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Making The Right Step Under The Wrong Authority: Kansas’s Expansion of CERCLA to Include State Statutes of Repose

*Mechler v. United States*¹

I. INTRODUCTION

Exposure to dangerous substances such as pharmaceutical drugs, pesticides, or chemicals can be destructive to both human health and property. When an injury arises, those affected may want to bring a toxic tort claim as recompense. Toxic tort suits are often brought as class actions on behalf of groups of people that have been injured, such as a neighborhood of residents who have been exposed to toxic drinking water. Although the elements of a toxic tort case vary according to the exact theories raised by the complainant, generally, a plaintiff must show that: (1) the substance was dangerous; (2) the plaintiff was exposed to the substance; and (3) the substance caused harm to the plaintiff. However, before a plaintiff can even begin to meet their burden of proof, they may be required to prove that their suit is not barred by procedural defenses—including statutes of limitations and statutes of repose.

When considering the nature of an injury in a toxic tort claim, it is not uncommon that a plaintiff will notice the injury several years after exposure to the substance. Thus, legislation such as the Federal Tort Claims Act (FTCA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) attempts to ensure plaintiffs will have a remedy for toxic injuries—20, 30, or even 40 years after exposure to an allegedly dangerous substance. The United States District Court for the District of Kansas was faced with deciding whether a federal statute of limitations and/or the State statute of repose would bar a suit by the Mechlers in *Mechler v. U.S.*²

The Court held that the FTCA’s statute of limitations did not bar the plaintiff’s claim because a reasonable plaintiff would not have discovered the

¹ No. 12-1183-EFM, 2013 U.S. Dist. LEXIS 108466, at *1-2 (D. Kan. Aug. 2, 2013).

² See *infra* note 34.

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groundwater contamination on his or her property before the statute had run.³ Concerning Kansas' statute of repose, the Court wrestled with whether CERCLA's preemption over state statutes of limitations should also apply to states' statutes of repose, even though CERCLA only explicitly refers to statutes of limitations. In the end, the Court expanded CERCLA's reach by holding that Kansas' statute of repose, and not just its statute of limitations, is preempted by CERCLA.⁴

II. FACTS AND HOLDING

Chris and Wallace Mechler (Plaintiffs), husband and wife, own title to a residence and 52 acres of real estate in Berrytown, Kansas.⁵ Until 1973, the Government (Defendant), through the United States Department of the Air Force (Air Force), operated a base across the road from Plaintiffs' property.⁶ During its operation, the east side of the base had two landfills where waste generated from the base was accepted, with the North Landfill being adjacent to both Plaintiffs' and Wallace Mechler's father's (Mechler Sr.) property.⁷ Years after the base closed, tests performed by both the U.S. Army Corps of Engineers (Corps) and the Kansas Department of Health and Environment (KDHE) showed that well-water on Plaintiffs' property had been contaminated with trichloroethene and vinyl chloride that exceeded the regulatory limits for drinking-water.⁸ Plaintiffs filed suit against the Government, alleging that the leeching of hazardous chemicals from the former Air Force base caused damage to their property.⁹

In 1994, the Corps began an environmental investigation of the former base.¹⁰ The Corps took a series of samples from wells installed near

³ See *infra* note 36.

⁴ See *infra* note 37.

⁵ *Id.*

⁶ *Id.* at 2.

⁷ *Id.*

⁸ *Id.* at 6.

⁹ *Id.* at 1.

¹⁰ *Id.* at 2.

the landfills.¹¹ Samples taken from a well between the northern landfill and Mechler Sr.'s property in October 1999 and January 2000 discovered vinyl chloride concentrations exceeding regulatory limits for safe drinking-water.¹² In September 2000, the Corps, along with the KDHE, took samples from additional wells, including wells that provide water to Plaintiffs' and Mechler Sr.'s homes.¹³ Results from the September 2000 testing revealed that water on Plaintiffs' land was within regulatory limits, but water at Mechler Sr.'s home exceeded the limit for vinyl chloride.¹⁴

The KDHE notified the Corps and Mechler Sr. about the contamination.¹⁵ In a meeting with Mechler Sr. and Plaintiff Wally Mechler on September 26, 2000, the Corps informed Wally that it believed the contaminants had leached from the landfill, to the groundwater, and then into Mechler Sr.'s well.¹⁶ To ensure Plaintiffs and Mechler Sr. had clean drinking water, the Corps installed whole-house granular activated carbon (GAC) units in both homes and offered to cover the expense of Plaintiffs and Mechler Sr. connecting to water lines from the City of Topeka.¹⁷ Despite the installation of the GAC units, Plaintiff Wally expressed a belief that the contamination of Mechler Sr.'s untreated well water had ruined the value of Mechler Sr.'s property, and that the Corps should reimburse that loss.¹⁸ Plaintiffs and Mechler Sr. also declined the Corps' offer to connect them to city water lines because it would require annexation of their property to the city, subjecting them to city taxes and ordinances.¹⁹

In the years following the discovery of the contamination, seventeen additional groundwater-monitoring wells were installed on and around the landfill, Plaintiff's property, and Mechler Sr.'s property.²⁰ Plaintiffs received

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 2-3.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *Id.* at 3, 4.

¹⁸ *Id.* at 4.

¹⁹ *Id.*

²⁰ *Id.*

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copies of the reports and were told that they would be notified if contamination ever reached their property.²¹ In the reports, each well was assigned an abbreviated code to describe its location.²² Plaintiffs believed the wells on Mechler Sr.'s property were designated as "MSR" for "Mechler Sr.," while believing wells located on Plaintiffs' property were labeled "PVW-MJR" for "Mechler Jr."²³

In a letter sent to Plaintiffs on April 3, 2009, the Corps revealed results of samples collected in October 2008 and March 2009.²⁴ The letter began by listing the wells' codes.²⁵ Two of the five wells listed (MSR-03 and OW-20), however, did not specify whether they were located on Plaintiffs' or Mechler Sr.'s property.²⁶ Plaintiffs believed that these two wells were located on Mechler Sr.'s front yard, especially after the Corps renamed OW-20 to OW-MSR-05.²⁷ OW-MSR-05 was, to the contrary of Plaintiffs' belief, installed on Plaintiffs' property.²⁸ An April 2009 letter showed that trichloroethene and vinyl chloride exceeded regulatory limits in well OW-MSR-05.²⁹ After testing well OW-MSR-05 again and installing an additional well on Plaintiff's property, the Corps sent a letter to Plaintiffs dated June 20, 2010, notifying Plaintiffs that the well water on their property had also been contaminated.³⁰ Plaintiffs contend that this was the first time they were told that new wells installed on their property had been sampled.³¹

Plaintiffs first filed an administrative claim with the Department of the Air Force.³² However, because the Air Force failed to dispose of the

²¹ *Id.* at 5.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* MSR-03 was identified as an upgrade from Plaintiffs' PVW-MJR cistern. OW-20 was identified as the "[n]ewly installed monitoring well east of barn in the field."

²⁷ *Id.* at 6.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 6-7.

³² *Id.* at 7.

claim within six months after it was filed, Plaintiffs were permitted to file suit in federal court under the FTCA, alleging that the leeching of hazardous chemicals from a former Air Force base caused damage to their property.³³ In response, the Government filed a Motion to Dismiss due to lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the grounds that Plaintiffs' suit was barred by the two-year statute of limitations found in the FTCA and/or Kansas' ten-year statute of repose.³⁴

In denying the Government's motion to dismiss for lack of subject matter jurisdiction³⁵, the United States District Court for the District of Kansas held that: (1) Plaintiffs' claims are not barred by the FTCA's two-year statute of limitations because a reasonable plaintiff would not have discovered the contamination on Plaintiffs' property more than two years before Plaintiffs filed suit;³⁶ and, (2) Plaintiffs' claims have not been extinguished under Kansas' statute of repose because CERCLA preempts state statutes of repose.³⁷

III. LEGAL BACKGROUND

First, this section will describe the Federal Tort Claims Act (FTCA). Second, it will compare states' statutes of repose with states' statutes of limitations. Third, it will highlight the interaction of State statutes of repose with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Fourth, this section will trace the decisions of courts that have addressed whether CERCLA preempts state statutes of repose in addition to state statutes of limitations. Lastly, this section will trace a line of United States Supreme Court cases that may suggest that preempting state statutes of repose violates due process for defendants.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1.

³⁶ *Id.* at 17.

³⁷ *Id.* at 25.

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The FTCA is a limited waiver of governmental sovereign immunity governed by 28 U.S.C. § 1346(b)(1).³⁸ Under specified circumstances, the FTCA renders the Government liable for monetary damages for various injuries caused by the negligence of Government employees.³⁹ A FTCA action is generally governed by the law of the state where the tortious act occurred; thus, governmental liability is only created if the act is a tort in that respective state.⁴⁰ Before a plaintiff can successfully maintain a FTCA action, they must have first exhausted all other administrative remedies prior to filing suit.⁴¹ There are numerous explicit exceptions to this waiver, including any claim based on the exercise or performance or failure to exercise or perform a discretionary function⁴² or duty on the part of a federal agency or

³⁸ 28 U.S.C. § 1346(b)(1) states that the “district courts...shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages...injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”

³⁹ *Id.* See also *Lanus v. United States*, 133 S. Ct. 2731, 2732 (U.S. 2013) (stating that the United States can be “liable to all persons, including servicemen, injured by the negligence of Government employees”).

⁴⁰ 31 Fed. Proc., L. Ed. § 73:443; See also *U.S. v. Olson*, 546 U.S. 43 (2005) (Holding that the “FTCA waives the federal government's sovereign immunity only where local law would make a private person liable in tort, not where local law would make a state or municipal entity liable, even where uniquely governmental functions are at issue”).

⁴¹ *McNeil v. U.S.*, 508 U.S. 106, 107 (2003).

⁴² To determine whether the discretionary function exception will bar suit against the Government, several principles must be applied. *Berkovitz v. U.S.*, 486 U.S. 531 (1988). First, it must be asked whether the discretionary conduct “involves an element of judgment or choice” by the employee; if it does not, then there “is no discretion in the conduct for the discretionary function exception to protect.” *Id.* at 536. Consequently, if a federal statute, regulation, or policy specifically sets out the conduct for an employee to follow, the discretionary function exception will not apply. *Id.* Second, if the “challenged conduct involves an element of judgment,” the Court must decide if it should be shielded by the discretionary function exception. *Id.* Ultimately, the Court stated that the exception will shield Government only if the challenged conduct “involves the permissible exercise of policy judgment;” thus, only “governmental actions and decisions based on considerations of public policy” are protected. *Id.* at 537. In *Berkovitz*, the Court declined to apply the discretionary function exception, deciding that the licensing of a polio vaccine that harmed the claimant was not barred by the discretionary function exception. However, in *U.S. v.*

employee, whether or not that discretion is abused.⁴³ The exceptions aim to set the boundary between Congress' willingness to impose tort liability on the U.S. and its desire to protect certain governmental activities from exposure to suit by private individuals.⁴⁴

In *U.S. v. Kubrick*, the United States Supreme Court concluded that the FTCA contains a two-year statute of limitations.⁴⁵ The Court explained that the true "purpose of the limitations statute" is to "require the reasonably diligent presentation of tort claims against the Government," and that when a plaintiff is "in possession of the critical facts that he has been hurt" and knows "who has inflicted the injury, . . . accrual" on the claim will begin.⁴⁶ Thus, the Court decided that the statute of limitations did not begin to run for a veteran that was treated at a government hospital until he became aware that he was infected.⁴⁷

A statute of repose is similar to a statute of limitation, except it is broader.⁴⁸ Like statutes of limitation, statutes of repose may originate either statutorily or by common law.⁴⁹ However, statutes of repose are generally

Gaubert, 499 U.S. 315 (1991), the Court ruled that federal regulators' supervision of a savings and loan association's operations involved the exercise of discretion in furtherance of public policy goals and was within the Federal Tort Claims Act's (FTCA) discretionary function exception. 24 A.L.R. Fed. 2d 329. *See also* Boyle v. United Technologies Corp., 487 U.S. 500 (1988); U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797 (1984); Dalehite v. U.S., 346 U.S. 15 (1953).

⁴³ 28 U.S.C. § 2680(a)(2012).

⁴⁴ U.S. v. Varig Airlines, 467 U.S. 797, 808 (1984).

⁴⁵ U.S. v. Kubrick, 444 U.S. 111 (1979).

⁴⁶ *Id.* at 122-123.

⁴⁷ *Id.* at 116.

⁴⁸ Peter E. Seley & Coral A. Shaw, *McDonald v. Sun Oil: The Ninth Circuit's Constitutionally Questionable Expansion of CERCLA's Toxic Tort Discovery Rule*, 39 ELR 10197 (Mar. 2009), available at <http://www.gibsondunn.com/publications/Documents/Seley-Shaw-McDonaldvSunOil.pdf> at 1.

⁴⁹ Douglas S. Arnold & Benjamin L. Snowden, *CERCLA SECTION 9658 AND STATE RULES OF REPOSE--Two Decades After Passage, Unanimity Still Elusive On Basic Question Of Statutory Interpretation*, <http://www.alston.com/Files/Publication/44e8cf2e-e2cd-4d18-bb1d-798772f8b676/Presentation/PublicationAttachment/b2c26b5c-eba6-4f7c-8537-7c1737181933/CERCLA%20.pdf> at 2 (last visited Jan. 14, 2014).

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longer than statutes of limitation and are not generally subject to tolling.⁵⁰ This is because while a statute of limitation begins to run once a plaintiff is *injured* by a tortious act, a statute of repose begins to run *after the completion of a tortious act*, regardless of whether a plaintiff has been injured or whether plaintiff's injury is manifest.⁵¹ In other words, it is irrelevant under a statute of repose as to *when* an individual discovers their injury.⁵²

Also, “[w]hile a statute of limitations generally is procedural and extinguishes the remedy rather than the right, ... [a statute of] repose is substantive and extinguishes both the remedy and the actual action.”⁵³ Consequently, a statute of repose “creates a substantive right in those protected to be free from liability after a legislatively-determined length of time.”⁵⁴ “In other words, a statute of repose establishes a ‘right not to be sued,’” for a potential defendant.⁵⁵ Kansas’ ten-year statute of repose, Kan. Stat. Ann. § 60-513, asserts that “in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.” Section 60-513(b) applies to specifically enumerated causes of action.⁵⁶ Like Kansas, most states have repose statutes that cover a broad

⁵⁰ *Id.* “Tolling generally operates by delaying the date on which a plaintiff’s claim accrues, and on which the statute as a result begins to run.” *Id.*

⁵¹ Seley, *supra* note 48, at 1.

⁵² *Id.*

⁵³ 51 Am. Jur. 2d *Limitation of Actions* § 32 (2000).

⁵⁴ *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d at 862, 866 (4th Cir. 1989).

⁵⁵ *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d at 355, 363 (5th Cir. 2005).

⁵⁶ The specific enumerated causes of action in Kan. Stat. Ann. § 513(a) that should be brought within two years are:

- (1) An action for trespass upon real property.
- (2) An action for taking, detaining or *injuring personal property*, including actions for the specific recovery thereof. (emphasis added)
- (3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.
- (4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.
- (5) An action for wrongful death.

range of actions that can implicate injury from hazardous substances within the scope of CERCLA.⁵⁷ CERCLA, however, only explicitly mentions “statutes of limitation,” and not state “statutes of repose.”⁵⁸

CERCLA is federal legislation that was enacted in 1980 to “promote efficient and equitable responses to the fallout from hazardous wastes.”⁵⁹ Immediately after CERCLA was enacted, Congress conducted a study which found that “injuries from toxic torts often [took] years to manifest” and that “many states’ statutes of limitations would run before the plaintiff [was] aware of the injury.”⁶⁰ In response to this study, Congress enacted the Superfund Amendments and Reauthorization Act (SARA) in 1986, which included a federal “discovery rule” in § 9658.⁶¹

Section 9658 applies to “any 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.”⁶² Under § 9658, if any state statute of limitation’s commencement date (when tolling begins) came before the federally required commencement date (“FRCD”), “the FRCD [will be used] in lieu of the date specified in such State statute.”⁶³ The FRCD is defined as “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.”⁶⁴

(6) An action to recover for an ionizing radiation injury as provided in K.S.A. 60-513a, 60-513b and 60-513c, and amendments thereto.

(7) An action arising out of the rendering of or failure to render professional services by a health care provider, not arising on contract.

⁵⁷ Seley, *supra* note 48, at 1.

⁵⁸ *Id.*

⁵⁹ *Mechler*, 2013 U.S. Dist. LEXIS 108466, at 21.

⁶⁰ *Id.* at 22.

⁶¹ Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 203(a), 100 Stat. 1613, 1695 (1986).

⁶² 42 U.S.C. § 9658(a)(2).

⁶³ § 9658(a)(1).

⁶⁴ § 9658(b)(4)(A).

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“Section 9658 is ‘hardly a model of legislative clarity,’” and there is still much debate concerning its scope.⁶⁵ Although district courts have largely similarly found that CERCLA § 9658 preempts state statutes of limitations,⁶⁶ the circuits have come to different conclusions as to whether § 9658 preempts state statutes of repose.”⁶⁷ While the Fifth Circuit believes that “the plain language of § 9658—which uses the phrase ‘statute of limitations’ five times—clearly show[s] that Congress intended to preempt only statutes of limitations,”⁶⁸ the Ninth and Fourth Circuits have found ambiguity in § 9658, pointing to CERCLA’s legislative history and the common interchangeable use of “the terms ‘statute of limitation’ and ‘statute of repose’ . . . at the time Congress enacted § 9658.”⁶⁹ The United States Department of Justice (DOJ) has taken the stance that CERCLA should not preempt state statutes of repose.⁷⁰

Aside from the debate over § 9658’s interpretation, the preemption of state statutes of repose may raise a serious question of due process for defendants.⁷¹ If the FRCD is ever held to affect a case where the repose period ended prior to SARA’s enactment, § 9658 could essentially “revive” a cause of action that is substantively extinct (as opposed to only being procedurally barred by a statute of limitations).⁷² And because a rule of repose “creates a substantive right in those protected to be free from liability

⁶⁵ Arnold, *supra* note 49, at 4.

⁶⁶ See *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d at 358 (holding that § 9658 does not preempt state statutes of repose); *But see* *Waldburger v. CTS Co.*, 2013 U.S. App. LEXIS 13942 (holding that § 9658 does preempt state statutes of repose); See also *McDonald v. Sun Oil Co.*, 548 F.3d 774 (9th Cir. 2008).

⁶⁷ *Id.* at 22-23. See *Burlington*, 419 F.3d at 355 (holding that § 9658 does not preempt state statutes of repose); *But see* *Waldburger v. CTS Co.*, 2013 U.S. App. LEXIS 13942 (holding that § 9658 does preempt state statutes of repose); See also *McDonald v. Sun Oil Co.*, 548 F.3d 774 (9th Cir. 2008).

⁶⁸ *Mechler v. United States*, 12-1183-EFM, 2013 U.S. Dist. LEXIS 108466, at 23 (D. Kan. Oct. 23, 2012).

⁶⁹ *Id.*

⁷⁰ Brief for Peter Waldburger, et al. as Amicus Curiae in Support of Appellants at 13, *Waldburger v. CTS Corp.*, 2012 WL 3528328 (C.A.4) (No. 12-1290).

⁷¹ Arnold, *supra* note 49, at 7.

⁷² *Id.*

after a legislatively-determined length of time,” preempting their repose rights could also arguably violate their due process rights.⁷³

There are several United States Supreme Court cases that deal with the revival of extinct claims and that give a guide as to when a revival either violates a defendant’s due process or not.⁷⁴ Early Supreme Court cases (the “*Campbell* line of cases”) range from 1885 to 1945 and focus heavily on whether the nature of the legislature’s set time limits concern the remedy or the cause of action.⁷⁵ By contrast, more recent Supreme Court cases dealing with this issue ranging from 1976 to 1992 (the “*Usery* line of cases”) suggest that the application of § 9658 to rules of repose may be constitutional—as long as it can meet the due process test of showing that the retroactive legislation is justified by a rational legislative purpose.⁷⁶

In *Campbell v. Holt*,⁷⁷ 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.”⁷⁸ However, the Court held that this did not apply for an action on a contract, because “the statute of limitations does not destroy the right . . . but only bars the remedy.”⁷⁹ The Court similarly held twenty years later in *Davis v. Mills*⁸⁰ that, when dealing with personal or real property, “the title . . . passes [when] the statute [of limitations] has run.”⁸¹ The Court thus stated that the “[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.”⁸²

Another 20 years later, in 1925, the Court in *William Danzer & Co. v. Gulf & Shop Island Railway Co.* stated that although cases like *Campbell*

⁷³ *Id.* at 5.

⁷⁴ Seley, *supra* note 48, at 3.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Campbell v. Holt*, 115 U.S. 620 (1885).

⁷⁸ *Id.* at 623.

⁷⁹ *Id.* at 624.

⁸⁰ *Davis v. Mills*, 194 U.S. 451 (1904).

⁸¹ *Id.* at 457.

⁸² *Id.*

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(where “statutory provisions fix[es] the time within which suits must be brought”) apply to the remedy only, sometimes these provisions “constitute a part of the definition of a cause of action created by the same or another provision, and operates as a limitation upon liability.”⁸³ In other words, sometimes these provisions operate as a statute of repose. Lastly, in *Chase Securities Corp. v. Donaldson*, the Court did not think that “lifting the bar of a statute of limitations,” and restoring a plaintiff’s remedy “lost through a mere lapse of time” was “per se an offense against the Fourteenth Amendment.”⁸⁴ Thus, the *Campbell* line of cases seem to suggest that when a statute sets a time limit on a purely procedural action, and does not create a vested interest for the defendant, there is no due process violation when the government alters that time limit;⁸⁵ and accordingly, that altering the time period for a statute that does, however, create a vested interest in the defendant may violate that defendant’s due process.⁸⁶

In *Usery v. Turner Elkhorn Mining Co.*, the Court rejected the arguments of coalmine operators that Title IV of the Federal Coal Mine Health and Safety Act of 1969 (FCMS) violated their due process.⁸⁷ The FCMS deemed certain operators liable for a miner’s injury arising out of employment in the mines.⁸⁸ Concerning liability of the operators who had left the mine before the FCMS was enacted, the miners argued that the FCMS “spread costs in an arbitrary and irrational manner by basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business.”⁸⁹

The Court stated that the “retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process.”⁹⁰ When

⁸³ *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633, 637 (1925).

⁸⁴ *Chase Sec. Co. v. Donaldson*, 325 U.S. 304, 316 (1945).

⁸⁵ *Id.* at 314.

⁸⁶ *Seley*, *supra* note 48, at 3-4.

⁸⁷ *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

⁸⁸ *Id.* at 2.

⁸⁹ *Id.* at 18. The Operators did not challenge Congress’ power to impose the burden of past min working conditions on the industry. *Id.*

⁹⁰ *Id.* at 17.

evaluating the “justification for the retrospective imposition of liability,” the Court considered “the possibilit[y] that the Operators may not have known of the danger of their employees' contracting pneumoconiosis.”⁹¹ Furthermore, the Court considered that even if the Operators knew of the danger, “their conduct may have been taken in reliance upon the current state of the law, which imposed no liability on them for disabling pneumoconiosis.”⁹² Ultimately, after applying rational basis analysis, the Court held that “the imposition of liability for the effects of disabilities bred in the past [was] justified as a rational measure to spread the costs of the employees’ disabilities to those who have profited from the fruits of their labor,” including the past operators.⁹³

Eight years after *Usery*, in *Pension Benefit Guar. Co. v. R.A. Gray & Co.*, an action was brought that challenged the application of the withdrawal liability provisions (requiring employer withdrawing to pay a fixed amount) of the Multiemployer Pension Plan Amendments Act (MPPA) to employers who withdrew from their pension plans during the five-month period preceding enactment of the MPPA.⁹⁴ Citing *Usery*, the Court found Congress’ decision to apply the MPPA was supported by a rational legislative purpose, and thus did not violate the Due Process Clause.⁹⁵ In this particular context, the Court explained that “it was eminently rational for Congress to conclude that the purposes of the MPPA could be more fully effectuated if its withdrawal liability provisions were applied retroactively.”⁹⁶

Most recently, in *General Motors Co. v. Romein*, although the Court noted that “[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation,”⁹⁷ it upheld a Michigan law under rational basis analysis, which required coordination of workers’ compensation benefits despite the fact that, as a result of the coordination, some companies were forced to refund money to disabled

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 18.

⁹⁴ *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 726 (1984).

⁹⁵ *Id.* at 734.

⁹⁶ *Id.* at 730.

⁹⁷ *Gen. Motors Co. v. Romein*, 503 U.S. 181, 191 (1992).

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employees.⁹⁸ Thus, the *Usery* line of cases takes the focus off whether the retrospective legislation concerns the remedy or the cause of action, and puts it on whether it is justified by a rational legislative purpose.⁹⁹

IV. INSTANT DECISION

A. FTCA

First, the United States District Court for the District of Kansas held that when a reasonable plaintiff would not have discovered a contamination on the plaintiff's property more than two years before the plaintiff filed suit, the plaintiff's claims are not barred by the FTCA's two-year statute of limitations.¹⁰⁰ The court began its analysis with deciding whether, prior to September 20, 2009, the Mechlers knew or had reason to know that the chemicals from Forbes Field travelled to and contaminated their land.¹⁰¹ The government expressed four arguments as to why Plaintiffs had knowledge that their land was contaminated by chemicals from Forbes Field—all of which were rejected by the court.¹⁰²

The court rejected the Government's first argument that Plaintiffs had sufficient knowledge of the contamination on their property to trigger the statute of limitations at three points prior to September 20, 2009.¹⁰³ In a May 28, 2009, phone call between Plaintiff Wally and a Corps employee, the Government argues that the employee specified that the contamination was on Plaintiffs' property.¹⁰⁴ Plaintiffs agree that the employee told them that well OW-20 was contaminated,¹⁰⁵ Plaintiffs deny, however, that the employee specified that the contamination was on Plaintiff's property.¹⁰⁶ The

⁹⁸ Seley, *supra* note 48, at 4.

⁹⁹ *Id.*

¹⁰⁰ *Mechler v. United States*, 12-1183-EFM, 2013 U.S. Dist. LEXIS 108466, at 23 (D. Kan. Oct. 23, 2012).

¹⁰¹ *Id.* at 12.

¹⁰² *Id.* at 12-17.

¹⁰³ *Id.* at 13-14.

¹⁰⁴ *Id.* at 13.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The Government submitted a copy of the employee's notes of the phone call, but

court stated that this conversation did not resolve the parties' dispute about the substance of the call and, furthermore, after reviewing the map depicting the locations of the monitoring wells, well OW-MSR-05 (formerly OW-20) was either on or close to the border between Plaintiffs' property and Mechler Sr.'s.¹⁰⁷ For these reasons, the Court stated that it could not find that Plaintiffs knew on May 28, 2009, that their groundwater was contaminated.¹⁰⁸

The court also rejected the Government's second argument that a reasonably diligent plaintiff should have noted the information in an addendum¹⁰⁹ they signed and recalled the conversation with the Corps employee four months prior (when the employee said that OW-20 showed contamination) to collectively realize Plaintiffs' property was contaminated.¹¹⁰ The court stated that it is unreasonable to expect that Plaintiffs, who were responsible for monitoring the status of their own property and Mechler Sr.'s, would recall during the signing of a lease agreement the code of a well mentioned in a phone conversation four months prior.¹¹¹

The court next rejected the Government's third argument that Plaintiffs should have known that their groundwater was contaminated when they received the testing results from the Corps on September 1, 2009, which showed that the well labeled OW-MSR-05 contained excessive amounts of trichloroethene and vinyl chloride.¹¹² The court stated that the letter from the Corps did not explicitly state that excessive levels of trichloroethene or vinyl

they do not resolve the parties' dispute about the substance of the call. Although the notes appear to read, "Mechler asked if OW under his property is contaminated the answer was Yes," it is unclear whether Plaintiff Wally actually asked about the "OW under his property" or if the note-taker, in summarizing the conversation, simply used that phrase to identify OW-MSR-05 (formerly OW-20). *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 13-14.

¹⁰⁹ Plaintiffs signed an addendum in August 2009 to a lease agreement that specifically stated that well OW-20 was to be renamed well OW-MSR-05 and was located on Plaintiffs' property. *Id.* at 14.

¹¹⁰ *Id.* at 14-15.

¹¹¹ *Id.* at 15.

¹¹² *Id.*

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chloride were detected on “*Plaintiffs’ property*” because the brief description following the code for well OW-20/OW-MSR-05 read: “Newly Installed monitoring well east of barn in the field.”¹¹³ The court stated that given that the barn is located on Mechler Sr.’s property and the code “MSR” in other contexts stands for “Mechler Sr.,” Plaintiffs’ failure to identify contamination on their property from the September 1, 2009 results was not unreasonable.¹¹⁴

Lastly, the Government asked the court to find that a reasonably diligent plaintiff would have pieced together disparate pieces of information¹¹⁵ from notices sent months apart, which independently inferred that Plaintiffs’ groundwater was contaminated. The court stated that it believed the Government “affords the reasonable person too much sleuthing prowess and too little faith in government assurances,” and that ultimately, it agrees with Plaintiffs that they did not have knowledge that the contamination had leached onto their property until they received the June 2010 results from the Corps.¹¹⁶ Thus, the court stated that Plaintiffs’ claims fall within the FTCA’s statute of limitations.¹¹⁷

B. CERCLA

Second, the court held that the Comprehensive Environmental Response, Compensation, and Liability Act preempt state statutes of repose and thus, Plaintiffs’ claims are not extinguished under Kansas’ statute of repose.¹¹⁸ The court stated that in order to decide whether Kansas’ statute for repose had extinguished Plaintiffs’ claim, the court must first consider whether Kan. Stat. Ann. § 60-513(b) encompasses Plaintiffs’ claim;¹¹⁹

¹¹³ *Id.* at 15-16.

¹¹⁴ *Id.* at 16.

¹¹⁵ The Government concedes that despite the constant monitoring and contact between Plaintiffs and the Corps, Plaintiffs never received a single notice that simultaneously informed them that (1) the OW-20/OW-MSR-05 well was located on Plaintiffs’ property, and (2) excessive amounts of trichloroethene and vinyl chloride were found in well OW-20/OW-MSR-05. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 20-21.

¹¹⁹ *Id.* at 17.

second, the court stated that it must analyze split circuit case law addressing the question of whether CERCLA preempts state statutes of repose.¹²⁰

First, the court held that § 60-513(b) does encompass Plaintiffs' claim.¹²¹ The court stated that Plaintiffs' claims are subject to the ten-year statute of repose found in § 60-513(b) because § 60-513(a)(4) encompasses all tort claims not otherwise specified in § 60-513(a)(4),¹²² including nuisance.¹²³ Second, although Plaintiffs' claims were subjected to Kansas' ten-year statute of repose, the court adopted the reasoning of the Fourth and Ninth Circuits and held that Congress intended for Section 9658 of CERCLA to preempt both state statutes of limitation and repose for causes of action arising from delayed injuries from hazardous waste.¹²⁴

The court reasoned that applying § 60-513(b) to Plaintiffs' claims would mean Plaintiffs' cause of action was extinguished in 1983—seventeen years before any of the Mechlers learned of the contamination of their groundwater.¹²⁵ The court further stated that to hold that the Kansas statute of repose prohibits Plaintiffs' claim would defeat Congress's intent to provide an avenue of relief for those suffering from delayed injuries caused by hazardous wastes in the environment.¹²⁶ Accordingly, the court held that Plaintiffs' cause of action against the Government is not extinguished under Kans. Stat. Ann. § 60-513(b) and that the court maintains its subject matter jurisdiction over Plaintiffs' claims.¹²⁷

V. COMMENT

Although *Mechler* correctly adheres to the “discovery rule” of Section 9658 of CERCLA for statutes of limitation, *Mechler* erroneously expands the scope of § 9658 to include Kansas' statute of repose. *Mechler's* expansion is

¹²⁰ *Id.*

¹²¹ *Id.* at 20.

¹²² *See supra* note 56.

¹²³ *Mechler*, 2013 U.S. Dist. LEXIS 108466 at 20.

¹²⁴ *Id.* at 25.

¹²⁵ *Id.* at 24-25.

¹²⁶ *Id.* at 25.

¹²⁷ *Id.*

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not without merit. *Mechler* takes a positive step for Kansas citizens in expanding the scope of relief available to private individuals who are harmed by toxic tortious conduct—who otherwise would be blocked due to an expired limitation period; the means by which *Mechler* takes that step, however, encroaches upon Congress' power, and is thus outside of the scope of the District Court's power. Additionally, the preemption of state statutes of repose may raise serious constitutional questions concerning violation of due process for defendants who are not federal agencies.¹²⁸

Before SARA was enacted in 1986, plaintiffs with latent injuries such as those caused by toxic substances were at a major disadvantage.¹²⁹ Some state statutes of limitation began when an individual was injured (e.g. first exposed to a substance on one's job), instead of when one first realized they had a claim.¹³⁰ SARA's addition of the discovery rule to § 9658 of CERCLA closed the gap in this shortcoming by requiring individuals to have "discovered" the injury before the statute of limitation began to run¹³¹—a significant step for one harmed by a toxic substance, which could take over a decade to manifest.

Mechler's holding goes one step further than SARA, and declares that the discovery rule should also cover the state statutes of repose. Section 9658, however, does not explicitly mention state statutes of repose. Although statutes of repose are similar to statutes of limitation in that they also limit the time in which a plaintiff can file a claim, they are not identical. There are several important distinctions between the two that suggest that courts should not presume that they are interchangeable for § 9658 purposes.¹³²

¹²⁸ A due process violation was not raised by the Federal Government in *Mechler*. This is chiefly due to the fact that the Federal Government does not have rights, only duties or responsibilities. Congress has complete power over the air force, having the power to cut its funding or to disband it. However, if the defendant in *Mechler* had been part of the private sector (e.g. a nuclear waste company), it is highly likely a due process defense would have been raised.

¹²⁹ Seley, *supra* note 48, at 1.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See *supra* notes 48-57.

Courts on both the district and circuit level wrestle with the dilemma of whether Congress intended for statutes of repose to be interchangeably used with statutes of limitation for purposes of § 9658. Oregon¹³³ and California¹³⁴ have similarly determined that § 9658 preempts state statutes of repose; however, the U.S. District Court for the Southern District of Alabama¹³⁵ and the South Dakota Supreme Court¹³⁶ have determined that they do not.

The Fifth Circuit in 2005 was the first circuit court to address this issue; it held that § 9658 does not preempt state statutes of repose;¹³⁷ stating that “the plain language of § 9658—which uses the phrase ‘statute of limitations’ five times—clearly showed that Congress intended to preempt only statutes of limitations.”¹³⁸ The Ninth and Fourth Circuits disagreed with the Fifth Circuit’s holding; they believe “the language of the statute is ambiguous because, at the time Congress enacted § 9658, courts across the country used the terms ‘statute of limitation’ and ‘statute of repose’ interchangeably.”¹³⁹ The Ninth and Fourth Circuits thus held that “Congress intended § 9658 to preempt state statutes of repose with a limitations period that included no expiration of the cause of action.”¹⁴⁰ After reviewing the Study conducted by Congress, the Ninth circuit further explained that “Congress’s primary concern in enacting [§ 9658] was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of it . . . this predicament can be caused by either statutes of limitation or statutes of repose, and is probably most likely to occur where statutes of repose operate.”¹⁴¹ *Mechler* sides with the Fourth and Ninth

¹³³ See *Buggsi, Inc. v. Chevron, U.S.A., Inc.*, 857 F. Supp. 1427 (D. Or. 1994).

¹³⁴ See *Los Angeles Chem. Co. v. Spencer & Jones*, 44 Cal. App. 4th 12 (Cal. Ct. App. 1996).

¹³⁵ 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).

¹³⁶ See *Clark County v. Sioux Equip. Co.*, 753 N.W.2d 406 (S.D. 2008).

¹³⁷ *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d at 355.

¹³⁸ *Id.* at 362.

¹³⁹ *Mechler v. United States*, 12-1183-EFM, 2013 U.S. Dist. LEXIS 108466, at 23 (D. Kan. Oct. 23, 2012).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 23-24.

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Circuits, holding that CERCLA encompasses, and thus preempts, state statutes of repose.

Ultimately, when interpreting the meaning of Congress' language, the United States Supreme Court has stated that "[i]t 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."¹⁴² Furthermore, § 9658 is a preemption statute, and "[p]reemption laws are construed narrowly."¹⁴³ Thus, a decision, like that of the Fifth Circuit, to apply § 9658 only to the explicitly mentioned "statutes of limitation," is consistent with Congress' "clear manifestation"—application of "statutes of repose," in light of its distinctions from statutes of limitation, is not.

Aside from the Ninth and Fourth circuits, and now *Mechler's*, questionable interpretation of § 9658, preempting state statutes of repose may also raise questions concerning due process violations for defendants. Notwithstanding the number of citizens possibly affected by the U.S. Air Force's operations complained of in Kansas (where the *Mechlers'* suit arises from the Forbes Air Force base that was established as far back as 1941 and closed in 1973), in North Carolina alone, the Centers for Disease Control and Prevention (CDC) has estimated that between 500,000 and 1 million people were exposed to contaminated water at marine base Camp Lejeune from 1953 to 1987.¹⁴⁴ Some diseases have *extensive* latency periods, causing them to sometimes develop decades after exposure to certain risk factors.¹⁴⁵ If

¹⁴² N.Y. State Dept. of Social Servs. v. Dublino, 413 U.S. 405, 413 (1973).

¹⁴³ Arnold, *supra* note 49, at 7.

¹⁴⁴ Maggie Fox, *Contamination at NC Marine Base Lasted up to 60 Years*, NBC NEWS (Mar. 14, 2013, 6:04 PM), <http://www.nbcnews.com/health/health-news/contamination-nc-marine-base-lived-60-years-f1C8880227>.

¹⁴⁵ For the majority of cancers, the latency period can be as long as 15 to 30 years. NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES, CANCER AND THE ENVIRONMENT, *available at* http://des.nh.gov/organization/commissioner/pip/publications/co/documents/cancer_environment.pdf. Malignant mesothelioma (a fatal cancer primarily associated with exposure to asbestos), has a latency period between first exposure to asbestos and clinical disease normally of about 20-40 years. CENTERS FOR DISEASE CONTROL AND PREVENTION,

statutes of repose are preempted by claims that are decades old—even before SARA was enacted—it could possibly violate defendants’ due process rights.¹⁴⁶ While there is some Supreme Court precedent that suggests defendants’ due process rights would be violated if statutes of repose were preempted, there is just as much precedent to suggest that they would not be.

The “*Campbell* line of cases” suggests that application of § 9658 to rules of repose is unconstitutional in some circumstances;¹⁴⁷ they focus heavily on whether the nature of the legislature’s set time limits concern the remedy or the cause of action.¹⁴⁸ The *Campbell* line of cases also seems to suggest that on one hand, when a statute sets a time limit on a purely procedural action, and does not create a vested interest for the defendant, there is no due process violation when the government alters that time limit.¹⁴⁹ On the other hand, they suggest that altering the time period for a statute that creates a vested interest in the defendant may violate that defendant’s due process.¹⁵⁰ Contrary to the *Campbell* line cases, the *Usery* line of cases suggests that the application of § 9658 to rules of repose may be constitutional—as long as it can meet the due process test of showing that the retroactive legislation is justified by a rational legislative purpose.¹⁵¹

The two divergent lines of cases seem to suggest different conclusions as to whether the application of § 9658 of CERCLA to state statutes of repose is constitutional or not. Under the *Campbell* line of cases, *Mechler’s* (and the Fourth and Ninth Circuits’) determination that preempting state statutes of repose would seem to violate defendants’ due process rights, especially when the legislation alters the time period for a statute that creates a substantive right for the defendant like with a statute of repose.¹⁵² However, under the

MALIGNANT MESOTHELIOMA MORTALITY --- UNITED STATES, 1999—2005, (2009), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5815a3.htm>.

¹⁴⁶ Seley, *supra* note 48, at 3.

¹⁴⁷ See *Campbell v. Holt*, 115 U.S. 620 (1885); *Davis v. Mills*, 194 U.S. 451 (1904); *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633, 637 (1925); *Chase Securities Co. v. Donaldson*, 325 U.S. 304 (1945).

¹⁴⁸ Seley, *supra* note 48, at 3.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 4.

¹⁵² See *supra* notes 67-68.

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Usery line of cases, a court would have to decide if § 9658's retroactive elimination of a defendant's vested right to repose serves a legitimate legislative purpose furthered by rational means.

Ultimately, no definite statement can be made as to whether *Merchler's* elimination of the U.S.'s right to raise the Kansas statute of repose violates its due process because it is impossible for the U.S. to raise a due process argument. However, given the varied views of the *Campbell* and *Usery* lines of cases, this issue may arise in the future when the defendant is a private party that is owed rights and duties under the constitution.

VI. CONCLUSION

Although *Mechler* successfully increases the scope of relief available to Kansas citizens, its decision oversteps the power of the courts, and it does not discuss the difficult issue of balancing this decision with the possible deprivation of due process rights for defendants. *Mechler's* holding follows a trend amongst federal circuits in that the terms "statute of limitation" and "statute of repose" are interchangeable (at least insofar as deciding whether CERCLA preempts statutes of repose). In aligning with the Ninth and Fourth Circuits' beliefs, despite potential interpretational and constitutional challenges, *Mechler's* holding may influence other circuits to interchangeably use those terms. It may also add to the current majority view among district and circuit courts that state statutes of repose, in addition to state statutes of limitation, are preempted by CERCLA. There is much debate surrounding § 9658's interpretation, and the incongruity between decisions will likely continue to increase until this issue is finally decided by the United States Supreme Court.

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