

2015

## Clarifying the Preemptive Scope of CERCLA Section 9658

Allison Tungate

Follow this and additional works at: <http://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

---

### Recommended Citation

Allison Tungate, *Clarifying the Preemptive Scope of CERCLA Section 9658*, 21 J. Envtl. & Sustainability L. 227 ()  
Available at: <http://scholarship.law.missouri.edu/jesl/vol21/iss1/9>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized administrator of University of Missouri School of Law Scholarship Repository.

## Clarifying the Preemptive Scope of CERCLA Section 9658

*Waldburger v. CTS Corp*<sup>1</sup>

### I. INTRODUCTION

Due to rising public concern regarding the dumping of hazardous wastes, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), which was designed to remedy unlawful disposal and transportation of hazardous wastes as well as inadequate maintenance of disposal sites.<sup>2</sup> Because some state statutes of limitation severely restricted parties from bringing CERCLA claims as they commenced “at the time of the injury instead of when the party ‘discovered’ that a hazardous substance caused the injury,” Congress enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA).<sup>3</sup> SARA established a discovery rule outlined in Section 9658,<sup>4</sup> which was a federally required commencement date that “preempts state statutes of limitation if the claims are based on hazardous substance releases and the state limitations period provides a commencement date earlier than federal law.”<sup>5</sup>

When Congress passed Section 9658 of CERCLA on October 17, 1986,<sup>6</sup> the plaintiff’s bar prematurely lauded the section as a device that would eliminate procedural barriers that prevented certain causes of action from being brought due to restrictive state-imposed statutes of limitation and

---

<sup>1</sup> *Waldburger v. CTS Corp.*, 723 F.3d 434 (4th Cir. 2013).

<sup>2</sup> Karen S. Nabholz, [\*The Tick of the Statute of Limitations Clock: How the FRCD Preempts the State Law Accrual Date in Freier v. Westinghouse Electric Corporation\*](#), 15 *VILL. ENVTL.L.J.* 41 (2004).

<sup>3</sup> *Id.* at 42.

<sup>4</sup> See *infra* note 53 (clarifying Section 9658 as also being the codified section and Section 309 as being the actual section of CERCLA).

<sup>5</sup> Nabholz, *supra* note 2 (citing *Angeles Chem. Co. v. Spencer & Jones*, 51 Cal. Rptr. 2d 594, 599 (Cal. Ct. App. 1996)(explaining circumstances where FRCD preempts state statutes of limitation)(quoting *Tower Asphalt, Inc. v. Determan Welding & Tank Serv.*, 530 N.W.2d 872, 875 (Minn. Ct. App. 1995))).

<sup>6</sup> P.L. No. 99-499, § 203(a), 100 Stat. 1695-96 (Oct. 17, 1986) (codified at 42 U.S.C. § 9658).

## CLARIFYING THE PREEMPTIVE SCOPE OF CERCLA SECTION 9658

statutes of repose.<sup>7</sup> However, since Section 9658’s inception, there have been varying interpretations of the implications of the preemptive language found in the section,<sup>8</sup> stirring much debate among federal courts.<sup>9</sup> Center in this debate is whether Congress intended for CERCLA to preempt not only statutes of limitation, which focus on when the injury occurred or was discovered by the plaintiff, but also statutes of repose, which focus on when the defendant’s tortious act occurred.<sup>10</sup> History suggests Congress used the terms “statute of limitations” and “statute of repose” interchangeably.<sup>11</sup>

The following comment explores *Waldburger v. CTS Corp.*,<sup>12</sup> in which the Fourth Circuit was faced with the question of whether Section 9658 preempted a North Carolina statute of repose, despite the language of Section 9658 referring only to “statutes of limitations.” The main issue to be analyzed is whether the Fourth Circuit’s application of the preemptive language of Section 9658 as applied to state statutes of repose adequately reflects Congress’s intent in passing the section. By correctly holding in *Waldburger* that Congress’s intent was to preempt both statutes of limitation and statutes of repose, the Fourth Circuit has further clarified how federal courts should apply the preemptive language of Section 9658 to statutes of repose.

### II. FACTS & HOLDINGS

Appellants David Bradley, Renee Richardson and twenty-three other landowners (“the landowners”) brought a nuisance action against Appellee CTS Corporation (“CTS”), after discovering in 2009 their well water contained concentrated levels of trichloroethylene (TCE) and cis-1, 2-dichloroethene (DCE)—both known carcinogens.<sup>13</sup>

---

<sup>7</sup> Van R. Delhotal, [\*Re-Examining CERCLA Section 309: Federal Preemption of State Limitations Periods\*](#), 34 WASHBURN L.J. 415 (1995).

<sup>8</sup> *Id.*

<sup>9</sup> See *infra* note 144.

<sup>10</sup> See *infra* notes 93 and 94.

<sup>11</sup> See *infra* note 84.

<sup>12</sup> 723 F.3d 434.

<sup>13</sup> *Waldburger v. CTS Corp.*, 723 F.3d 434, 437 (4th Cir. 2013).

From 1959 to 1985, CTS manufactured and disposed of electronics and electronic parts at the Mills Gap Road Electroplating Facility (“Facility”) on a fifty-four-acre plant located in Asheville, North Carolina.<sup>14</sup> In its operation at the Facility, CTS stored significant amounts of TCE.<sup>15</sup> Additionally, manufacturing of the electronic products required the usage of TCE, cyanide, chromium VI, and lead.<sup>16</sup> Upon selling the Facility in 1987, CTS promised realtors the site was environmentally sound and no wanton disposal practices occurred at the Facility.<sup>17</sup> Further, CTS assured realtors that once any existing storage drums of hazardous materials were removed from the premises, any threat to human health or the environment would cease.<sup>18</sup>

Over the years, the landowners bought portions of the land where the Facility was formerly located.<sup>19</sup> However, subsequent to the purchase, the landowners were notified by the Environmental Protection Agency (“EPA”) that their property was contaminated.<sup>20</sup> Jointly, residents who lived within the area of the former Facility brought a state law nuisance claim and contended they were continuously being exposed to toxins from the air, land and water resulting from CTS’s operations.<sup>21</sup> Due to their allegations of unknowingly being exposed to toxins, the landowners cited damages such as diminution in the value of their land and fear for their health and safety.<sup>22</sup> Further, the landowners requested a judgment forcing CTS to reclaim 1,000,000 pounds of toxic contaminants belonging to the corporation; remediation of the harm caused by CTS; and monetary compensation for losses and damages suffered, both present and future.<sup>23</sup>

---

<sup>14</sup> *Id. Waldburger*, 723 F.3d. at 440.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id. Waldburger*, 723 F.3d at 440.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

## CLARIFYING THE PREEMPTIVE SCOPE OF CERCLA SECTION 9658

In response to the complaint, CTS filed a motion to dismiss, citing a North Carolina statute<sup>24</sup> that sets a ten-year limitations period for a real property action that accrues over time.<sup>25</sup> The statute establishes that claimants cannot bring an action for property damage more than ten years after the defendant's tortious act.<sup>26</sup> Importantly, the statute makes knowledge of the harm within the ten-year window irrelevant.<sup>27</sup> Accordingly, CTS argued that because their alleged last act or omission occurred in 1987 and the landowners were bringing the nuisance action in 2011, the claim should be barred based on North Carolina's law.<sup>28</sup>

In return, the landowners relied on the language of CERCLA to prove that their claim should not be barred.<sup>29</sup> Specifically, the landowners argued CERCLA's Section 9658 discovery rule, under which claims accrue on the date plaintiffs knew or should have known of injuries as a result of hazardous substances, preempted North Carolina law.<sup>30</sup> However, the magistrate judge rejected the landowners' argument and differentiated the North Carolina law as a statute of repose, whereas Section 9658 of CERCLA only preempts state statutes of limitation.<sup>31</sup> Based on the magistrate judge's recommendation of dismissal, the district court granted CTS's motion to dismiss.<sup>32</sup>

On appeal, the Fourth Circuit reversed the district court's decision. The Fourth Circuit rejected the characterization of North Carolina's law as a

---

<sup>24</sup> "Within three years an action...[u]nless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years form the last act or omission of the defendant giving rise to the cause of action." [N.C. GEN.STAT. § 1-52\(16\)](#).N.C. Gen.Stat. § 1-52(16).

<sup>25</sup> *Waldburger*, 723 F.3d at 441.

<sup>26</sup> *Id.* at 440-41.

<sup>27</sup> *Id.* at 441.

<sup>28</sup> *Id.* *Waldburger*, 723 F.3d at 441.

<sup>29</sup> *Id.* at 438.

<sup>30</sup> *Id.* at 441.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

statute of repose and instead likened it to a statute of limitation.<sup>33</sup> Because the court found no distinction between the North Carolina law and Section 9658, the court held that CERCLA preempted North Carolina's ten-year limitation on the accrual of real property claims.<sup>34</sup> Accordingly, statutes of limitations and statutes of repose conflicting with Section 9658 of CERCLA will be preempted.

### III. LEGAL BACKGROUND

#### A. History of CERCLA

In response to the Valley of the Drums<sup>35</sup> and Love Canal<sup>36</sup> disasters in the 1960s and 1970s, Congress was faced with the task of developing legislation that would establish a means of redress and compensation for the dumping of toxic wastes. Thus, in 1980, Congress passed CERCLA to address the emerging problem of unregulated hazardous substance release.<sup>37</sup> CERCLA identifies both a public and private mechanism for determining liability with regards to clean up and compensation.<sup>38</sup> CERCLA allows for

---

<sup>33</sup> *Id.* at 442-443.

<sup>34</sup> *Id.* at 445. *Waldburger*, 723 F.3d at 445.

<sup>35</sup> "The Valley of the Drums is a twenty-three acre site near Louisville, Kentucky, where a large number of waste-storing drums were deposited in the 1960s. The drums' leakage and the lack of regulation at the site caused an environmental disaster." *Id.* at 438 n.1 (citing *NPL Site Narrative for A.L. Taylor (Valley of the Drums)*, ENVTL. PROT. AGENCY (Sept. 8, 1983), <http://www.epa.gov/superfund/sites/npl/nar447.htm>). *Waldburger v. CTS Corp.*, 723 F.3d 434, 438 (4th Cir. 2013) (citing *NPL Site Narrative for A.L. Taylor (Valley of the Drums)*, Env'tl. Prot. Agency (Sept. 8, 1983), <http://www.epa.gov/superfund/sites/npl/nar447.htm>).

<sup>36</sup> Love Canal, near Niagara Falls, New York, became a dumpsite in the 1920s for toxic chemicals and the consequences of the contamination did not come to light until the 1970s. . *Id.* at 438 n.2 (citing Eckardt C. Beck, *The Love Canal Tragedy*, ENVTL. PROT. AGENCY (Jan. 1979), <http://www2.epa.gov/aboutepa/love-canal-tragedy>). *Waldburger v. CTS Corp.*, 723 F.3d 434, 438 (4th Cir. 2013) (citing Eckardt C. Beck, *The Love Canal Tragedy*, Env'tl. Prot. Agency (Jan. 1979), <http://www.epa.gov/history/topics/lovecanal/01.html>).

<sup>37</sup> Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 45 BUS. LAW. 923, 925 (1990). Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 45 Bus. Law. 923, 925 (1990).

<sup>38</sup> *Id.*

## CLARIFYING THE PREEMPTIVE SCOPE OF CERCLA SECTION 9658

the federal government to immediately be given the “tools necessary for a prompt and effective response to problems” derived from the dumping of toxic materials<sup>39</sup> and impose cleanup costs on those responsible for the unlawful dumping.<sup>40</sup>

Additionally, CERCLA was designed to “establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites” and “shift the costs of cleanup to the parties responsible for the contamination.”<sup>41</sup> Notably, because Congress passed CERCLA during the closing hours of the ninety-sixth session and did so only due to a compromise that blended three separate bills, the Act has been notorious for its lack of clarity.<sup>42</sup> However, it is clear that CERCLA is a remedial statute designed to right the wrongs caused by the illegal dumping of toxic wastes.<sup>43</sup>

Because of the haphazard manner in which CERCLA was passed, Congress created a Study Group (“Group”) to “determine the adequacy of common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances in the environment.”<sup>44</sup> By creating the Group, Congress decided against creating a “federal cause of action for persons injured by the release of

---

<sup>39</sup> *United States v. Reilly Tar & Chem. Corp.*, 546 F.Supp. 1100, 1112 (D. Minn.1982).*United States v. Reilly Tar & Chem. Corp.*, 546 F.Supp. 1100, 1112 (D. Minn.1982).

<sup>40</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989).*Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273, 2277 (1989).

<sup>41</sup> *Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings Inc.*, 473 F.3d 824, 826-27 (7th Cir. 2007) (quoting H.R.Rep. No. 96-1016, pt. 1, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120).*Metropolitan Water Reclamation Dist. v. N. Am. Galvanizing & Coatings Inc.*, 473 F.3d 824, 826-27 (7th Cir. 2007)(quoting H.R.Rep. No. 96-1016, pt. 1, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120).

<sup>42</sup> “CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage.” *Waldburger v. CTS Corp.*, 723 F.3d 434, 438 (quoting *Artesian Water Co. v. New Castle Cnty.*, 851 F.2d 643, 658 (3rd Cir. 1988)).

<sup>43</sup> *Id.* (citing *Metro. Water Reclamation Dist.*, 473 F.3d at 826-27 (7th Cir. 2007) (internal citations omitted)).

<sup>44</sup> 42 U.S.C.. § 9651 (2012).

hazardous substances.”<sup>45</sup> Instead, the twelve-member Group, comprised of law professors and attorneys from both the plaintiff and defense bars, considered the adequacy of current state common law remedies for compensating victims of hazardous wastes.<sup>46</sup> The Group considered the sufficiency and availability of existing remedies under the then present state statutes in remedying harm from the unlawful dumping of hazardous substances; the nature of barriers to recovery with respect to initiating lawsuits; the scope of evidentiary burdens placed on the plaintiff, especially in consideration of the hurdle of scientific uncertainty in proving causation; the adequacy of existing remedies available for compensation for natural resources damage; the scope of liability—especially with respect to insurance—that limits initial liability; and barriers to recovery due to existing laws establishing statutes of limitation.<sup>47</sup>

Among their findings, the Group noted that environmental injuries related to the dumping of hazardous substances generally have “long latency periods, sometimes [twenty] years or longer[.]” and state laws ordering causes of action to accrue upon the defendant’s last act or plaintiff’s exposure to harm will defeat a lawsuit before its initiation since manifestations of injury will often occur after the statute of limitations has fully run.<sup>48</sup> Thus, as a result of the findings, the Group recommended “that all states . . . clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause.”<sup>49</sup> The Group came to this conclusion in order to “remove unreasonable procedural and other barriers to recovery in court” for plaintiffs, including rules associated with the “time of accrual of actions.”<sup>50</sup> Notably, the Group made a point to apply

---

<sup>45</sup> Delhotal, *supra* note 7, at 420.

<sup>46</sup> Thomas O. McGarity, *Proposal for Linking Culpability and Causation to Ensure Corporate Accountability for Toxic Risks*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 1, 51 (2001) (citing 42 U.S.C. § 9651(e)).

<sup>47</sup> 42 U.S.C. § 9651(e)(1)-(4).

<sup>48</sup> Superfund Section 301(e) Study Group, *Injuries and Damages from Hazardous Wastes-Analysis and Improvement of Legal Remedies, A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510)*, 97th Cong., 2d Sess. 43 (Comm. Print 1982) available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015004856327;view=1up;seq=45>.

<sup>49</sup> *Id.* at 241.

<sup>50</sup> *Id.* at 240.



## CLARIFYING THE PREEMPTIVE SCOPE OF CERCLA SECTION 9658

their findings to cover the repeal of state statutes of repose, such as the North Carolina law at issue in *Waldburger v. CTS Corp.*<sup>51</sup>

### *B. Section 9658 of CERCLA*

In response to the Group's findings, Congress opted out of waiting for the individual states to amend their statutes and instead chose to "address the problem identified in the study."<sup>52</sup> Thus, on October 17, 1986, Section 9658<sup>53</sup> was added to CERCLA.<sup>54</sup> The key provision of Section 9658 states: "If the applicable limitations period<sup>55</sup> for specified state law actions provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute."<sup>56</sup> Specifically, the "federally required commencement date" is, "the date 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."<sup>57</sup> Section 9658 is applicable to "[a]ny action brought under state law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility...."<sup>58</sup>

---

<sup>51</sup> *Id.* at 241.

<sup>52</sup> *Waldburger v. CTS Corp.*, 723 F.3d 434, 439 (4th Cir. 2013) (quoting H.R. Rep. No. 99-962, at 261 (1986) (Conf. Rep.), reprinted in 1986 U.S.C.C.A.N. 3276, 3354).

<sup>53</sup> § 9658 refers to the statutory section number, but the reader should keep in mind that the section can also be referred to by its CERCLA section number (§ 309). Technically, § 309 was added to CERCLA and then codified as § 9658, but for the sake of consistency and our purposes, I will use § 9658 throughout this note.

<sup>54</sup> Delhotal, *supra* note 7, at 417 (citing Pub. L. No. 99-499, § 203(a), 100 Stat. 1695096 (1986) (codified at 42 U.S.C. § 9658)).

<sup>55</sup> "The term 'applicable limitations period' is defined to mean the period specified in a statute of limitations during which the specified civil actions may be brought . . . It includes both statutory and common law commencement dates." *Id.* at 417 n.8 (citing 42 U.S.C. §§ 9658(b)(2), (a)(1) (2012)).

<sup>56</sup> 42 U.S.C. § 9658(a)(1).

<sup>57</sup> 42 U.S.C. § 9658(b)(4)(A).

<sup>58</sup> 42 U.S.C. § 9658(a)(1).

Essentially, Section 9658 sets a federal minimum standard for accrual dates in certain type of cases, such as those involving personal injury and property damage claims.<sup>59</sup> Such federal minimum standards are not novel—federal law has established many minimum standards in environmental legislation, such as the Clean Air Act and Solid Waste Disposal Act.<sup>60</sup> However, Section 9658 has been the subject of criticism for seemingly violating the principles of federalism by encroaching on the sovereign authority of a state in determining statutes of limitation for certain causes of actions.<sup>61</sup> Nonetheless, Section 9658 is significant in that if either a state statutory or common law provides for an earlier accrual date than that of Section 9658, the federal minimum date usurps the state law.<sup>62</sup> Alternatively, Section 9658 allows for the application of state law if the accrual date would be the same under federal law.<sup>63</sup>

### C. *Interpreting Ambiguous Statutes*

Courts are frequently faced with interpreting statutes whose meanings are not easily discernible. When faced with interpreting such a statute, the court's goal is to "effectuate Congress's intent"<sup>64</sup> by reading the text of the statute<sup>65</sup> and considering whether the law is either plain in meaning or ambiguous. If a plain reading of the text is appropriate, the court will accord it the straightforward meaning, "absent . . . clearly expressed legislative intent to the contrary."<sup>66</sup> However, if the text is determined to be ambiguous, the court will defer to the legislative history of the statute.<sup>67</sup> A statute is deemed ambiguous if it is "susceptible to two or more reasonable interpretations," but

---

<sup>59</sup> Delhotal, *supra* note 7, at 418.

<sup>60</sup> *Id.* at 418 n.22 (internal citations omitted).

<sup>61</sup> *Id.* (citing Alfred R. Light, *Federal Preemption, Federal Conscription Under the New Superfund Act*, 38 MERCER L. REV. 643, 651 (1987)).

<sup>62</sup> 42 U.S.C. 9658(a)(1).

<sup>63</sup> *Id.*

<sup>64</sup> *Waldburger v. CTS Corp.*, 723 F.3d 434, 442 (4th Cir. 2013) (citing *United States v. Abdelshafi*, 592 F.3d 602, 607 (4th Cir. 2010)).

<sup>65</sup> *Id.* (citing *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 603 (4th Cir. 1999)).

<sup>66</sup> *Waldburger*, 723 F.3d at 442 (citing *Abdelshafi*, 592 F.3d at 607 (quoting *United States v. Bell*, 5 F.3d 64, 68 (4th Cir. 1993))).

<sup>67</sup> *Id.* (quoting *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1482 (4th Cir. 1996) (en banc)).

is not considered ambiguous if different interpretations are merely conceivable.<sup>68</sup> Additionally, the court considers the specific context in which the language is used—specifically giving consideration to the broader context of the statute as a whole.<sup>69</sup>

#### *D. The Preemption Doctrine*

As a principle of statutory interpretation, the notion of “presumption against preemption” is relatively new when considering early discussions of state versus federal power.<sup>70</sup> Deriving from the Supremacy Clause,<sup>71</sup> the preemption doctrine is the “judicial tool by which courts define the contours of federal control of a subject when Congress has legislated pursuant to one of its enumerated powers.”<sup>72</sup> Further, the doctrine “gives content to the parameters of that principle in areas left in doubt under particular federal legislation, and there inevitably will be areas of doubt.”<sup>73</sup> Ultimately, the preemption doctrine attempts to define what law controls when there is a conflict, or the appearance of one, between federal and state law.<sup>74</sup>

Historically, when Congress decided to enter an area of regulation, there was an assumption that Congress occupied the entire field being regulated.<sup>75</sup> However, with the advent of the New Deal in the 1930s, the Supreme Court increasingly became uncomfortable with expansive federal

---

<sup>68</sup> *Agrilink Foods, Inc. v. Dep’t of Revenue*, 103 P.3d 1226, 1228-1229 (2005) (quoting *State v. Hahn*, 924 P.2d 392 (1996)).

<sup>69</sup> *Id.* (citing *Holland*, 181 F.3d at 603 (quoting *Robinson*, 519 U.S. at 341 (internal citations omitted))).

<sup>70</sup> Robert N. Weiner, *The Height of Presumption: Preemption and the Role of Courts*, 32 *HAMLIN L. REV.* 727, 727 (2009).

<sup>71</sup> See U.S. CONST. art. VI, cl. 2.

<sup>72</sup> Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 *S.C.L. REV.* 967, 968 (2002).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Weiner, *supra* note 70, at 728 n.3 (citing Stephen A. Gardbaum, *The Nature of Preemption*, 79 *CORNELL L. REV.* 767, 786 (1994) (noting that “[u]nlike modern preemption doctrine, which is focused exclusively on the (express or implied) intent of Congress, the earlier doctrine operated automatically whenever Congress entered a field of regulation; thus any federal regulation of any given area automatically preempted all state regulation in the same area.”)).

authority.<sup>76</sup> In *Rice v. Santa Fe Elevator Corp.*, an early field preemption case, the Supreme Court stated that it should be assumed that “the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>77</sup> Paramount to the application of the preemption doctrine is the Justices’ “political or philosophical beliefs about the scope of federal legislation and how it should be interpreted.”<sup>78</sup>

Currently, preemption analysis involves state law yielding to federal law, *vis-a-vis* the Supremacy Clause, “if the federal statute contains explicit language preempting the state law.”<sup>79</sup> Alternatively, “a court may find a state law impliedly preempted if it directly conflicts with federal law—if compliance with both state and federal law is a physical impossibility—or if state law stands as an obstacle to the accomplishment of federal goals,” *i.e.*, “obstacle preemption.”<sup>80</sup> When determining whether the preemption doctrine applies, the Supreme Court has taken various routes. In some cases, the Supreme Court has conspicuously ignored the presumption and in other cases has reinforced the notion that in cases areas traditionally regulated by state law,<sup>81</sup> the presumption against preemption is given special force, while also considering Congress’s purpose of passing the piece of legislation.<sup>82</sup>

---

<sup>76</sup> *Id.* at 728.

<sup>77</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>78</sup> Davis, *supra* note 72, at 970. See David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1129 (1999) (“For most judges, whether liberal or conservative, these cases pit one dimension of their ideology, their principles of federalism, against another, their policy preferences or attitudes toward the particular local regulation at issue.”). See also J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. CAL. L. REV. 523, 536 (2001).

<sup>79</sup> Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 699-700 (2008) (citing U.S. CONST. art. VI, cl. 2; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (“[T]he pre-emptive language of [the relevant statute] means we need not go beyond that language to determine whether Congress intended the MDA to pre-empt at least some state law . . . , [though] we must nonetheless ‘identify the domain expressly pre-empted’ by that language . . . .” (citations omitted))).

<sup>80</sup> *Id.* at 700.

<sup>81</sup> “Traditional state powers” are those areas of governance pertaining to the “life, health, and safety of the general public.” Davis, *supra* note 72, at 968.

<sup>82</sup> Weiner, *supra* note 70, at 729.

*E. Similar Cases to Waldburger v. CTS Corp.*

Prior to *Waldburger*, both the Fifth and Ninth Circuits addressed the issue of whether Section 9658 preempts state statutes of repose. In *McDonald v. Sun Oil Company*, the Ninth Circuit was faced with a similar issue as that in *Waldburger*. Plaintiff property owners in Jefferson County, Oregon, brought suit against Sun Oil Company (“Sun”) for alleged negligence, contribution, breach of contract and fraud due to the unlawful dumping of calcine<sup>83</sup> tailings at Horse Heaven Mine.<sup>84</sup> Granting Sun’s motion for summary judgment, the district court held that the plaintiffs’ negligence claim was barred by Oregon’s statute of repose for negligent injury to person or property.<sup>85</sup> The Ninth Circuit reversed, holding that the phrase “statute of limitations” in Section 9658 was intended by Congress to include statutes of repose and it was ambiguous as to whether it excluded statutes of repose.<sup>86</sup> Like the court in *Waldburger*, the Ninth Circuit acknowledged that many instances existed in which the terms “statute of limitations” and “statute of repose” were used interchangeably by Congress.<sup>87</sup> Thus, similar to the conclusion made in *Waldburger*, the court determined there was considerable uncertainty about the distinction between the two terms and so ambiguity existed as to whether Section 9658 applied solely to statutes of limitation or included statute of repose.<sup>88</sup>

Because the term “statute of limitations” was ambiguous at the time Congress passed Section 9658, the court next reviewed the legislative history of CERCLA. Similarly to the court in *Waldburger*, the *McDonald* court referenced the Group’s conclusions that Congress should “adopt a rule that an action accrues when the plaintiff discovers or should have discovered the

---

<sup>83</sup> *McDonald v. Sun Oil Co.*, 548 F.3d 774, 778 (9th Cir. 2008) (“Calcine is a waste product resulting from the processing of mercury ore into mercury. Mercury sulfide ore is mined, crushed, and heated in a furnace or ‘retort’ to separate mercury from the ore. After the heating process is complete, the crushed rock, now called calcine, is stockpiled.”).

<sup>84</sup> *Id.* at 777.

<sup>85</sup> *Id.* at 779.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (citing BLACK’S LAW DICTIONARY (8th ed. 2004)).

<sup>88</sup> *Id.*

injury or disease and its cause.”<sup>89</sup> Since the term “statute of repose” is not used in any of the text of the United States Code, and because Congress specifically cited to the Group’s recommendations, the Ninth Circuit concluded that the legislative history indicates that the term “statute of limitations” applied to “statutes of repose.”<sup>90</sup>

Conversely, the Fifth Circuit came to a different conclusion in *Burlington Northern & Santa Fe Railroad Company v. Poole Chemical Company*, holding that CERCLA did not preempt a Texas statute of repose for products liability claims.<sup>91</sup> The court contended that CERCLA was intended only to address issues of delayed discovery regarding long-latency diseases caused by the dumping of toxic chemicals.<sup>92</sup> However, the products liability claim derived from the rupturing of a tank containing agricultural blending materials, which made the plaintiffs instantaneously aware of the resulting harm.<sup>93</sup> Because the injury that occurred was not associated with long-latency diseases caused by hazardous materials, Section 9658 did not apply.<sup>94</sup>

#### IV. INSTANT DECISION

Prior to analyzing the ruling of the district court, the Fourth Circuit in *Waldburger v. CTS Corp.* examined the concepts of “statutes of limitation” and “statutes of repose.”<sup>95</sup> The court acknowledged that both concepts function as limitations the amount of time a plaintiff could potentially bring a claim.<sup>96</sup> Thus, the court compared the Black’s Law Dictionary definition of the two terms. A statute of limitation is a “law that bars claims after a specified period...based on the date when the claim accrued (as when the injury occurred or was discovered).”<sup>97</sup> A statute of repose “bars any suit that

---

<sup>89</sup> *Id.* at 782.

<sup>90</sup> *Id.* at 783.

<sup>91</sup> *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 358 (5th Cir. 2005).

<sup>92</sup> *Id.* at 364.

<sup>93</sup> *Id.* at 365.

<sup>94</sup> *Id.* at 364-65.

<sup>95</sup> *Waldburger v. CTS Corp.*, 723 F.3d 434, 441 (4th Cir. 2013).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (citing BLACK’S LAW DICTIONARY 1546 (9th ed. 2009)).

## CLARIFYING THE PREEMPTIVE SCOPE OF CERCLA SECTION 9658

is brought after a specified time since the defendant's act...even if this period ends before the plaintiff has suffered a resulting injury.”<sup>98</sup> The court noted that because North Carolina barred lawsuits brought more than ten years after the defendant acted regardless of the plaintiff's knowledge of his harm,<sup>99</sup> the limitation should be characterized as a statute of repose, rather than a statute of limitation.<sup>100</sup> Accordingly, the court concurred with the district court's assessment that despite North Carolina not explicitly identifying the limitation as a statute of repose within the text of the law, it was proper to categorize the law as such.<sup>101</sup>

After establishing that North Carolina's ten-year limitation was a statute of repose, the court embarked on an exercise of statutory interpretation to determine whether Section 9658 of CERCLA would affect the operation of the limitation.<sup>102</sup> The court had to determine Congress's intent in passing Section 9658 by first examining the text of the statute to determine whether the language was plain in meaning or ambiguous.<sup>103</sup> In the analysis of whether the text was plain, the court took into consideration the language itself, the specific context of the language, and the broader context of the statute in its entirety.<sup>104</sup>

Upon considering these factors, the court determined that the statute was ambiguous.<sup>105</sup> Although on its face, the text could lead to a reasonable conclusion that Section 9658 only applied to statutes of limitation since the term is used five different times,<sup>106</sup> compared to the term “statutes of repose”

---

<sup>98</sup> *Id.* (citing BLACK'S LAW DICTIONARY 1546 (9th ed. 2009)).

<sup>99</sup> *Id.* at 441 (citing N.C. GEN. STAT. § 1-52(16) (2010)).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 441-42 (internal citations omitted).

<sup>102</sup> *Id.* at 442.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (citing *United States v. Abdelshafi*, 592 F.3d 602, 607 (4th Cir. 2010) (quoting *United States v. Bell*, 5 F.3d 64, 68 (4th Cir. 1993))).

<sup>105</sup> *Id.*

<sup>106</sup> In his dissent, Circuit Judge Thacker cited the plain meaning of the language used in § 9658. He noted that the statute defines “the applicable limitations period” as the “period specified in a *statute of limitations* (emphasis in original) during which a civil action ... of this section may be brought.” *Id.* at 446 (Thacker, J., dissenting). Thus, he concluded, § 9658 only preempts “state law where a state statute of limitation begins to run before it

not being used at all, the court concluded that an alternate interpretation was also feasible.<sup>107</sup> In support of a second reading, the court compared the language of Section 9658 to the North Carolina law.<sup>108</sup> Under Section 9658, two conditions regarding a state limitations period must be met before the federally required commencement date applies to the cause of action: (1) it must be an “applicable limitation period . . . specified in the State statute of limitations or under common law,” and (2) it must “provide a commencement date which is earlier than the federally required commencement date.”<sup>109</sup>

Applying these two conditions, the court outlined three reasons why the North Carolina ten-year limitations met the requirements of Section 9658, and was therefore preempted.<sup>110</sup> First, the court reasoned that the ten-year bar was a limitations period “specified in the State statute of limitations or under common law.”<sup>111</sup> Next, because the landowners had a ten-year window to bring a civil action under the North Carolina law, the court characterized the limitation as comporting with the definition of “applicable limitations period” defined in Section 9658.<sup>112</sup> Lastly, because the running of the statute of limitations began when the defendant committed his last act, as opposed to when the plaintiff had knowledge of the harm, the North Carolina commencement date started earlier than its federal counterpart.<sup>113</sup> Thus, despite Section 9658’s repeated usage of “statute of limitations” in the text, the law is susceptible to an interpretation that includes statutes of repose, like North Carolina’s.<sup>114</sup> Because of the possibility of two reasonable interpretations, the court found the statutory language to be ambiguous.<sup>115</sup>

---

would have run under the federally required commencement date.” *Id.* at 446-47 (Thacker, J., dissenting).

<sup>107</sup> *Id.* at 442.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (citing 42 U.S.C. § 9658(a)(1)).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (citing N.C. GEN. STAT. § 1-52; quoting 42 U.S.C. § 9658(a)(1)).

<sup>112</sup> *Id.* “The term ‘applicable limitations period’ means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.” 42 U.S.C. § 9658(b)(2).

<sup>113</sup> *Waldburger*, 723 F.3d at 442 (citing 42 U.S.C. § 9658(a)(1)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 442-43.



## CLARIFYING THE PREEMPTIVE SCOPE OF CERCLA SECTION 9658

In support of their ruling, the court outlined two explanations for their decision.<sup>116</sup> First, the court reasoned that both courts and scholars have used the terms “statute of limitations” and “statute of repose” interchangeably.<sup>117</sup> Thus, the court found that Congress’s sole usage of “statutes of limitation” within the text was not dispositive as to whether Section 9658 should apply to statutes of repose and it was entirely reasonable that Congress intended “statute of limitations” to apply to ten-year limitations like the one found in North Carolina.<sup>118</sup> Further, the court held that Section 9658 lacked internal consistency in reference to the “applicable limitations period” and “commencement date” because the section failed to manifest a plain meaning applicable to a statute of limitation found under the common law. Instead, the section only discusses the applicability of the “applicable limitations period” and “commencement date” under state statute.<sup>119</sup>

Because the court found the text of Section 9658 to be ambiguous, they examined the congressional intent in passing the section and the legislative history of CERCLA for interpretation purposes.<sup>120</sup> The court noted that Section 9658 was adopted by Congress in response to the Group, created at the time of the passing of CERCLA, which had the goal of determining the “adequacy of existing common law and statutory remedies in providing legal redress for harm...caused by the release of hazardous substances into the environment.”<sup>121</sup> Based on the Group’s findings and recommendation to require all states to adopt a rule in which an action accrues when the plaintiff discovers or should have reasonably discovered the

---

<sup>116</sup> *Id.* at 443.

<sup>117</sup> *Id.* (citing *McDonald v. Sun*, 548 F.3d 774, 781 nn. 3-4 (9th Cir. 2008)).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 438-39 (citing 42 U.S.C. § 9651(e)(1)).

harm and its cause,<sup>122</sup> Congress preemptively passed Section 9658 to directly address the problems identified by the Group.<sup>123</sup>

Additionally, the court pointed to the remedial and corrective—as opposed to regulatory—nature of CERCLA.<sup>124</sup> Specifically, the court noted the characterization of CERCLA being a “backward-looking statute” designed to ensure adequate remedies for plaintiffs with claims regarding hazardous waste sites and toxic spills.<sup>125</sup> Thus, the court reasoned that because of the remedial nature of CERCLA, the section was passed by Congress to comport with the goal of preempting state limitation periods that would otherwise limit plaintiffs’ ability to bring forth causes of actions when harms are delayed.<sup>126</sup>

Because of the reinforced characterization of CERCLA as corrective in nature the court employed a “standard of liberal construction” applicable to remedial statutes.<sup>127</sup> Applying such a standard, the court explicitly rejected an interpretation of Section 9658 that excluded application to provisions like North Carolina’s ten-year bar on accrual of real property claims.<sup>128</sup> Although the court conceded that an alternate interpretation is perfectly reasonable, the court refused to apply such a narrow approach that “thwarts Congress’s unmistakable goal of removing barriers to relief from toxic wreckage.”<sup>129</sup> The court further reasoned that such a limited approach

---

<sup>122</sup> “Worth noting is that the Group did not confine its concerns simply to statutes of limitation: ‘The Recommendation is intended also to cover the repeal of statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring [a] plaintiff’s claim before he knows that he has one.’” *Id.* at 439 (citing 301(e) Study Group, *supra* note 48, at 241).

<sup>123</sup> *Id.* (quoting H.R. Rep. No. 99-962, at 261 (1986) (Conf. Rep.), reprinted in 1986 U.S.C.C.A.N. 3276, 3354).

<sup>124</sup> *Id.* at 443 (citing Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 286 (1996)).

<sup>125</sup> *Id.* (quoting WILLIAM MURRAY TABB & LINDA A. MALONE, ENVIRONMENTAL LAW: CASES & MATERIALS 637 (1992)).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 444 (quoting *Urie v. Thompson*, 337 U.S. 163, 180 (1949)).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

## CLARIFYING THE PREEMPTIVE SCOPE OF CERCLA SECTION 9658

in interpreting the application of Section 9658 to statutes of repose would effectively “allow states to obliterate legitimate causes of action before they exist.”<sup>130</sup> Thus, the court held that Section 9658 preempts North Carolina’s ten-year limitation on the accrual of real property claims.<sup>131</sup>

In so holding, the court acknowledged that many underlying policy reasons justify statutes of repose.<sup>132</sup> However, in support of their holding, the court noted that the goal of statutes of repose is not solely to protect defendants, but also to ensure the efficient processing of cases.<sup>133</sup> Accordingly, the court noted that protections still exist for potential defendants in that the burden of proof continues to rest on the plaintiff, and, as time passes, necessary evidence will disappear and intervening causes will complicate the burden of proving causation.<sup>134</sup> Additionally, the court made the observation that in under North Carolina law, plaintiffs are still required to bring claims within three years of discovery, which is in accordance with CERCLA. In conclusion, the court stated that by holding that North Carolina’s ten-year limitation on the accrual of actions is preempted by Section 9658 of CERCLA, the court simply furthered Congress’s intent to help remove recovery barriers that victims of toxic waste face in seeking to hold accountable those responsible for the harm caused by the dumping of such waste.<sup>135</sup>

Notably in his dissent, Judge Thacker argued that a presumption against preemption should be applied when interpreting Section 9658.<sup>136</sup> Such a reading would limit the reach of Section 9658 to only state statutes of limitation, without extending it to state statutes of repose.<sup>137</sup> The dissent asserted that, “Even federal laws containing a preemption clause, such as

---

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (citing *United States v. Kubrick*, 444 U.S. 111, 117 (1979)).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 445.

<sup>136</sup> *Id.* at 453 (Thacker, J., dissenting).

<sup>137</sup> *Id.* at 445 (Thacker, J., dissenting).

9658, do not automatically escape the presumption against preemption.”<sup>138</sup> Further, the dissent reasoned that a state’s ability to create a substantive right, such as a state tort law limiting liability, has long been held to be within the realm of state regulation.<sup>139</sup> Thus, when taking these considerations as whole, the dissent concluded, a presumption against preemption should apply.<sup>140</sup>

## V. COMMENT

With the advent of federal agencies promulgating complex and convoluted regulations, like those implementing CERCLA, the jurisprudence regarding whether these rules preempt similar state laws has become equally complex and convoluted.<sup>141</sup> Past precedent.<sup>142</sup> In some instances, courts have developed a “clear statement” rule regarding the presumption against preemption: the court will not interpret a statute as overriding a state law unless Congress has clearly and unambiguously stated its intent to preempt.<sup>143</sup> Other courts have articulated the rule explicitly, holding that the presumption should be that Congress did not intend to supersede state law.<sup>144</sup>

Conversely, some courts have ignored the rule of presumption against preemption completely.<sup>145</sup> As a consequence of these “helter-skelter” applications, some courts have been accused of using the preemption doctrine as a shield to issue result-oriented decisions.<sup>146</sup> Thus, in order to avoid such

---

<sup>138</sup> *Id.* at 453 (Thacker, J., dissenting) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

<sup>139</sup> *Id.* at 453 (Thacker, J., dissenting).

<sup>140</sup> *Id.* at 453 (Thacker, J., dissenting) (internal citations omitted).

<sup>141</sup> Weiner, *supra* note 70, at 728.

<sup>142</sup> *Id.* at 727.

<sup>143</sup> *Id.* at 729 (citing *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140-41 (2004) (explaining that the Court should read statutes “in a way that preserves a State’s chosen disposition of its own power, in the absence of the plain statement” historically required.)).

<sup>144</sup> *Id.* (citing *N. Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (“[We] have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law.” (internal citations omitted))).

<sup>145</sup> *Id.* at 730 (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488-89 (2008); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476-77 (1996)).

<sup>146</sup> *Id.* at 730.

## CLARIFYING THE PREEMPTIVE SCOPE OF CERCLA SECTION 9658

charges, and for the sake of judicial economy, there is a need for uniformity in employing the preemption doctrine. Specifically, consistency in applying the preemption language of Section 9658 of CERCLA within the federal courts is especially crucial, since the implications of the section have fostered much debate.<sup>147</sup>

In its quest to create uniformity among the federal courts' application of the preemptive language of Section 9658, the Fourth Circuit considered two cases regarding the discovery rule in relation to state statutes of repose. In *McDonald v. Sun*,<sup>148</sup> the Ninth Circuit held that the phrase "statute of limitations" was ambiguous. Thus, in considering Congress's intent in passing CERCLA, the Ninth Circuit ultimately held that Section 9658 was intended to encompass state statutes of repose as well.<sup>149</sup> In *Waldburger*, the Fourth Circuit reaffirmed the Ninth Circuit's holding, thus taking a step towards uniformity among federal courts in the application of Section 9658 to include state statutes of repose. Notably, the Fourth Circuit distinguished both *Waldburger* and *McDonald* from *Burlington Northern and Santa Fe Railway Co. v. Poole Chemical Co.*,<sup>150</sup> a Fifth Circuit case involving a similar issue. The Fourth Circuit articulated in its ruling that the plaintiffs in *Burlington Northern and Santa Fe Railway Co.* had "prior knowledge of their claims prior to expiration of the state statute of repose...the case [did] not involve the delayed discovery...which [Section] 9658 was intended to address."<sup>151</sup> Thus, the Fourth Circuit adequately distinguished *Waldburger* and *McDonald* from *Burlington Northern and Santa Fe Railway Co.*, which in turn should guide federal courts faced with similar issues regarding the preemptive scope of Section 9658.

---

<sup>147</sup> For an overview of this debate, *see, e.g.*, *Barnes ex rel. Estate of Barnes v. Koppers, Inc.*, 534 F.3d 357, 362-65 (5th Cir. 2008).

<sup>148</sup> 548 F.3d 774.

<sup>149</sup> *McDonald v. Sun Oil Co.*, 548 F.3d 774, 783 (9th Cir. 2008).

<sup>150</sup> 419 F.3d 355.

<sup>151</sup> *Waldburger v. CTS Corp.*, 723 F.3d 434, 444 (quoting *Burlington Northern*, 419 F.3d at 359-60, 364-65).

As noted earlier, generally there has been a presumption against preemption in fields traditionally regulated by the state<sup>152</sup> and the burden is on the plaintiff to overcome this presumption.<sup>153</sup> However, there has been the assumption that “historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>154</sup> In order to articulate this requirement of a “clear and manifest purpose of Congress,” the Fourth Circuit was correct in analyzing Congress’s intent and the legislative history of Section 9658. By doing so, the Fourth Circuit acknowledged the remedial nature of CERCLA collectively and Section 9658’s purpose of eliminating state-imposed procedural obstacles for plaintiffs. Thus, the Fourth Circuit’s ruling that the use of “statute of limitations” in Section 9658 was intended to include state statutes of repose incorporates Congress’s “clear and manifest purpose,” which in turn leads to a preemption of any conflicting state statutes of repose.

In response to this analysis, that if Congress’s “clear and manifest purpose” were to include state statutes of repose, then such language would have been included in Section 9658. However, the Fourth Circuit correctly established that “statute of limitations” was often used interchangeably with “statutes of repose” due to their common restrictive nature. Additionally, the “clear and manifest purpose” of Congress should not be by the plain language of the law, but rather the overall intent of passing such legislation should be the primary focus of the court. Preemption should not hinge on the “clear and manifest *language*” of Congress; preemption should hinge on the *purpose* of the law. Thus, the Fourth Circuit was correct in applying Congress’s intent of eliminating state obstacles by passing Section 9658 in ruling that “statutes of limitation” included “statutes of repose.”

Additionally, like prior decisions construing Section 9658<sup>155</sup> and determining Congress’s intent, the Fourth Circuit gave substantial weight to

---

<sup>152</sup> See *Nat’l City Bank of Ind. v. Turnbaugh*, 463 F.3d 325, 330 (4th Cir. 2006). See also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

<sup>153</sup> *Barnes ex rel. Estate of Barnes*, 534 F.3d at 362-63 (internal citations omitted).

<sup>154</sup> *Medtronic*, 518 U.S. at 485 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>155</sup> See *McDonald v. Sun Oil Co.*, 548 F.3d 774 (9th Cir. 2008). See also *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355 (5th Cir. 2005).

## CLARIFYING THE PREEMPTIVE SCOPE OF CERCLA SECTION 9658

the Group's report in order to determine Congress's purpose in passing the section.<sup>156</sup> The Group's findings of inadequacies in existing common law and statutory remedies providing redress for harms caused by the release of hazardous substances<sup>157</sup> were the impetus of Congress's prompt action in developing and passing Section 9658.<sup>158</sup> Because the court gave significant consideration to the Study in interpreting the preemption language of the section as applying to statutes of limitation and statutes of repose, the court has further elevated the significance of the Group's findings, which will potentially impact future courts in their analysis of Section 9658. Although it is well within the individual states' province to pass statutes of limitation regarding tort law claims and is derivative of the states' historic police powers, such sovereignty is preempted when Congress's purpose to do so is "clear and manifest."<sup>159</sup> Cognizant of Congress's intent to eliminate potential procedural barriers pursuant to the Group's findings, the Fourth Circuit appropriately gave significant weight to these combined factors in holding that Section 9658 preempted North Carolina's statute of repose.

As a result of *Waldburger*, potential plaintiffs with claims arising from alleged unlawful hazardous waste dumping will no longer have the obstacles imposed by state statutes of repose.<sup>160</sup> Instead, state statutes of repose that would cause increased obstacles for private citizens seeking relief from unlawful dumping of hazardous substances will now be preempted by Section 9658. Additionally, in reaffirming the ruling of the Ninth Circuit in *McDonald*,<sup>161</sup> the Fourth Circuit has established precedent for other federal courts faced with similar issues. Notably, defendants will not be susceptible to a wave of litigation due to the Fourth Circuit's holding in *Waldburger*. Procedural limitations, such as North Carolina's requirement that plaintiffs

---

<sup>156</sup> *Waldburger*, 723 F.3d at 443 (internal citations omitted).

<sup>157</sup> *Id.*

<sup>158</sup> Delhotal, *supra* note 7, at 421-22, 424 (internal citation and emphasis omitted).

<sup>159</sup> Weiner, *supra* note 70, at 728 (citing *Rice*, 331 U.S. at 230 (1947)).

<sup>160</sup> Statutes of repose became increasingly popular—and almost every state has them on the books—in response to states enacting the “discovery rule, which provides that a cause of action accrues when the injured party first discovered the damage or when the damage would have been discovered had the party used due diligence.” Susan C. Randall, *Due Process Challenges to Statutes of Repose*, 40 Sw. L.J. 997, 997-98 (1986).

<sup>161</sup> See *supra* text accompanying note 85.

bring claims within three years of discovery,<sup>162</sup> will continue to provide defendants some protection from untimely litigation. Additionally, the burden of proof will remain on the plaintiffs, and meeting that burden may become increasingly difficult as time passes.<sup>163</sup> Thus because such procedural limitations are still in place, defendants will not be vulnerable to an “opening of the floodgates” of litigation. Rather, as a result of *Waldburger*, plaintiffs have one procedural barrier removed—unfair statutes of repose—but are still faced with a battle in meeting their burden of proof and statutes of limitation.

## VI. CONCLUSION

The Fourth Circuit’s interpretation of Section 9658 to include statutes of repose, despite the seemingly plain language of the law, correctly reflects Congress’s intent in passing the section. Through its ruling, the Fourth Circuit has alleviated a common and onerous procedural barrier for plaintiffs alleging harm due to illegal dumping of hazardous substances—time. Often, any opportunity for redress for potential plaintiffs is fleeting because environmental harms frequently take time to manifest into tangible harm. However, the Fourth Circuit’s ruling in *Waldburger* allow more time for potential plaintiffs bringing claims to become aware of their injury and develop a complaint, thus eliminating onerous time constraints that state statutes of repose impose. Additionally, by holding that Section 9658 preempted North Carolina’s statute of repose, the court established clarity for plaintiffs and other courts alike in determining the true potency of the preemptive language of the section. In reaffirming the preemptive power of Section 9658, the Fourth Circuit has reinvigorated Congress’s intent in making CERCLA a remedial statute by insuring that victims of toxic waste will not be hindered by inconsistent and restrictive state procedural obstacles.

ALLISON TUNGATE

---

<sup>162</sup> See *supra* text accompanying notes 134-35.

<sup>163</sup> See *supra* text accompanying note 134.



CLARIFYING THE PREEMPTIVE SCOPE OF CERCLA SECTION 9658