Or. Rev. Stat. §12.115(1) (10-year limit).
13. *See* Conn. Gen Stat. §52-577a (10-year limit); Fla. Stat. §95.031 (12 or 20-year limit); Ga. Code Ann. §51-1-11 (10-year limit); Idaho Code §6-1403 (10-year limit); Ind. Code §34-20-3-1 (10-year limit); Iowa Code §614.1 (15-year limit); Kan. Stat. Ann. §60-3303 (10-year limit); Ky. Rev. Stat. Ann. §411.310 (5-year limit); Neb. Rev. Stat. §25-224 (10-year limit); N.C. Gen. Stat. §1-50(a)(6) (6-year limit); Or. Rev. Stat. §30.905 (10-year limit); R.I. Code Ann. 2125.02 (10-year limit); Tex. Code. Ann. §29-28-103(a) (10-year limit); Wash. Rev. Code §7.72.060 (12-year limit).
14. Jones v. Saxon Mortgage, Inc., 537 F.3d 320, 327 (4th Cir. 1998).
15. Ex parte Liberty Nat'l Ins. Co., 825 So. 2d 758, 764-65 (Ala. 2002); *see also, e.g.*, American Gen. Life & Accident Ins. Co. v. Underwood, 886 So. 2d 807, 812 (Ala. 2004) ("repose does not depend on 'accrual' because the concept of accrual sometimes incorporates other factors, such as notice, knowledge, or discovery").
16. Burlington Northern & Santa Fe Railway Co. v. Skinner Tank Co., 419 F.3d 355, 363 (5th Cir. 2005) (quoting Cadle Co. v. Wilson, 136 S.W.3d 345, 350 (Tex. App. 2004)).
17. 860 F.2d 1434 (7th Cir. 1988).
18. *Id.* at 1436. Other courts used similar grounds to avoid addressing the question. *See, e.g.*, First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862 (4th Cir. 1989) (CERCLA does not cover plaintiff's asbestos claim to recover costs of removing asbestos from interior of building); Covalt v. Carey Canada Inc., 860 F.2d 1434 (7th Cir. 1988) (plaintiff's claim is not covered by CERCLA §309 because exposure to asbestos was in the workplace and thus the asbestos was not "released into the environment"); Electricity Power Bd. of Chattanooga v. Westinghouse Elec. Corp., 716 F. Supp. 1069 (E.D. Tenn. 1988) (plaintiff's cause of action was not covered under CERCLA §309 because the toxic dielectric fluid was not "released into the environment" and was not "from a facility"); Knox v. AC & S, Inc., 690 F. Supp. 752 (S.D. Ind. 1988) (finding CERCLA §309 did not apply to plaintiff's claim because the asbestos was not "released into the environment"); Morgan v. Exxon Corp., 869 So. 2d 446 (Ala. 2003) (plaintiffs were unable to show that CERCLA applied to their claims because they could not show that the harmful chemical was "released into the environment").
19. *See* Buggsi, Inc. v. Chevron, U.S.A., Inc., 857 F. Supp. 1427 (D. Or. 1994).
20. *See* Los Angeles Chem. Co. v. Spencer & Jones, 44 Cal. App. 4th 112 (Cal. Ct. App. 1996).
21. *See* A.S.I., Inc. v. Sanders, 835 F. Supp. 1349 (D. Kan. 1993).
22. *See* German v. CSX Transp., Inc., 510 F. Supp. 2d 630 (S.D. Ala. 2007); *but see* Abrams v. Olin Corp., 2007 WL 4189507, at *6 (S.D. Ala. Nov. 21, 2007) (reaching the opposite conclusion).
23. *See* Clark County v. Sioux Equip. Corp., 753 N.W.2d 406 (S.D. 2008).
24. 419 F.3d 355 (5th Cir. 2005).
25. *Id.* at 362.
26. *Id.*

covery rule to state statutes of repose. In *McDonald*,[27] the court determined that CERCLA §309 applied to Oregon's 10-year statute of repose for negligent injury to person or property.[28]

The panel noted the substantive differences between statutes of limitations and statutes of repose and acknowledged that §309 discusses statutes of limitations without mentioning statutes of repose. The *McDonald* court then determined, however, that the phrase statutes of limitations is ambiguous because at the time §309 was enacted—in 1986—some cases confused the two phrases or used them interchangeably.[29] The Fifth Circuit in *Burlington Northern*, the Ninth Circuit decided, had "failed to analyze the meaning of 'statute of limitations' at the time §309 was adopted."[30]

Having deciding that the term "statute of limitation" in §309 was ambiguous, the court delved into the provision's legislative history, and determined that the committee print and Conference Report "show that Congress' primary concern in enacting §309 was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of it."[31] Because that loss may occur as a result of either a statute of repose or a statute of limitations, the Ninth Circuit found that Congress meant for §309's discovery rule to apply to statutes of repose as well as statutes of limitation. Thus, in the *McDonald* court's view, Oregon's statute of repose was preempted by CERCLA §309.

IV. The Trouble With *McDonald*

Setting aside for a moment the Ninth Circuit's questionable conclusion that the phrase statute of limitation in CERCLA §309 is ambiguous,[32] the preemption of state rules of repose raises serious constitutional questions about due process for defendants.

Some diseases have latency periods of 30 or 40 years, e.g., mesothelioma, a disease often linked to asbestos exposure, and some environmental releases can linger for decades before they are discovered. Nullifying rules of repose could revive claims that expired 30, 40, or even 50 years ago, long before SARA was enacted in 1986. Courts have yet to face a due process challenge to CERCLA's §309 preemption of state statutes of repose, but when they do, the challenge will be based on strong arguments that preemption of state statutes of repose violate defendants' due process rights.

Early U.S. Supreme Court decisions dealing with the revival of extinct claims establish some framework for determining when the revival of extinct claims violates a defendant's due process rights and when it does not. In the 1885 case of *Campbell v. Holt*,[33] the Court stated that "in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect . . . such act deprives the party of his property without due process of law."[34] The same is not true, the Court held, for actions on a contract, because "the statute of limitations does not destroy the right . . . but only bars the remedy."[35] Twenty years later, the Court repeated this principle in *Davis v. Mills*.[36] The Court stated that in cases of real or personal property, the title passes once the statute of limitation has run. Thus, "[t]he lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder."[37] Another 20 years later, in the 1925 case of *William Danzer & Co. v. Gulf & Shop Island Railway Co.*,[38] the Court stated that statutes of limitations sometimes apply only to the remedy in an action, but "such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability."[39] And finally, yet another 20 years later, in *Chase Securities Corp. v. Donaldson*,[40] the Court noted that "certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment."[41]

These decisions appear to turn on the question of whether the time limit being changed by the legislature is in the nature of a cause of action or a remedy. When a statute setting a time limit on an action is merely procedural, i.e., it determines only whether a remedy exists for a cause of action, and does not create a vested right for the defendant, there is no due process violation when the government alters that time period. But when the statute creates an interest that is vested in the defendant, altering that period of time may violate the defendant's due process rights.

Although these cases would support arguments that application of §309 to rules of repose are in some circumstances unconstitutional, in a series of more recent cases, *Usery v. Turner Elkhorn Mining Co.*,[42] *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*,[43] and *General Motors Corp. v. Romein*,[44] the Court has applied a less constricting standard for retroactive legislation.

In *Usery*, the Court rejected a group of coal mine operators' argument that a new law expanding coal mine operators' liability for a miner's death or disability due to pneumoconiosis arising out of employment in the mines violated their due

27. No. 06-35683.
28. Or. Rev. Stat. §12.115(1).
29. No. 06-35683, at *4.
30. *Id.*
31. *Id.* at *5.
32. Not only is the Ninth Circuit's finding of ambiguity dubious in light of the plain language of the provision, it conflicts with the long-established proposition that congressional enactments effecting a preemption of state law must be construed as narrowly as possible. *See, e.g.*, New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973):

    > If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

33. 115 U.S. 620 (1885).
34. *Id.* at 623.
35. *Id.* at 624.
36. 194 U.S. 451 (1904).
37. *Id.* at 457.
38. 268 U.S. 633 (1925).
39. *Id.* at 637.
40. 325 U.S. 304 (1945).
41. *Id.* at 316.
42. 428 U.S. 1 (1976).
43. 467 U.S. 717 (1984).
44. 503 U.S. 181 (1992).

process rights insofar as it applied to miners who left the mines before the provision was enacted. The Court stated:

> It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.[45]

The Court cautioned, however, that Congress cannot legislate retrospectively as freely as it can legislate prospectively. "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."[46]

In *Pension Benefit*, the Court considered whether the application of an act that required an employer withdrawing from a multiemployer pension plan to pay a fixed amount into the plan was unconstitutional as applied to employers who withdrew from a pension plan during the five months before the act took effect. Citing *Usery*, the Court found no due process violation. The Court stated that the test of due process "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."[47] For the provision in question, "it was eminently rational for Congress to conclude that the purposes of the [statute] could be more fully effectuated if its withdrawal liability provisions were applied retroactively."[48]

Finally, in *General Motors*, the Court upheld a Michigan law requiring coordination of workers' compensation benefits despite the fact that, as a result of the benefit coordination, some companies were forced to refund money to disabled employees. The Court noted that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."[49] The Court reiterated that to satisfy due process, the law must be "a legitimate legislative purpose furthered by rational means,"[50] and determined that the provision in question satisfied that test.

Given these two diverse lines of Court precedent, no definitive statement about the application of CERCLA §309 to state rules of repose can be made. Under the *Campbell* line of cases, application of CERCLA §309 to rules of repose (as opposed to statutes of limitation) appears to violate defendants' due process rights. Under the *Usery* line of cases, a court would need to evaluate whether CERCLA §309's retroactive elimination of a defendant's vested right to repose, particularly given the presumption against federal preemption, serves a legitimate legislative purpose.

V. Conclusion

McDonald significantly expands the scope of CERCLA §309. By finding ambiguity in the plain language of the statute and broadly construing this preemption provision to include state rules of repose, the Ninth Circuit has raised serious constitutional questions about the extermination of toxic tort defendants' due process rights. Given the Fifth Circuit's contrary approach in *Burlington Northern*, and the potential for *McDonald* to resurrect hazardous substance exposure claims long expired, the time is ripe for action to clarify yet another of CERCLA's troublingly unsettled provisions.

45. *Usery*, 428 U.S. at 15.
46. *Id.* at 16-17.
47. *Pension Benefit*, 467 U.S. at 730.
48. *Id.*
49. *General Motors*, 503 U.S. at 191.
50. *Id.*