

## **Does CERCLA Preempt State Medical Monitoring Claims?**

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An appeal pending before the U.S. Court of Appeals for the Third Circuit asks whether CERCLA preempts state law claims for medical monitoring in *Giovanni v. U.S. Department of the Navy*, No. 17-2473 (3d Cir.). This is an important issue in the context of perfluorinated chemicals (PFCs) because the exact health effects remain in dispute. Residents state PFCs from the U.S. Department of the Navy's Willow Grove and Warminster facilities contaminated their drinking water. The two naval facilities are currently being cleaned up under the Superfund program. The district court dismissed the request for an injunction to require the Navy to fund a health effects study and medical monitoring because the court held that the residents' claim constituted a challenge to an ongoing cleanup, which was barred by Section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Section 113(b) of CERCLA provides U.S. district courts with exclusive original jurisdiction over all controversies arising under CERCLA. Section 113(h) withdraws jurisdiction from federal courts to review "challenges to removal or remedial action" except in certain instances, 42 U.S.C. Section 9613(h). CERCLA preempts state common law claims when there is a conflict, see *Niagara Mohawk Power v. Chevron U.S.A.*, 596 F.3d 112 (2d Cir. 2010). State statutory claims for contribution are preempted by CERCLA where the use of state law is an attempt to end-run CERCLA's contribution mechanisms as in *PMC v. Sherwin-Williams*, 151 F.3d 610 (7th Cir. 1998). At least one circuit has held that CERCLA bars tort claims brought to reallocate costs of response incurred under a CERCLA consent decree because section 113(f) is intended to provide the exclusive remedy for that situation, as in *NCR v. George A. Whiting Paper*, 768 F.3d 682, 711 (7th Cir. 2014). CERCLA preemption decisions raise questions about the interplay between state hazardous waste cleanup statutes and CERCLA. In Pennsylvania, courts have concluded that the state analog to CERCLA, the Pennsylvania Hazardous Sites Cleanup Act (HSCA), casts a broader net than CERCLA.

Plaintiffs' medical monitoring claim was originally filed in state court under HSCA. The government removed the case to federal court under 28 U.S.C. Section 1442(a)(1)—the provision that allows the United States and its agencies to remove actions filed against them in state court. Plaintiffs filed a motion to remand the case back to state court on the basis that the claims were brought under state law and Section 113(h) of CERCLA precludes "pre-enforcement review of remedial and recovery actions." The government, in turn, moved to dismiss, arguing the federal court lacked subject matter jurisdiction because section 113(h) of CERCLA barred judicial review of claims that interfere with ongoing cleanup work. Additionally, the government argued that the state court could not hear the claim because the Navy asserted sovereign immunity.

In response, plaintiffs argued section 113(h) did not preclude the district court from having jurisdiction over the claim because the complaint did not "challenge" a "removal or remediation action." This argument contradicted, according to the court, the plaintiff's earlier position seeking remand to the state court. The court focused on public health language in the

definitions of “remedial action” and “removal” under CERCLA. Cf., 42 U.S.C. Section 9601(24) (remedial action includes “any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment”) with 42 U.S.C. Section 9601(23) (removal includes action taken to “prevent, minimize, or mitigate damage to the public health or welfare or to the environment”).

Because “assessing the effects of public health is an integral part of implementing a remedial action,” and plaintiffs sought an injunction to require the Navy to perform medical monitoring and a health effects study, the court concluded that plaintiffs were challenging a removal or remedial action. An injunction requiring the Navy to pay for medical monitoring and a health effects study would require a determination of who is responsible for the site and costs. Plaintiffs argued that medical monitoring claims do not constitute a “challenge” under section 113(h) of CERCLA. The cases on which plaintiffs relied concluded that medical monitoring was not a recoverable “response cost” under CERCLA and the term “response” includes a removal or remedial action. As a result, medical monitoring could not be a “challenge” to “removal or remedial action” barred by CERCLA. The court rejected this argument because it interpreted “response” and “response cost” to mean the same thing. Because the state court lacked jurisdiction over the Navy due to the assertion of sovereign immunity, and the federal court lacked subject matter jurisdiction, the court dismissed the action under the doctrine of derivative jurisdiction.

Plaintiffs have appealed the judgment to the U.S. Court of Appeals for the Third Circuit. Citizen groups concerned about the ability to obtain early health effects studies and medical monitoring have filed amicus curiae briefs in support of the appeal. The appeal was consolidated with a related appeal, *Palmer v. United States Department of Navy*, No. 17-3196 (3d Cir.), in which the district court dismissed plaintiffs’ claim for the same reasons provided in the *Giovanni* decision. The government’s response brief in the consolidated appeal is due in January.

On appeal, the plaintiffs argue medical monitoring claims are not recoverable response costs under CERCLA, but they are cognizable claims under state common law and HSCA. HSCA was intended to fill the gaps left by CERCLA. Under *Redland Soccer Club v. Department of the Army*, 696 A.2d 137 (Pa. 1997), the plaintiffs contend that Pennsylvania adopted medical monitoring as a common law claim and allowed recovery under HSCA. In the plaintiffs’ view, the injunction would not affect selection of remedial action or otherwise impact the cleanup plan so there is no “challenge” contemplated by section 113(h). The argument follows that removal and remedial actions are directed at preventing or minimizing danger to the public and the environment, not at addressing physical harm caused by past exposure.

Did the district court find there is a conflict between HSCA and CERCLA? What are the practical implications of the appeal? For example, if the Third Circuit upholds the lower court’s decision, when would plaintiffs be allowed to bring their claim? Alternatively, what happens if the Navy is ordered to fund medical monitoring and it is later determined that the Navy is not liable for all of the costs? Under which statute, and in which court, would the reallocation proceed? If

medical monitoring is not a recognized response cost under CERCLA, would the reallocation proceed under HSCA? But, in that instance, would a state law claim for contribution be preempted by CERCLA? CERCLA preemption cases are often fact specific, which creates less certainty for litigants. The Giovanni appeal is an important case to watch in 2018. The appeal should be fully briefed by the end of January. •

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