

## CERCLA PREEMPTS STATE LAW DAMAGES CLAIMS

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On May 19, 2017, in *Bartlett v. Honeywell Int'l, Inc.*, (N.D.N.Y. May 19, 2017), the United States District Court for the Northern District of New York dismissed common law claims for property damages based on CERCLA preemption. Plaintiffs alleged their property was damaged because it is adjacent to a property used to store and treat dredged sediment from the Onondaga Lake Bottom Superfund Site. The Plaintiffs asserted three causes of action: (1) negligence, (2) private nuisance, and (3) trespass.

Ten years prior, the PRP (Honeywell International, Inc.) entered into a Consent Decree agreeing to dredge 2.65 million cubic yards of sediment from the Onondaga Lake Bottom Superfund Site. The Consent Decree required that dredged sediment be transported via pipeline to property where it was treated and stored, in accordance with the state and federal requirements.

In analyzing the preemption issue, the District Court stated that CERCLA preemption may apply if the alleged activity "is consistent with a consent decree, regardless of the damages that plaintiffs seek." According to *Cavallo v. Star Enter.*, 100 F.3d 1150, 1156 (4th Cir. 1996), state law claims are preempted by CERCLA if the activities (1) were required, directed, or supervised by the EPA, and (2) were performed properly. The Fourth Circuit also found in *Feikema-in-Cavallo v. Star Enter.*, 100 F.3d 1150 (4th Cir. 1996), that a PRP "cannot be held liable for activities-in conformity with the EPA Orders."

Plaintiffs' alleged that Honeywell's cleanup plan was inadequate and resulted in Plaintiffs' damages. The District Court held that Honeywell's activities were required by the EPA and the New York Department of Environmental Conservation and were "clearly contemplated" by the Consent Decree. In addition, because Honeywell's actions complied with EPA's requirements under the Consent Decree, they were presumed to be performed properly. Accordingly, the Court dismissed Plaintiffs' claims as preempted by CERCLA.

Honeywell argued that CERCLA § 122(e)(6) explicitly prohibits it from undertaking any remedial actions other than those that the Consent Decree authorizes. Specifically, CERCLA § 122(e)(6) provides that, "[w]hen either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President." 42 U.S.C. § 9622(e)(6).

In the Second Circuit, in *Town of Halfmoon v. Gen. Elec. Co.*, 105 F.Supp.3d 202 (N.D.N.Y. 2015), plaintiffs sought damages for the defendants' allegedly negligent dredging operation that was undertaken in conformance with a court-ordered Consent Decree. See *id.*-at 217. The court recognized that the CERCLA savings clauses may allow for common law claims that concern the original-hazardous waste deposit, but plaintiffs were instead attacking "the dredging project and the environmental and health threats stemming therefrom." *Id.*-at 218. The court found that "[i]t is impossible for [the defendant] to comply with the requirements of the Consent Decree without subjecting itself to liability under state statutory and common law, which is an obstacle to the execution of the dredging project." *Id.*-at 217-18. The court concluded that the plaintiffs' state law claims interfered with the implementation of a remedial action "ordered by a federal agency (EPA), per federal law (CERCLA), approved by this federal court." *Id.*-at 218. In *Coastline Terminals of Conn., Inc. v. USX Corp.*, 156 F.Supp.2d 203 (D. Conn. 2001), the court held that the plaintiffs' state law actions created a disincentive to

CERCLA settlement by providing a potential avenue for recovery against a potentially responsible party that has settled a CERCLA action, and, therefore the state law claims were preempted. -*Id.*-at 208-09.

Plaintiffs in the Honeywell case contended that their claims are allowed by CERCLA § 302(d), which provides that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, *including common law, with respect to releases of hazardous substances or other pollutants or contaminants.*" 42 U.S.C. § 9652(d) (emphasis added). The Court ruled, however, that CERCLA's Savings Clause in Section 302(d) does not apply to *all*-common-law claims. -Rather, the Savings Clause is intended to preserve only "those state law claims relating to the underlying contamination that CERCLA was enacted to address (i.e., the contamination of the sediment in Onondaga Lake), and not those relating to remediation activities mandated by a consent decree."-See Dkt. No. 115 at 6; *accord Town of Halfmoon*, 105 F. Supp. 3d at 217.-

The Court found that, first, state-law claims that create an actual conflict with CERCLA are preempted. Second, consent decrees entered into pursuant to CERCLA, which require a PRP to undertake specific action or contravene CERCLA § 122(e)(6), qualify as federal law that can conflict with state law. Third, preemption may apply if the plaintiffs' claims merely allege activity that is consistent with a consent decree, regardless of the damages that plaintiffs seek, i.e., injunctive relief or monetary damages. In sum, these principles track the test the court articulated in *Cavallo*, that "[d]amages claims conflict with [a consent decree and, are thus preempted,] only if the allegedly tortious activities (1) were required, directed, or supervised by the EPA, and (2) were performed properly."-*Cavallo*, 100 F.3d at 1156. Thus, the Court adopts these principles to analyze Plaintiffs' claims.

Ironically, the defendant in this case did not raise a CERCLA § 113(h), which prohibits federal courts from reviewing any challenges to CERCLA cleanup once an EPA-ordered removal or remedial action is underway.- 42 U.S.C. § 9613(h).- This is a significant case in an era when plaintiffs are seeking common law damages to bypass CERCLA's statutory cost recovery requirements.- Importantly, under CERCLA a party cannot second guess EPA's remedy decision after the public comment period has expired and the remedy has been selected and implemented.- More importantly, parties performing remedial actions should be able to rely on the statutory protections of CERCLA when implementing a remedy.

Keep in mind, however, that failure to properly implement a CERCLA remedy may result in state law common law damages claims. The California Environmental Lawyers at Bick Law will continue to monitor cases related to common law claims for property damages based on CERCLA preemption.