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U.S. SUPREME COURT RULES IN ARCO V. CHRISTIAN THAT STATE LAW MONETARY CLAIMS CAN PROCEED, BUT PARALLEL RESTORATION CLAIMS UNDER STATE STATUTE AT A SUPERFUND SITE REQUIRE EPA APPROVAL

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The Supreme Court ruled today on an important environmental case involving common law and state statutory claims (Atlantic Richfield Co. v. Christian et al., case number 17-1498).The question before the court was whether Atlantic Richfield Company ("ARCO") is liable for remediation by landowners at a Superfund site beyond that required by the Environmental Protection Agency ("EPA") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The answer is "yes—so long as the landowners first obtain EPA approval for the remedial work they seek to carry out."

The Supreme Court did not entertain CERCLA's preemption of the state statute invoked by the plaintiffs in this case because EPA had not yet approved the plaintiffs' proposed restoration plan under the state statute, which the Court ruled is required. The Supreme Court reversed in part, vacated in part, and remanded in part. The Montana Supreme Court has two options on remand: (1) enter a stay to allow the landowners to seek EPA approval or (2) enter judgment against the landowners on their restoration damages claim without prejudice to their ability to refile if they obtain EPA approval. Either way, EPA must approve the restoration plan before it can proceed.

The case involved arsenic and lead contamination associated with the Anaconda Copper Smelter in Butte, Montana.- The current owner of the now-closed smelter, ARCO, agreed to remediate the site pursuant to the CERCLA. A group of landowners subsequently sued ARCO in Montana state court for common law nuisance, trespass, and strict liability, and sought restoration that exceeded the CERCLA remedial actions approved by EPA. The trial court ruled the restoration claim was not preempted by CERCLA and could go forward. The Montana Supreme Court affirmed, ruling that the landowners were not potentially responsible parties ("PRPs") and rejecting ARCO's argument that the state court did not have jurisdiction.

The United States Supreme Court ruled that CERCLA does not strip the state courts of jurisdiction over common law nuisance, trespass, and strict liability claims arising under state law and not under CERCLA. Although CERCLA §113(b) provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter," and state courts lack jurisdiction over such actions, the Court held that the landowners' case against ARCO does not "arise under" CERCLA. Because it arises under state law, jurisdiction in the state courts is appropriate. Therefore, state law claims for monetary damages may go forward in state court against a PRP.

Importantly, the Court did not grant state courts and the landowners carte blanche for all of the state law claims. Rather, the Court held that the restoration damages, which by state statute must be spent on property rehabilitation, could not go forward without EPA's approval. In doing so, the Court maintained the pre-enforcement review requirement in CERCLA §113(h).

Future cost recovery cases brought by CERCLA lawyers will be informed by the Court decision in ARCO clarifying that CERCLA §§113(b) and 113(h) work independently of one another, even though the provisions overlap with respect to challenges to cleanup plans in federal

court that "arise under" CERCLA. In those cases, section 113(h) prevails, such that there is no pre-enforcement review of EPA's remedial action decisions.

The Supreme Court also overturned the Montana Supreme Court and ruled that the landowners may be PRPs as defined by CERCLA §§107(a)(1)–(4). The Montana high court had found the landowners are not PRPs because they are not responsible for any of the contamination. However, the Supreme Court had previously held that current and former landowners who are not responsible for contamination may still fall within the definition of PRPs and be held strictly liable for the cleanup.

The Court noted that the landowners failed to meet the requirements to be deemed "contiguous property owners" under CERCLA, which the landowners argued as a reason they were not PRPs. In particular, one of the requirements was, at the time the person acquired the property, the person "did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances." CERCLA §107(q)(1)(A)(viii)(II). Because all of the landowners purchased their property after the Anaconda Company built the gigantic smelter, and there was "almost overwhelming" evidence of "public knowledge" of contamination, the landowners had reason to know their property "could be contaminated by a release or threatened release" of a hazardous substance.

The landowners also argued that because EPA had not sued them, they were not PRPs and they were not included in the PRP settlement negotiations. The Court ruled that EPA's nonenforcement policy towards homeowners does not change their status as PRPs. Homeowners who own land located on a Superfund site may be PRPs, regardless of EPA's nonenforcement, and could be brought into a case by other PRPs, subject to the "innocent landowner" or "third party" defenses set forth in CERCLA §107(b)(3).

In a dissent, Justice Neil Gorsuch (joined by Justice Clarence Thomas) championed the federalism cause, in what the majority characterized an "evocative claim" accusing them of "paternalistic central planning." Rather than siding with big business, Justice Gorsuch championed the rights of property owners, asserting that the property owners did the only thing they could when the cleanup work on their property was substandard. As an example, he noted that only 24 of 77 properties were remediated and that soil near a daycare playground still had high arsenic levels. He argued "the regulation of real property and the protection of natural resources is a traditional and central responsibility of state governments." The majority countered that Justice Gorsuch failed to appreciate that cleanup plans must comply with applicable or relevant and appropriate standards of state environmental law under CERCLA §121(d)(2)(A)(ii), or that states must be afforded opportunities for "substantial and meaningful involvement" in initiating, developing, and selecting cleanup plans under CERCLA §121(f)(1), or that EPA usually defers to a state that is already remediating under CERCLA §105(h). The majority hung its hat on the fact that CERCLA is known for "cooperative federalism" while Gorsuch painted a stark picture of innocent landowners forced "to suffer toxic waste in their backyards, playgrounds, and farms."

That Justice Gorsuch seemed willing to dispose of provisions of a federal statute in favor of state law may be a portend of things to come in the WOTUS decision in the County of Maui case pending before the Court. We shall see.

The decision to affirm in part and reverse in part may appear to be a "draw," allowing trespass and nuisance common law claims, but not allowing remediation activities under state law without EPA approval. The implication of this case will be felt across the country as PRPs face down plaintiffs in state court seeking common law monetary damages, including loss of use and enjoyment of property, diminution of value, incidental and consequential damages, and annoyance and discomfort, while simultaneously collaborating with EPA to remediate sites under CERCLA. The Supreme Court's ruling claims to protect the "heart" of CERCLA – settlements — by preventing landowners from changing the remedy selected by EPA, without EPA's approval. To have held otherwise, would have upended remedial actions, creating uncertainty and risk, and disincentivizing PRPs from signing onto Consent Decrees. There will be other impacts to EPA-PRP negotiations, as well. For example, PRPs will need to be careful about confidentiality during discussions with EPA to avoid disclosures that could trigger or be used in state court claims.

The ARCO opinion may also affect EPA's collaboration with the community affected by a Superfund site, including current landowners. EPA holds public meetings at sites and is required to publish remedial action decisions for public comment. Landowners may use this opinion to assert requests to EPA during the public comment process, or even outside the public comment process, to make the remedial action more protective than required by law. If EPA agrees, then PRPs may be liable for cleanup beyond what they anticipated, and even beyond what they previously agreed to with EPA. This will create uncertainty for PRPs and increase the risk of unknown additional costs associated with cleanups.

The landowners in this case plan to discuss with the EPA their restoration plan's revisions to the existing remedial action plan. That should be an interesting conversation. The landowners' restoration plan includes digging up contaminated soil that has been deliberately capped in place. It is difficult to imagine that EPA will agree to that change, or any change that would delay the remedy. In fact, EPA submitted multiple filings in the ARCO case indicating that it believes that the landowners' plan presents serious environmental risks. It is likely that the

EPA will not approve that plan. If it did, then EPA would need to renegotiate the Consent Decree with ARCO and ARCO may not be willing to do so. It is notable that EPA stood on the side of ARCO in this case, supporting ARCO's arguments. By doing so, EPA signaled that it is unlikely to reopen ARCO's Consent Decree or reconsider the remedy that is already underway.

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The case is Atlantic Richfield Co. v. Christian et al., case number 17-1498, in the U.S. Supreme Court.

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