5-1-2014

Function Over Form: Why CERCLA's Discovery Rule Should Preempt Statutes of Repose

Chloe Coenen Mickel

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I. INTRODUCTION

Among the many man-made environmental tragedies the United States has endured, the explosion of BP's Deepwater Horizon drilling rig in the Gulf of Mexico is regarded as one of the most devastating.[1] Roughly 200 million gallons of crude oil were released into the gulf,[2] impacting the local ecosystems and daily lives of Americans living in Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida.[3] When a public disaster of such magnitude occurs, individual and commercial landowners in the affected area can anticipate the ways their property may be contaminated. This allows them to assess their potential damage and, if warranted, take prompt legal action.

Most environmental incidents, however, do not make headline news immediately after they occur. It is far more common for harm to persons and property to emerge well after a toxic release. Many landowners do not become aware of environmental contamination of their property until many years, or even decades, after the harm occurs. For instance, the Environmental Protection Agency ("EPA") has raised concerns about the release of a carcinogenic solvent called perchloroethylene, or "perc," which is widely used by dry cleaning

[1] Alan Silverleib, *The Gulf Spill: America's Worst Environmental Disaster?* CNN.COM (Aug. 10, 2010, 11:09 AM) http://www.cnn.com/2010/US/08/05/gulf.worst.disaster/. On June 15, 2010, President Barack Obama described the BP oil spill as "the worst environmental disaster America has ever faced."
[2] Henry Fountain, *Gulf Spill Sampling Questioned*, THE NEW YORK TIMES (Aug. 19, 2013) http://www.nytimes.com/2013/08/20/science/earth/new-analysis-of-gulf-oil-spill.html?_r=0.
[3] The New York Times, *Tracking the Oil Spill in the Gulf*, http://www.nytimes.com/interactive/2010/05/01/us/20100501-oil-spill-tracker.html?_r=0.

businesses.[4] Despite state[5] and federal[6] efforts to regulate the use of perc, landowners across the country continue to be negatively affected by its slow seepage into soil and groundwater.[7]

When a landowner discovers environmental contamination decades after the initial discharge, it is imperative to determine whether legal action seeking redress is time barred by state law. Possible causes of action for environmental damage include negligent maintenance and storage of hazardous substances, trespass, negligent nondisclosure, fraud, nuisance and personal injury.[8] If the limitations period has run, a landowner may not be able to recover damages for his or her injuries and may be forced to bear the high cost of cleaning up the property.

State limitations periods typically take one of two forms; "statutes of limitations" or "statutes of repose." According to the Second Restatement of Torts, under a statute of limitations "an action may be commenced only within a specified period after the cause of action arises" which is typically after the tort is complete or the injury occurs.[9] In contrast, as the Restatement explains, statutes of repose "set a designated event for the statutory period to start running and then provide that at the expiration of the period any cause of action is barred regardless of usual reasons for 'tolling' the statute."[10]

As demonstrated by these definitions, one of the primary differences between the two limitations periods is an event triggers the running of the time limit. Statutes of limitations begin

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[4] United States Environmental Protection Agency, *Frequently Asked Questions about Drycleaning*, http://www.epa.gov/dfe/pubs/garment/ctsa/factsheet/ctsafaq.htm.
[5] See New Jersey Spill Compensation and Control Act: N.J.S.A. 58:10-23.11 et seq.
[6] See U.S. Environmental Protection Agency Design for Environment Garment and Textile Care Partnership.
[7] New Jersey Dept. of Environmental Protection v. Dimant, 212 N.J. 153 (2012); City of Modesto Redevelopment Agency v. Superior Court, 119 Cal. App. 4th 28, 13 Cal. Rptr. 3d 865 (2004); Baylor Health Care Sys. v. Maxtech Holdings, Inc., 111 S.W. 3d 654 (Tex. App. 2003).
[8] Westfarm Assoc. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n, 66 F.3d 669 (4th Cir. 1995); Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001); McDonald v. Sun Oil Co., 548 F.3d 774 (9th Cir. 2008); State of N.Y. v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).
[9] Restatement (Second) of Torts § 899 (1979).
[10] *Id.*

running from the date when the cause of action accrues, which is usually when the injury is discovered.[11] For example, a statute of limitations for a trespass claim may begin running on the date the property owner discovers that the wrongdoing occurred.[12] In contrast, statutes of repose typically run from a fixed date that is linked to some action by the defendant such as the date of sale of a particular product, the completion of a transaction, or the occurrence of an event listed in the state statute.[13] For example, construction statutes of repose usually begin to run after the date of substantial completion on the project[14] and products liability statutes of repose usually begin to run on the date of purchase or the date of first use.[15]

Unlike statutes of limitations, statutes of repose are not subject to equitable tolling.[16] As the Second Circuit opined, statutes of repose cannot be tolled because they affect the plaintiff's underlying right to bring legal action, not the plaintiff's potential legal remedies.[17] Thus, statutes of repose run without interruption after the requisite triggering event has occurred, even if the plaintiff could not have discovered the environmental harm.[18] For these reasons, statutes of limitations are often favored by plaintiffs based on their flexible nature, whereas, statutes of repose are often favored by defendants because they are easily calculated and provide a sense of finality.

Despite these clear differences between the two types of limitations periods, courts have often used the terms interchangeably and have paid little attention to the actual terminology of a statutory provision. In fact, even the Supreme Court has used the two phrases interchangeably;

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[11] Black's law dictionary (9th ed. 2009); *Caviness v. Derand Resources Corp*., 983 F.2d 1295, Fn. 7 (4th Cir. 1993).
[12] Tucker v. S. Wood Piedmont Co., 28 F.3d 1089, 1090 (11th Cir. 1994).
[13] *Caviness*, 983 F.2d at Fn. 7.
[14] CAL. CIV. PROC. CODE § 337.1(a) (West 1982); IND. CODE ANN. §34-4-20-2 (Burns Supp. 1984).
[15] GA. CODE ANN. §§ 105-106(b)(2) (1984); TENN. CODE ANN. § 29-28-103 (1980; ALA. CODE § 6-5-502(c) (Supp. 1984).
[16] Lampf, Pleva, Lipkind, Prupris & Petrigrew v. Gilbertson, 501 U.S. 350, 363 (1991).
[17] Fed. Hous. Fin. Agency v. UBS Americas Inc., 712 F.3d 136, 140 (2d Cir. 2013) citing P. Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 102-3 (2d Cir. 2004).
[18] *Id.*

referring to statutes of limitations generally as "statutes of repose" in one case[19] and stating that "the statute of limitations is a statute of repose" in another case.[20] Similarly, in a Tenth Circuit products liability case, the court noted that the statute of repose at issue was wrongly titled "Statute of Limitations."[21] The court determined that, regardless of its title, the limitations period was a statute of repose because the claim was time barred by an independent event and not by the passage of time after the plaintiff's right to bring a legal claim accrued.[22]

As if interpreting state limitations periods was not challenging enough for plaintiffs and defendants, there are also federal limitations periods for certain claims which may preempt[23] or alter a state limitations period. In the context of environmental law, claims are governed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, commonly known as "CERCLA."[24] When CERCLA was amended in 1986, a federal discovery rule was enacted.[25] This discovery rule, Section 309 of CERCLA, 42 U.S.C. § 9658 (hereinafter referred to as "§ 9658"), contains a provision which defers the accrual of a cause of action under state law until the landowner "knew or, exercising reasonable diligence, should have known of the facts giving rise to the cause of action."[26]

The purpose of the discovery rule is to ensure that plaintiffs are not deprived of their day in court because a limitations period has run before the personal injury or property damage is discovered or should have been discovered.[27] As Congress explained:

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[19] United States v. Kubrick, 444 U.S. 111, 117 (1979).
[20] Guar. Trust Co. v. United States, 304 U.S. 126, 136 (1938).
[21] Alexander v. Beech Aircraft Corp., 952 F.2d 1215, Fn. 2 (10th Cir. 1991).
[22] *Id.*
[23] Although statutes of repose may not be tolled on equitable grounds, they can be preempted by federal legislation.
[24] 42 U.S.C.A. Ch. 103.
[25] 42 U.S.C. § 9658.
[26] Burlington Northern & S. F. Ry. Co. v. Poole Chemical, 419 F.3d 355, 362 (5th Cir. 2005) citing Computer Assoc. Int'l v. Altai, Inc., 918 S.W.2d 453, 455 (Tex. 1996), 42 U.S.C. § 9658.
[27] *McDonald*, 548 F.3d at783 citing H.R. Conf. Rep. No. 99-962, at 261 (1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3354.

> State statutes of limitations define the time in which an injured party may bring a lawsuit seeking compensation for his injuries against the party alleged to be responsible for those injuries . . . . In the case of long-latency disease, such as cancer, a party may be barred from bringing his lawsuit if the statute of limitations begins to run at the time of the first injury rather than from the time when the party 'discovers' that his injury was caused by the hazardous substance or pollutant or contaminant concerned.[28]

The preemptive effect of this rule seems simple enough; state limitations periods are not triggered until the plaintiff discovers the environmental harm. Practical application, however, has proven difficult and a split of opinion has emerged on the issue of whether CERCLA's discovery rule applies to state statutes of limitations *and* state statutes of repose. In recognition of the importance of clarifying whether the CERCLA discovery rule preempts to both types of limitations periods, the Supreme Court granted a petition for a writ of certiorari on January 10, 2014. Oral argument is scheduled for April 23, 2014.

Until the Supreme Court makes its decision, landowners will be treated differently depending on how their circuit interprets the preemptive effect of CERCLA's discovery rule. In order to illustrate the practical effect of the circuit split, what follows next is a fictional scenario about a landowner navigating the current legal landscape after she experiences property damage caused by the release of a toxic substance.

Crummy Cleaners has been operating a dry cleaning business since 1960. In 1985, an underground pipe used to dispose of waste water contaminated by perc, a chemical solvent used for cleaning, burst and contaminated the soil and groundwater. Crummy's owner repaired the pipe but decided not to clean up the perc remaining in the environment, reasoning that the amount of the solvent would not have a big impact. Crummy is located in a mixed commercial and residential district. Among the 500 residents living in this area is Laura Landowner.

[28] *Id.*

In 2005, twenty years after the initial release of the hazardous solvent, a local journalist investigating the environmental impact of perc, exposed the contamination by Crummy. After the story broke, several environmental organizations launched an outreach campaign to educate local residents about the potential health and environmental impacts of perc exposure. As a result of the campaign, Landowner learned that her property may be contaminated.

Several weeks later, Landowner hired an environmental scientist to test the soil and groundwater on her property for perc. The tests revealed that the soil and groundwater on Landowner's property contained levels of perc higher than the legal limit established by the EPA.[29] Upon further investigation, Landowner learned that the cost of cleaning her property would be approximately $100,000.

In 2013, Landowner brought nuisance and negligence claims against Crummy based on the release of perc into the environment and the resulting contamination to her property. The state limitations periods created a ten-year statute of limitations on the accrual of real property actions such as nuisance and a fifteen-year statute of repose on her negligence claim which started running on the date of the installation of the new water pipe.

If CERCLA's discovery rule had never been enacted, and her state has no local discovery rule, both of her claims would be barred. The nuisance claim would have expired in 1995 and the negligence claim would have expired in 2000. Thus, if it applies, CERCLA's discovery rule will delay the expiration of those claims until Landowner knew or should have known about the environmental harm.[30] Turning first to the "statute of limitations," federal circuits agree that Landowner's nuisance claim will be equitably tolled until 2005, the date she became aware of

[29] The threshold level for perc is 5 parts per billion.
[30] 42 U.S.C. § 9658.

the contamination.[31] Therefore, Landowner was within her ten-year limitations period when she filed her nuisance lawsuit in 2013.

The challenge here is determining whether the CERCLA discovery rule applies to Landowner's negligence claim because it is limited by a "statute of repose." If she resides in a state within the Fifth Circuit,[32] her negligence claim will likely be barred because that jurisdiction follows the rule that § 9658 does not apply to statutes of repose and more than fifteen years have passed since the new water pipe was installed.[33] This would mean that Landowner would be responsible for the high costs of cleaning up the property.

In contrast, if Landowner resides in a state within the Fourth or Ninth Circuits,[34] it is likely that the limitations period on her negligence claim would not begin running until 2005 regardless of the fact that her state limitations period is a statute of repose.[35] Therefore, Landowner's legal remedies are significantly different depending on how her jurisdiction interprets CERCLA's discovery rule.

This comment aims to offer possible solutions for the split between the federal circuits regarding whether or not CERCLA's discovery rule preempts state statutes of repose. Part II provides a brief background of CERCLA and the relevant statutory provisions. Part III discusses the circuit split and the legal reasoning behind both positions. Finally, Part IV argues that the majority position is the best approach and that the Supreme Court should hold that CERCLA's discovery rule preempts state statutes of repose.

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[31] Barnes ex rel. Estate of Barnes v. Koppers, Inc., 534 F.3d 357 (5th Cir. 2008); Freier v. Westinghouse Elec. Corp., 303 F.3d 176 (2d Cir. 2002); O'Connor v. Boeing North American, Inc., 311 F.3d 1139 (9th Cir. 2002).
[32] The Fifth Circuit includes Texas, Louisiana and Mississippi.
[33] For purposes of this example, assume that the statute of repose is triggered by a negligent act of the defendant.
[34] The Fourth Circuit includes West Virginia, Virginia, North Carolina and South Carolina and the Ninth Circuit includes Arizona, California, Nevada, Oregon, Washington, Idaho and Montana.
[35] Waldburger v. CTS Corp., 723 F.3d 434, 439 (4th Cir. 2013).); McDonald v. Sun Oil Co., 548 F.3d 774 (9th Cir. 2008).

II. CERCLA AND THE DISCOVERY RULE

A. A Brief History of CERCLA

In 1980, Congress enacted CERCLA with the objective "to facilitate the prompt cleanup of hazardous waste sites and to shift the environmental response from the taxpayers to the parties who benefited from the wastes that caused the harm."[36] Thus, CERCLA has two primary goals; (1) to protect the environment and preserve public health by facilitating the efficient cleanup of environmental releases; and (2) to assure that the party responsible for the release of the hazardous substances is liable for the costs of cleanup and any resulting injuries.[37]

CERCLA is widely criticized for its hasty passage and its resulting lack of precision. The final version of the Act was a cursory combination of three major hazardous substance response bills which has been previously proposed to Congress.[38] Given its piecemeal nature, problems of interpretation have arisen from the Act's inadequately defined terms and its many ambiguities.[39] The Ninth Circuit quipped that, "neither a logician nor a grammarian will find comfort in the world of CERCLA."[40]

Shortly after the Act was passed, Congress established a study group consisting of members of the American Bar Association, the American Law Institute, the Association of American Trial Lawyers, and the National Association of State Attorney General.[41] The group was charged with reviewing the adequacy of common law and state statutory remedies for plaintiffs bringing environmental claims under CERCLA.[42] After it completed its review, the

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[36] *Burlington Northern*, 419 F.3d at 364 citing OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1578 (5th Cir. 1997).
[37] *Carson Harbor Vill., Ltd.*, 270 F.3d at 880.
[38] Rhodes v. County of Darlington S.C., 833 F.Supp. 1163, 1173 (D.S.C. 1992).
[39] Artesian Water Co. v. Gov't of New Castle Cnty, 851 F.2d 643, 648 (3d Cir. 1988), See also *Rhodes*, 883 F.Supp. at 1173-1174 for an in-depth overview of the passage of CERCLA.
[40] *Carson Harbor Village, Ltd.*, 270 F.3d at 883.
[41] 42 U.S.C. § 9561(e)(2).
[42] 42 U.S.C. § 9561(e)(1).

study group recommended that those states that have not yet done so, should adopt a discovery rule which would delay the accrual of an action until the plaintiff actually discovered or should have discovered the harm or disease, and its cause.[43] Notably, the group also recommended the repeal of state statutes of repose that bar a plaintiff's CERCLA claims before he or she is aware of their existence.[44]

B. CERCLA's discovery rule

Instead of waiting for individual states to amend their statutory scheme to implement the recommendations of the study group, Congress enacted § 9658 of CERCLA in 1986.[45] The relevant portion of the statute reads:

> In the case of 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, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) 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.[46]

The statute goes on to explain that the term "federally required commencement date" is defined as "the date *the plaintiff knew (or reasonably should have known)* that the personal injury or property damages," referred to above, "were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."[47]

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[43] *McDonald*, 548 F.3d at 782 citing Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes–Analysis and Improvement of Legal Remedies 256 (Comm. Print 1982).
[44] *Id.*
[45] *Waldburger*, 723 F.3d at 439.
[46] 42 U.S.C. § 9658 (a)(1).
[47] 42 U.S.C. § 9658 (b)(4)(A) (emphasis added).

Significantly, § 9658 does not create a federal cause of action for plaintiffs nor a uniform statute of limitations.[48] As the Fourth Circuit explained, "if a state statute of limitations provides that the period in which an action may be brought begins to run prior to a plaintiff's knowledge of his injury, § 9658 preempts the state law and allows the period to run from the time of the plaintiff's actual or constructive knowledge." [49] The addition of the discovery rule to the Act undoubtedly supports the study group's overall goal of preserving claims that would have otherwise expired under the state limitations periods.

III. THE CIRCUIT SPLIT

A. Overview of the Federal Circuit Split

Section 9658 of CERCLA establishes a federal discovery rule which preempts state limitations periods in situations where a person loses the legal right to bring a cause of action before becoming aware of it.[50] While United States Circuit Court of Appeals are in agreement that § 9658 preempts state statutes of limitations, there is a circuit split on the issue of whether § 9658 also preempts state statutes of repose. In *Waldburger v. CTS Corp*., the Fourth Circuit created a majority view by agreeing with the Ninth Circuit's finding that Congress intended the phrase "statute of limitations" in CERCLA to include state statutes of repose.[51] The court adopted this approach based on its finding that "statute of limitations" was ambiguous at the time of the adoption of the statute, and Congress's "unmistakable goal of removing barriers to relief from toxic wreckage."[52]

[48] In re Pfohl Bros. Landfill Litig., 68 F. Supp. 2d 236 (W.D.N.Y. 1999).
[49] *Waldburger*, 723 F.3d at 440.
[50] *McDonald*, 548 F.3d at 783.
[51] *McDonald*, 548 F.3d at 774, *Waldburger*, 723 F.3d at 444.
[52] *Waldburger*, 723 F.3d at 444.

The *Waldburger* court expressly disagreed with the Fifth Circuit's decision in *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co.*,[53] in which the court found CERCLA's discovery rule does not preempt statute statutes of repose. The Fifth Circuit reasoned that, due to the substantive differences between statutes of limitations and statutes of repose, its interpretation of the preemptive effect of the rule "comports with a fundamental principle of statutory construction–common sense."[54]

B. The Minority View

On one side of the split, the Fifth Circuit has taken the position that the CERCLA discovery rule does not preempt state statutes of repose. In *Burlington Northern*, a storage tank containing several hundred thousand gallons of chemicals ruptured and released chemicals onto Poole's property and an adjacent railroad easement.[55] The railroad conducted an emergency clean-up and restoration of its right-of-way and then sued Poole and the tank manufacturer, Skinner Tank Company.[56] Skinner moved for summary judgment based on Texas's fifteen-year statute of repose for products liability claims against manufacturers.[57] The property owner contended that § 9685 of CERCLA preempted the Texas statute of repose, and thus delayed the expiration of his claim until he discovered the chemical spill.[58]

The court began its analysis of the impact of CERCLA's discovery rule by considering the language of the statute.[59] Relying on the ordinary meaning of the words used, the court concluded that the plain language of § 9658 demonstrates that the discovery rule only applies to

[53] *Burlington Northern*, 419 F.3d at 362.
[54] *Id*. at 364.
[55] *Id.* at 368.
[56] *Id.* at 358.
[57] *Id.*
[58] *Id*. at 361.
[59] *Burlington Northern*, 419 F.3d at 362.

statutes of limitations.[60] The court noted that the provision only refers to "statutes of limitations" and defines "commencement date" as the "date specified in a *statute of limitations* as the beginning of the applicable limitations period."[61]

Next, the court emphasized the difference between statutes of limitations and statutes of repose. The court opined that statutes of limitations cut off a plaintiff's remedy by extinguishing the right to pursuing a cause of action after a certain period of time, whereas, statutes of repose abolishes a cause of action after some act of the defendant, regardless of whether a plaintiff's cause of action has actually accrued.[62] The court also concluded that, although Congress added § 9658 to deal with the problem of delayed discovery of the effect of a release of a toxic substance, CERCLA's legislative history indicates that the discovery rule was intended only to preempt state statutes of limitations.[63] Accordingly, the court found that, in the absence of express Congressional intent to the contrary, it was bound by the plain language of the § 9658.[64]

C. The Majority View

Three years after *Burlington Northern* was decided, the Ninth Circuit arrived at the opposite conclusion. In *McDonald*, landowners brought negligence, contribution, breach of contract, and fraud claims against a mining company based on its alleged oral warranty that certain crushed rock piles on their property did not contain mercury.[65] The district court, relying on *Burlington Northern*, granted summary judgment on the McDonald's negligence claim, holding that it was barred by Oregon's statute of repose for negligent injury to person or property.[66] On appeal, the circuit court reversed and found that the district court's reliance on

[60] *Id.*
[61] *Id.*
[62] *Id.* at 363 (citations omitted).
[63] *Id.* at 364.
[64] *Id.*
[65] *McDonald*, 548 F.3d at 777.
[66] *Id.* at 779.

Burlington Northern was misplaced because the Fifth Circuit's statutory interpretation did not include analysis of the meaning of "statute of limitations" at the time the CERCLA discovery rule was enacted.[67]

When the *McDonald* court conducted its analysis, it determined that the phrase "statute of limitations" was ambiguous at the time the discovery rule was added to CERCLA.[68] Based on this finding, the court looked to the statute's legislative history in order to determine the Congressional intent underlying the provision.[69] The court found that, Congress had enacted the discovery rule for situations like the one facing the McDonald's – where a plaintiff may lose the ability to bring a cause of action before he or she is even aware of environmental harm.[70] Thus, the court reasoned that, because a scenario in which a plaintiff loses a cause of action before becoming aware of the environmental harm can occur under a statute of limitations or a statute of repose, the term "statute of limitations" in § 9658 was intended by Congress to include statutes of repose.[71]

Based on that determination, the court expressly rejected the district court's reliance on *Burlington Northern's* flawed statutory analysis.[72] In additional to disagreeing with the Fifth Circuit's legal analysis, the *McDonald* court pointed out that the facts of *Burlington Northern* did not involve a long-latency disease that went undetected until the limitations period had run.[73] Because the chemical spill in *Burlington Northern* was discovered prior to the expiration of time

[67] *Id.* at 782.
[68] *Id.*
[69] *Id.* at 781.
[70] *Id.*at 783.
[71] *McDonald*, 548 F.3d at 783.
[72] *Id.* at 782.
[73] *Id.*

under the statute of repose, § 9658's "policies against destroying a plaintiff's claims before they could be asserted" were not in issue.[74]

Accordingly, the *McDonald* court concluded that that the plaintiffs' negligence claim was not time-barred by Oregon's statute of repose.[75] In support of its holding, the court rejected a number of the defendant oil company's arguments including the argument that Congress could not have been ignorant to statutes of repose at the time it enacted § 9658 because it had enacted several statutes of repose in the past.[76] Relying upon four sections of the United States Code that contain statutes of repose, the defendant argued that Congress clearly knew of the distinction between statutes of limitations and statutes of repose and then intentionally used the language "statute of limitations" in the CERCLA discovery rule.[77] The court countered that, although each of these provisions may qualify as a statute of repose, "an electronic search of the text of the United States Code fails to reveal a single instance of the phrase 'statute or repose.'"[78]

The Fourth Circuit's recent decision in *Waldburger v. CTS Corp*., tipped the previously balanced scale and created a majority view on the preemptive effect of § 9658. In that case, landowners became aware that their well water was contaminated by high levels of two toxic substances and brought a nuisance action against the alleged perpetrator, CTS Corporation.[79] The district court granted CTS's motion to dismiss the complaint based on North Carolina's ten-year limitation on the accrual of real property claims.[80]

In North Carolina, real property actions are subject to a three-year statute of limitations and begin to accrue when physical damage to the property either becomes apparent or should

[74] *Id*.
[75] *Id*. at 783.
[76] *Id.*
[77] *McDonald*, 548 F.3d at 784.
[78] *Id*. at 784.
[79] *Waldburger*,723 F.3d at 437.
[80] *Id*.

become apparent to a reasonable person.[81] The state limitations period is restricted by the state statute of repose which prohibits any plaintiff from bringing a cause of action more than 10 years after the last act or commission made by the defendant.[82] The plaintiffs in *Waldburger* were bringing their nuisance claim twenty-three years after the last act of omissions by CTS.[83] This means that if the court agreed with *Burlington Northern* the plaintiffs claim would be time barred by the statute of repose, but if the court agreed with *McDonald*, the plaintiffs' nuisance action would be preserved.[84]

On appeal, the Fourth Circuit acknowledged that "a simple review of § 9658's language could reasonably lead to a conclusion that its application is limited only to statutes of limitations," however, the court opined that the text was susceptible to an "alternate reading" as well.[85] In supporting of the finding that § 9658 could be interpreted as preempting both statutes of limitations and statutes of repose, the court opined that the two labels have often been used interchangeably.[86] Consistent with the Ninth Circui'ts findings, the court determined that it was entirely probable that when § 9658 was enacted Congress intended "statute of limitations" to include state statutes of repose.[87] Additionally, the court noted that the text of § 9658 itself suggests ambiguity because there is a lack of internal consistency in the provision's reference to applicable limitations period.[88]

[81] *Id.* at 441 citing N.C. Gen. Stat. § 1-52(16).
[82] *Id.*
[83] *Id.* at 441.
[84] *Id.*
[85] *Waldburger*, 723 F.3d at 442.
[86] *Id.* at 442-43.
[87] *Id.*, at 443.
[88] *Id.* at 443; Subsection (a)(1) notes that such a period is "specified in the State statute of limitations or under common law," but the definition of "applicable limitations period" and "commencement date" make no reference to common law. Thus, to the extent that a limitations period is established only under common law, § 9658 fails to manifest a plain meaning applicable in such a circumstance.

After it determined that the provision was ambiguous, the court began its statutory analysis by considering Congressional intent as evidenced by CERCLA's legislative history.[89] First, the court observed that § 9658 was adopted to address the Congressional study group's concern that state limitations periods may bar a cause of action before a plaintiff becomes aware of it.[90] Moreover, the court noted that the study group was concerned with both types of limitations periods, and with the potential of barring claims before a plaintiff becomes aware of them.[91]

Looking to the statute as a whole for additional evidence of Congressional intent, the court observed that CERCLA was enacted as a remedial statute.[92] To that end, the court opined that CERCLA "does not set standards for prospective compliance by industry but essentially is a tort-like backward-looking statute designed to [clean up] expeditiously abandoned hazardous waste sites and respond to hazardous spills and releases of toxic wastes into the environment."[93] Moreover, the CERCLA discovery rule was enacted as a key part of this remedial scheme because it preserves causes of action that would otherwise be extinguished by state limitations periods.[94] The court took the position that when faced with the interpretation of a remedial statute it had to construe all provisions liberally in order to promote the intent behind the Act.[95]

In light of CERCLA's congressional history, the court concluded that the defendant's reading of § 9658 was so narrow that it "thwarts Congress's unmistakable goal of removing

[89] *Id.* at 443.
[90] *Waldburger*, 723 F.3d at 443.
[91] *Id.* at 443.
[92] *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) (Internal citation omitted).
[93] *Id.*
[94] *Waldburger*, 723 F.3d at 443.
[95] *Id.* at 444 citing *Urie v. Thompson*, 337 U.S. 163, 180 (1949).

barriers to relief from toxic wreckage."[96] The court, therefore, endorsed the *McDonald* court's decision and held that § 9658 preempts North Carolina's ten-year statute of repose.[97]

D. The *Waldburger* Dissent

Although the *Waldburger* court ultimately agreed with the Ninth Circuit's decision in *McDonald,* the three-judge panel was sharply divided. Judge Davis joined the majority opinion, authored by Judge Floyd, but wrote a separate concurring opinion.[98] The third member of the panel, Judge Thacker, dissented.[99] Much of Thacker's dissent mirrors the Fifth Circuit's reasoning in *Burlington Northern;* she believed that, § 9658 is unambiguous and clearly indicates that only statutes of limitations are preempted.[100] Thacker also argued that, even if § 9658 could be interpreted differently, there is a presumption against preemption which would prohibit extending the scope of the provision to include statutes of repose.[101]

In addition, Thacker's dissenting opinion endorses the Fifth Circuit's reasoning in *Burlington Northern* by emphasizing the significant differences between statutes of limitations and statutes of repose.[102] Like the defendant oil company in *McDonald,* Thacker reasoned that these distinctions were well known by Congress in 1986 when it enacted § 9658, and, with that knowledge, Congress intentionally used the language "statute of limitations."[103] Thacker also noted that the Congressional study group expressly intended its recommendation to "cover the repeal of statutes of repose,"[104] and yet Congress "chose to leave § 9658 completely replete of

[96] *Waldburger*, 723 F.3d at 444.
[97] *Id.*
[98] *Id. at* 445.
[99] *Id.*
[100] *Waldburger*, 723 F.3d at 445 (Thacker, J., dissenting).
[101] *Id.*
[102] *Id.* at 447-448.
[103] *Id.*
[104] *Id.* at 451.

any reference to such statutes."[105] Based on her analysis, Judge Thacker concluded that § 9658 preempted North Carolina's statute of limitations, but not its statute of repose, thereby striking "a balance between harmonizing certain procedural matters in toxic tort cases and allowing states to continue to regulate their own substantive areas of law."[106]

III. ARGUMENT

Courts on both sides of the circuit split offer well-reasoned arguments for their conclusions regarding the preemptive effect of CERCLA's discovery rule. These decisions, however, go beyond judicial rhetoric and have real-world implications for property owners across the county. Recall the hypothetical scenario presented at the beginning of this comment in which Laura Landowner faces the prospect of bringing two legal claims that were potentially barred because she lived in a jurisdiction with two different types of limitations periods. Under the Fourth and Ninth Circuits' interpretation of § 9658, Landowner would not be time-barred in bringing her nuisance and negligence claims. In contrast, under the Fifth Circuit's interpretation of § 9658, Landowner's nuisance claim would be equitably tolled by § 9658 but her personal injury claim would have expired and would likely be dismissed at the outset of litigation. Thus, the Supreme Court's forthcoming decision in *Waldburger* will have a substantive impact the lives of everyday citizens. For the following reasons, the Supreme Court should affirm *Waldburger* and hold that CERCLA's discovery rule applies to statutes of repose.

A. The Term "Statute of Limitations" in § 9658 is Ambiguous

At its most fundamental level, this circuit split is a disagreement about whether the term "statute of limitations" in § 9658 is ambiguous. The Fifth Circuit found that, based on its plain

[105] *Id.* at 452.
[106] *Waldburger*, 723 F.3d at 453 (Thacker, J., dissenting).

and ordinary meaning, § 9658 only preempts state statutes of limitations,[107] whereas the Fourth and Ninth Circuits found that § 9658 is ambiguous because the phrase "statute of limitations" did not have a clear plain meaning with respect to whether it incorporated statutes of repose when the CERCLA discovery rule was adopted.[108]

One of the foundational principles of statutory interpretation is that, in interpreting the meaning of a term or phrase, "ordinary meaning" should be based on the use of the term at the time the law was enacted.[109] As the Supreme Court explained, "[t]he maxim of statutory interpretation … cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term."[110]

Although circuit courts have recognized that statute of limitations and statutes of repose have their differences,[111] the phrase "statute of limitations" was ambiguous in 1986 and continues to be used interchangeably with the phrase "statutes or repose" today.[112] For instance, several scholarly sources indicate that the meaning of statute of limitations encompassed statutes of repose around the time the CERCLA discovery rule was enacted. In one 1991 treatise on limitations of actions, the author described five accepted definitions for statute of repose:

> (1) in the most general sense, statute of repose is synonymous with statute of limitations; (2) [it] is a general term that encompasses various statutes, including statutes of limitations …; (3) it is merely one type of statute of limitations; (4) [it] is considered distinct from a statute of limitations because it begins to run at a time unrelated to the traditional cause of action, that is, from the date of the act of injury regardless when discovered; and (5) it is synonymous with the "useful safe life" provisions of products liability statutes.[113]

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[107] *Burlington Northern*, 419 F.3d at 362.
[108] *McDonald*, 548 F.3d at 781.
[109] *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004).
[110] *Taylor v. U.S.*, 495 U.S. 575, 596 (1990).
[111] *Amoco Prod. Co. v. Newton Sheep Co*., 85 F.3d 1464, 1472 (10th Cir. 1996), *Fed. Hous. Fin. Agency*, 712 F.3d 136, 140 (2d Cir. 2013), *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003).
[112] *Waldburger*, 723 F.3d at 443; *McDonald*, 548 F.3d at 781.
[113] Nat'l Credit Union Admin Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246, 1259 (10th Cir. 2013) citing Calvin W. Corman, 1 *Limitations of Actions*, § 1.3.2.1, at 30-31 (1991); See also Francis E. McGovern, THE Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 AM. U.L.REV. 579 (1980).

Three out of these five definitions of statutes of repose indicate that the phrase has a similar meaning as statues of limitations. Furthermore, the first definition, which would have been most commonly used, states that a statute of repose is synonymous with a statute of limitations. Similarly, in a 1991 law review article discussing the distinction between statutes of repose and statutes of limitations in asbestos cases, one scholar pointed out that older legal treaties used both phrases interchangeably, leaving judges to make distinctions between the limitations periods.[114]

When courts are left to categorize limitations periods, they must look beyond the title of a provision and analyze how it functions. One district court in Wisconsin remarked that, "[t]he problem with the analysis is that the terms "statute of repose" and "statute of limitations" have long been two of the most confusing and interchangeably used terms in the law."[115] In Wisconsin, the Supreme Court now considers the term "statute of limitations" to include states of repose, noting that the term "statute of repose" is "largely a judicial label for a particular type of limitation on actions."[116]

Furthermore, a review of federal legislation suggests that when Congress enacts limitations statutes, it rarely uses the phrase "statute of repose."[117] As the Tenth Circuit pointed out, Congress has used a variety of provision titles for limitations periods in the United States Code, including "time limits," "limitations of actions," and "time limitations."[118]

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[114] Asbestos Litigation and Statutes of Repose: The Application of the Discovery Rule in the Eight Circuit Allows Plaintiffs to Breathe Easier, 24 CREIGHTON L. REV. 965, 966-967 (1991).
[115] Merner v. Deere & Co., 176 F.Supp. 2d 882, 889 (E.D. Wisc. 2001).
[116] Landis v. Physicians Ins. Co., 628 N.W.2d 893, 896 (Wisc. 2001); See also Nat'l Credit Union Admin Bd., 900 F.Supp.2d at 1222 (the terms "statute of limitations" and "statute of repose" are often conflated); Anixter v. Home-Stake Production Co., 939 F.2d 1420, 1434 N. 17 (10th Cir. 1991) ("[a]lthough the two concepts differ, the terminology has become interchangeable").
[117] Nat'l Credit, 727 F.3d at 1264(citation omitted).
[118] *Id.*

Notwithstanding of the title of the provision, it may regulate either when a plaintiff can bring a claim or when a plaintiff is forever barred from bringing a claim.[119]

This history of inconsistency in the titles of limitations periods challenges the *McDonald* defendant's argument that Congress was aware of the existence of statutes of repose but intentionally selected to use the language "statute of limitations" in § 9658.[120] The absence of the word repose cannot be considered a deliberate omission. Based on the interchangeable use of the terms "statutes of repose" and "statutes of limitations" at the time § 9658 was enacted, and continued confusion regarding the definitions of the terms, the text of the discovery rule is ambiguous.

B. Congressional Intent Behind the Passage of § 9658 Indicates that it was Intended to Preempt State Statutes of Repose

Based on the conclusion that the CERCLA discovery rule is ambiguous, Congressional intent serves as a valuable tool for determining the preemptive effect of § 9658. As noted in Part II, § 9658 was not enacted as a part of the original CERCLA.[121] It was added along with amendments that were drafted in response to the recommendations of a Congressional study group.[122] The study group was created with the express purpose of evaluating the adequacy of existing remedies for plaintiffs under common law and state statutes.[123] After the study group concluded its analysis, its members were troubled by the likelihood that plaintiffs would not be able to seek legal redress until many years, or even decades, after the state limitations period had

[119] *Id.* citing In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig., 900 F.Supp.2d 1055, 1063 (C.D.Cal. 2012).
[120] *McDonald*, 548 F.3d at 783.
[121] *Burlington Northern*, 419 F.3d at 362.
[122] *Burlington Northern*, 419 F.3d at 362.
[123] *Waldburger*, 723 F.3d at 438-439 citing 42 U.S.C. § 9651(e)(1).

expired.[124] Thus, the group recommended that states across the county protect plaintiffs by enacting discovery rules that delay the accrual limitations periods.[125]

The group did not limit this recommendation to states that had statutes of limitations instead of statutes of repose. To the contrary, its final report explicitly stated that, "[t]he 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 plaintiff's claim before he knows that he has one."[126] Faced with the prospect of an inconsistent approach across the states, Congress implemented the study group's recommendation by enacting § 9658.[127] If Congress intended for each state to fashion its own approach it would have ignored the group's recommendation and left the states to their own devices, however, the addition of CERCLA's discovery rule demonstrates that Congress sought to establish a consistent framework under which all limitations periods are triggered when the plaintiff knew or should have known about the injury.

In addition to the study group's report, a second source of legislative history indicates that Congress intended to preempt state statutes of repose when it enacted § 9658. The Superfund Amendment and Reauthorization Act of 1986, which included the discovery rule at issue here, was initially proposed in a House Conference Report on October 3, 1986.[128] In § 203 of the Report, the House acknowledged that there may be situations in which a party is barred from bringing a lawsuit if the limitations period is triggered by the first injury rather than the

[124] *McDonald*, 548 F.3d at 782 citing Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes–Analysis and Improvement of Legal Remedies 256 (Comm. Print 1982).
[125] *Id*.
[126] *McDonald*, 548 F.3d at 782 citing Superfund Section 301(e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes–Analysis and Improvement of Legal Remedies 256 (Comm. Print 1982).
[127] 42 U.S.C. § 9658.
[128] H.R. Conf. Rep. No. 99-962, at 261 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354.

discovery of that injury.[129] In order to prevent state limitations periods from depriving plaintiffs of their day in court, the Report encourages Congress to remedy the problem identified by the study group.[130] The Report states that,

> While State law is generally applicable regarding actions brought under State law for personal injury, or property damage, which are caused or contributed to by exposure to any hazardous substances, or pollutant or contaminant, released into the environment from a facility, a Federally required commencement date for the running of state statutes of limitations is established.[131]

Thus, the House viewed the passage of a Federal discovery rule as the best way to carry out the study group's recommendation that statutes of limitations and statutes of repose be triggered when the plaintiff knew or should have known about the environmental injury. The dilemma contemplated by the study group and the House, that a plaintiff may lose a cause of action before becoming aware of it, is likely to occur under both types of limitations periods. Therefore, the legislative history of the passage of § 9658 indicates that Congress passed CERCLA's discovery rule with the goal of preserving plaintiffs causes of action in all situations where they may have expired before the plaintiff had the opportunity to seek legal redress.

C. The Ambiguity of the Statute Defeats the Minority View that the Substantive Differences between the Limitations Period is Determinative

The Minority View's most compelling argument is that § 9658 should not apply to statutes of repose because they are substantively different than statutes of limitations. As Part I of this Comment explained, one of the key distinctions between the two types of limitations periods is that a statute of repose creates a substantive right of defendants to be free from liability after a certain period of time while a statute of limitations bars a plaintiff from seeking a specific

[129] *Id.*
[130] *Id.*
[131] *Id.*

remedy.[132] Thus, an act of the defendant, such as the date of sale of a particular product or completion of a business transaction triggers the statute of repose.[133]

One of the potential benefits of a statute of repose is that it offers a clear date on which defendants may no longer fear litigation resulting from environmental harm. As the Fifth Circuit explained, "[u]nlike a statute of limitations, a statute of repose creates a substantive right to be free from liability after a legislatively determined period of time. In other words, a statute of repose establishes a right not to be sued, rather than a right to sue."[134] After this right to sue is gone, defendants may find security in the fact that the judiciary will not retroactively resurrect a cause of action.

Additionally, as the dissenting judge in *Waldburger* explained, the motivations behind statutes of limitations and statutes of repose are different.[135] Statutes of limitations are motivated by "considerations of fairness to defendants and are intended to encourage prompt resolution of disputes by providing a simple procedural mechanism to dispose of stale claims,"[136] whereas statutes of repose are motivated by "considerations of the economic best interests of the public as a whole" and reflect a "legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists."[137] Thus, unlike statutes of limitations, statutes of repose are substantive grants of immunity from liability.[138]

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[132] *Nat'l Credit,* 727 F.3d at 1265.
[133] *Caviness*, 983 F.2d at Fn. 7.
[134] *Burlington Northern*, 419 F.3d at 363 (internal quotations and citations omitted).
[135] *Waldburger*, 723 F.3d at 447 (Thacker, J., dissenting).
[136] *Waldburger*, 723 F.3d at 448 (Thacker, J., dissenting) citing *First United Methodist Church*, 882 F.2d at 866.
[137] *Id*.
[138] *Waldburger*, 723 F.3d at 448 (Thacker, J. dissenting).

In a recent article, two environmental attorneys argued that the *McDonald* court erred in significantly expanding the scope of § 9658 to include statutes of repose.[139] The crux of their argument is that statutes of limitations are procedural while statutes of repose are substantive rules which create a vested right for a defendant not to be sued.[140] The authors suggest that, by broadly construing the provision, the Majority View raises constitutional concerns by violating defendants' due process rights and reviving extinct claims.[141]

Although these arguments have some merit, they should not be given much weight in the context of § 9658 because of the provision's legislative underpinning which reflect a strong desire to preempt all limitations periods. There is no doubt that statutes of limitations and statutes of repose operate differently, however, when Congress enacted CERCLA's discovery rule it sought to preserve a plaintiff's cause of action regardless of the type of limitations period.

Moreover, because one of the critical characteristics of a statute of repose is that it may be triggered by an early act of the defendant[142], statutes of repose are exactly the type of limitations period Congress sought to preempt through the passage of § 9658. As one scholar points out, "[p]otential plaintiffs can be as diligent as possible in prosecuting their claims and still find them time barred by the running of a repose period" because statutes of repose can expire regardless of whether an injury has actually occurred or has been discovered by a plaintiff.[143] The primary goal behind the CERCLA discovery rule was to prevent the unfortunate situation where a plaintiff loses the ability to seek legal redress for delayed injuries caused by

[139] Peter E. Seley, Coral A. Shaw, McDonald v. Sun Oil: The Ninth Circuit's Constitutionally Questionable Expansion of CERCLA's Toxic Tort Discovery Rule, Environmental Law Reporter News & Analysis, March 2009, 39 ENVTL. L. REP. NEWS & ANALYSIS 10197.
[140] *Id.* at 4.
[141] *Id.* at 5.
[142] For example, a statute of repose may begin running upon the sale of a container used to store hazardous substances.
[143] La Fave, Daniel J., Remedying the Confusion Between Statutes of Limitations and Statutes of Repose in Wisconsin – A Conceptual Guide, 88 MARQ. L. REV. 927, 928 (2005).

hazardous waste in the environment. Congress was aware that states had different types of limitations periods when it decided that enacting a consistent discovery rule was the best way to carry out the pro-plaintiff spirit of CERCLA.

D. It Would be Inequitable for the Supreme Court to Hold that § 9658 Does Not Preempt Statutes of Repose

Proponents of the Minority View argue that the Supreme Court should not find that § 9658 preempts state statutes of repose because statutes of repose are meant to provide security to defendants after a certain period of time has passed. As one court opined, "[u]sing a fixed date easily determined by the defendant allows for 'repose' from the cause of action and serves the need for finality in certain financial and professional dealings."[144] While this is a valid argument, it is inconsistent with the overall spirit of § 9658 which is clearly plaintiff-friendly.

The court in *Waldburger* addressed this concern by asserting that the purpose of repose statutes goes beyond protecting defendants.[145] Statutes of repose also encourage efficiency by preventing courts from having to deal with cases in which "the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."[146] Thus, the preservation of plaintiffs' claims is balanced by the fact that as time goes on it will become more and more difficult for plaintiffs to marshal enough evidence to meet their burden of proof.

Additionally, state-specific burdens of proof may offer another layer of protection for defendants. For instance, New Jersey's Spill Compensation and Control Act[147] imposes a heightened causation requirement on plaintiffs. New Jersey plaintiffs must prove that the

[144] *Caviness*, 983 F.2d at 1295, Fn. 7.
[145] *Waldburger*, 723 F.3d at 444.
[146] *Waldburger*, 723 F.3d at 444 citing *Kubrick*, 444 U.S.117 (1979).
[147] N.J.S.A. 58:10-23.11 et seq.

defendant is responsible for a "discharge" under the Act and that there is a nexus between the discharge and the contamination for which the cleanup was required.[148]

Furthermore, one underlying goals of CERCLA is to shift the responsibility for cleaning up contaminated property from the taxpayers to the entities involved in, or profiting from, the activity causing the contamination.[149] CERCLA defines four categories of potentially responsible parties ("PRPs") who may be liable for cleanup costs.[150] These include (1) the current owner and operator of a vessel or facility; (2) any person who owned or operated a vessel or facility at the time the hazardous substances were disposed of; (3) any person who arranged for the disposal or treatment of any hazardous substance located on the site; and (4) any person who transported hazardous substances to the site.[151] If the Supreme Court determines that § 9658 does not preempt statutes of repose, it will undermine § 9607 by preventing plaintiffs from holding the abovementioned PRPs liable.

Such a holding would encourage PRPs to remain silent after they commit an act which may give rise to liability under CERCLA. This could lead to a variety of negative outcomes. Specifically, because there is a disincentive for PRPs to come forward, hazardous substances will linger in the environment longer. In addition to causing more widespread environmental harm, cleanup costs will increase. If PRPs successfully wait out the repose period, the landowner may be forced to bear all of those costs. Furthermore, plaintiffs would have the obligation to discover the contamination which may be challenging if, like the perc exposure described above, the hazardous substance is moving below ground.

[148] *Dimant*, 212 N.J. at 830-31.
[149] 42 U.S.C.A. § 9607(a)(4)(A).
[150] *Id.*
[151] *Id.*

In addition to carrying out Congress' goal of preserving claims for plaintiffs across the country, holding that the CERCLA discovery rule preempts statutes of repose would create a cohesive legislative structure in which plaintiffs can more easily determine when their legal claim(s) will expire. Although the courts came out differently in *Waldburger* and *Burlington Northern,* those cases addressed a substantive issue that many other courts had avoided. In several earlier cases, courts declined to decide whether § 9658 preempts statutes of repose by determining that the cause of action asserted by the plaintiff was not covered by CERCLA.[152] For example, in *Covalt v. Carey Canada, Inc.,* the Seventh Circuit determined that § 9658 did not preempt the Indiana statute of repose but its basis was not the distinction between statutes of limitations and statutes of repose.[153] The court determined that there was no release "into the environment" as is required by CERCLA because the asbestos was only exposed to the interior of the workplace.[154] Instead of being expected to wade into the murky waters of statutory interpretation or sidestepping the issue altogether, courts should have clear guidance on how § 9658 operates.

Moreover, plaintiffs faced with hundreds of thousands of dollars of cleanup costs should be able to rest assured that their state limitations period will be tolled until they know or should have known of the contamination. As the hypothetical scenario earlier in this Comment demonstrates, if § 9658 only preempts statues of limitations it will lead to inequitable results within and between jurisdictions. In states with statutory schemes including both types of limitations periods, application of the Minority View would undermine the Congressional intent behind the discovery rule by preserving causes of actions for some, but not all, plaintiffs. If

[152] First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862 (4th Cir. 1989); Covalt v. Carey Canada, Inc., 860 2d 1434 (7th Cir. 1988); Knox v. AC & S, Inc., 690 F.Supp. 752 (S.D. Ind. 1988); Elec. Power Bd. of Chattanooga v. Westinghouse Elec. Corp., 716 F.Supp 1069 (E.D. Tenn. 1998).
[153] *Covalt*, 860 F.2d at 1441.
[154] *Id.* at 1436.

residents in one state are harmed by the same environmental release in different ways, it is not reasonable for one person's claim to be protected while their neighbor's claim is time-barred. Regardless of the state in which the initial toxic release occurs, Plaintiffs that are similarly harmed should all be able bring a lawsuit as they discovery property damage. If the Supreme Court affirms *Waldburger*, it will provide plaintiffs with the security of a clear deadline before which they must complete the potentially extensive process of assessing the property damage, receiving a medical diagnosis, and perhaps joining together in class actions.

IV. CONCLUSION

Concerned with the delayed nature of environmental damages, Congress enacted CERCLA's discovery rule which delays the accrual of state statutes of limitations until plaintiffs knew or should have known about the injury. Since § 9658 was added to CERCLA in 1986, there has been much confusion about whether the phrase "statute of limitations" was intended to include another type of limitations period, the statute of repose. Eventually, a federal circuit split emerged on that issue. The Supreme Court recently granted a writ of certiorari to determine the preemptive scope of § 9658. Based on the Congressional intent behind the discovery rule, as evidenced by its legislative history, and consistent with basic principles of equity, the Supreme Court should determine that § 9658 preempts statutes of repose.