CARLTON FIELDS

Supreme Court Remediates CERCLA's Exclusivity Provisions

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In *Atlantic Richfield Co. v. Christian*, the Supreme Court recently held that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) does not prevent state courts from exercising jurisdiction over state law claims seeking restoration damages for remediation of Superfund sites beyond what the Environmental Protection Agency has already required. But the court also held that the plaintiff landowners in the case must still seek EPA approval before conducting any remediation inconsistent with the EPA-approved remediation plan.

For more than 30 years, the Atlantic Richfield Company had been working with the EPA under a remedial action plan to clean the 300-square-mile Anaconda copper smelter Superfund site. In 2008, 98 landowners living on the site filed state law claims against Atlantic Richfield in Montana state court. The landowners, alleging there was still too much contamination on their properties, sued for trespass, nuisance, and strict liability. Importantly, the landowners sought restoration damages to fund their own remediation of the property to a significantly more stringent level than required by the EPA remediation plan. The landowners estimated that their proposed remediation would cost Atlantic Richfield more than $50 million.

In a fractured opinion authored by Chief Justice Roberts, the Supreme Court held that CERCLA does not displace state court jurisdiction over state law claims, even those seeking additional remediation of property already subject to EPA-approved remedial action plans. Justice Alito, the only justice dissenting from this part of the opinion, argued that the case did not require the court to decide this issue. He was concerned that the court's opinion ran contrary to provisions in the act that seemingly granted the federal courts exclusive jurisdiction over such claims and that "state courts and juries, eager to serve local interests, may disregard the EPA's expert judgment regarding the best plan for a CERCLA site and may mandate relief that exacerbates environmental problems."

But the court also held 7–2 (with Justices Gorsuch and Thomas dissenting) that the Montana Supreme Court erred by finding the plaintiff landowners were not "potentially responsible parties"

under the act. The court held that the landowners, owners of property on the "facility," were indeed potentially responsible parties who, because a remedial investigation and a feasibility study had already been completed for the site, must seek EPA approval before performing any remediation themselves. The court was not swayed by Justice Gorsuch's dissenting argument that because the six-year limitation on recovery of remediation costs had run, the landowners could not be potentially responsible parties. Nor was the court swayed that the landowners were merely "contiguous property owners" as their property was actually on the "facility" as defined in the act. The court concluded:

> Atlantic Richfield remains potentially liable under state law for compensatory damages, including loss of use and enjoyment of property, diminution of value, incidental and consequential damages, and annoyance and discomfort. The damages issue before the Court is whether Atlantic Richfield is also liable for the landowners' own remediation beyond that required under the Act. Even then, the answer is yes — so long as the landowners first obtain EPA approval for the remedial work they seek to carry out.

The decision narrowly leaves open state court claims seeking damages for more stringent remediation on Superfund sites, potentially putting in jeopardy the stability that parties rely on when settling with the EPA. In Florida, for example, Florida Statutes section 376.313 creates a statutory cause of action allowing "any person" to bring "a cause of action ... for all damages resulting from a discharge or other condition of pollution" covered by this statute, which might allow for such a claim. Although *Atlantic Richfield* held that, under CERCLA, landowner potentially responsible parties cannot remediate on their own once the remedial investigation and feasibility study have begun, which likely would limit many litigants from successfully obtaining more stringent restoration standards, there is the potential that non-potentially responsible parties might not be so limited in seeking further restoration costs. Moreover, it means that landowner potentially responsible parties might be able to exert further leverage on the EPA and settling potentially responsible parties simply by filing suit long after the remedial action plan has been put into effect. It is not hard to see how enterprising plaintiffs' attorneys might try to exploit the case.

An interesting twist in the case was Chief Justice Roberts' treatment of CERCLA as a straightforward, clearly written statute. In fact, the act was rushed through Congress in the waning hours of the Carter presidency and has confused litigants and courts for decades, with many decrying how poorly written it is. Indeed, in his concurring and dissenting opinion, Justice Alito worried about the court's interpretation of the act's "devilishly difficult statutory provisions."

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