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by Richard S. Conn

The Properties of Preemption

CERCLA may preempt state laws barring claims on the real property interests of heirs

TWO CALIFORNIA STATUTES promote the policy of certainty and finality in the transfer of property interests to the lawful successors in interest of a person who dies. One is an expedited statute of limitations applicable to claims that could have been asserted against the decedent before death.[1] The other policy is embodied in the Probate Code's so-called nonclaim statutes, which require the decedent's creditors, on actual or constructive notice of estate administration, to timely file and prosecute claims.[2]

A competing policy legitimates the interest of creditors in obtaining satisfaction of bona fide claims from the assets of the decedent before they pass to heirs or beneficiaries. Frequently, creditors have an interest in claims that arise from a decedent's ownership of real property. When representing the administrators and trustees of estates with real property, practitioners may consider the potential liabilities unique to real estate but may be inclined to discount them and rely on statutes of limitation or repose. For example, unwary practitioners may think that the one-year statute of limitation found in Section 366.2 of the Code of Civil Procedure, which runs from the date of death of a decedent, and the 120-day claims filing requirements of Probate Code Sections 9100 (probate estates) and 19100 (applicable to trusts, when invoked by the trustee) adequately protect an estate from liability. Unfortunately, the law provides no such assurance.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides the fed-

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eral government statutory authority to recover response costs and to compel owners, operators, and other potentially responsible parties to clean up environmental contamination of real property.[3] An owner of real property is presumptively a potentially responsible party, unless the owner can prove entitlement to the status of innocent landowner. In general, this requires a showing that an unrelated party was the sole cause of the contamination and damage and that the landowner guarded against the foreseeable acts and omissions of the responsible party.[4] Potentially responsible parties other than landowners and operators include those who transport or dispose of hazardous materials.[5]

Under Section 9607(a), CERCLA liability includes:

> A. All costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; B. Any other necessary costs of response incurred by any other person consistent with the national contingency plan; C. Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and D. The costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Notably, in addition to empowering the government to enforce removal and remediation of contaminants, CERCLA creates causes of action in favor of private parties, including for contribution and damages. Statutes of limitation vary depending on whether the action is for contribution or for costs of responding to contamination, and whether funds have been expended for a removal action or a remedial action, some being three years and others six years.[6] Of material consequence, the various statutory periods may run from the date of a judgment, a court-approved settlement, an administrative order, or from completion of work. The limitations periods may span decades after the contamination is caused or discovered. A viable claim for contribution or response costs may be timely asserted under a CERCLA statute of limitations years after the death or dissolution of an original responsible party.

CERCLA is not limited to establishing federal liability for specified damages and cleanup costs. Under 42 USC Section 9658, state statutes of limitation respecting recovery of damages for environmental torts may be extended. As the code states, "[I]f 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."

Thus, in addition to providing federal remedies, CERCLA potentially has a significant effect on rights under state law. For example, in *Angeles Chemical Company Inc. v. Spencer & Jones,* the court of appeal held that California's 10-year statute of limitation for construction defect claims was preempted. Negligence and breach-of-contract claims were therefore viable even though more than 10 years had passed since the occurrence that gave rise to liability.[7]

One Year or More?

California's one-year statute of limitation respecting postdeath lawsuits provides:

> If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.[8]

This language would appear sufficiently broad to bar claims for contribution and damage to natural resources, whether accruing before or after the decedent's death. A number of decisions have applied Section 366.2 to bar claims.[9] However, the general application of these decisions has been called into question by the more recent holding in *Dacey v. Taraday*.[10] In *Dacey,* the court of appeal found that the administrator of an estate could not invoke the bar of Section 366.2 against a contract claim that was still contingent at the time of the decedent's death. While the opinion may be limited to claims arising in contract, certain language in the opinion is sufficiently broad to apply to any circumstance in which the claimant could not have sued the decedent for injuries sustained at the time of death. In the case of claims for contribution under CERCLA, if the contribution expenditures are incurred after the decedent's death, *Dacey* raises the prospect that Section 366.2 will not bar a claim asserted against an administrator or trustee more than one year after the decedent's death.

The application of the nonclaim statutes is subject to less doubt. *Dacey,* for example, recognizes that the statutes are clearly intended to apply to claims that may be unaccrued, unliquidated, or contingent.[11] However, the nonclaim statutes may prove a double-edged sword. In order to benefit from their protection, an administrator-trustee must serve notice of administration, including the right to file a claim, on "all known or reasonably ascertainable creditors of the decedent."[12] Any creditor not served may seek leave of court to file a claim within 60 days after the creditor "has actual knowledge of the administration of the estate." Similarly, the creditor may seek leave of court to file a claim if the creditor "had no knowledge of the facts reasonably giving rise to the existence of a claim more than 30 days prior to the time for filing a claim" and files its petition for leave to file a claim within 60 days after the creditor has actual knowledge of facts reasonably giving rise to the claim and of the administration of the estate.[13] While the nonclaim statutes appear to provide better protection under California law than Section 366.2, they require effective notice to potential environmental claimants and are not a certain bar to liability.

In sum, an administrator or trustee who relies on Section 366.2 risks exposure to environmental claims that accrue after the decedent's death. The nonclaim statutes do not provide sure protection against the risk of claims by parties who were not notified or were not aware of facts disclosing that a claim had accrued. Moreover, issues of liability do not terminate on the distribution of assets to beneficiaries. To the extent that a distribution is made by a trustee without satisfaction of subsisting indebtedness, the dis-

In *Dacey v. Taraday*, the court of appeal found that the administrator of an estate could not invoke the bar of Section 366.2 against a contract claim that was still contingent at the time of the decedent's death.

MCLE Test No. 229

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1. Under California law, a creditor of a deceased person generally has one year from the date of death to bring an action against the deceased person's successors.
True.
False.

2. A nonclaim statute relieves a creditor of the obligation to file a claim in a probate proceeding.
True.
False.

3. "CERCLA" refers to the Comprehensive Environmental Response, Compensation, and Liability Act.
True.
False.

4. An owner of real property is presumptively a potentially responsible party under CERCLA unless the owner can prove entitlement to innocent landowner status.
True.
False.

5. CERCLA only creates rights in the U.S. government, a state, or an Indian tribe and does not affect the rights of private parties against one another.
True.
False.

6. Code of Civil Procedure Section 366.2 bars actions for breach of contract brought more than one year after the death of a contracting party, even if the breach had not occurred prior to the date of death.
True.
False.

7. Federal statutes always preempt state statutes addressing the same subject matter.
True.
False.

8. Federal courts have uniformly held that the CERCLA statutes of limitation preempt state nonclaim statutes.
True.
False.

9. Statutes of repose differ from statutes of limitation in that statutes of repose may bar a suit before a cause of action has accrued.
True.
False.

10. CERCLA may extend the statute of limitation for actions under state law to recover damages for environmental torts.
True.
False.

11. California's 10-year statute of limitations for construction defects may be extended by CERCLA.
True.
False.

12. Two U.S. courts of appeal have held that CERCLA provisions that extend state statutes of limitations for environmental torts were intended to apply equally to statutes of repose.
True.
False.

13. In order for a probate administrator to be protected by California's nonclaim statutes, he or she must serve notice of the right to file a claim on all known or reasonably ascertainable creditors.
True.
False.

14. A creditor who is not timely served with notice of the right to file a probate claim must file a claim within six months of learning of the administration of the estate.
True.
False.

15. If a creditor does not have knowledge of facts reasonably giving rise to a claim as of 30 days prior to the expiration of the claims filing period, and therefore omits filing a claim, the creditor is forever barred from pursuing recovery.
True.
False.

16. The court in *Witko v. Beekhuis* held that any state statute of limitation running from the date of a responsible party's death will be unaffected by CERCLA.
True.
False.

17. An administrator of a probate estate may rely on Code of Civil Procedure Section 366.2 to protect against all claims for damages based on environmental torts committed by the decedent.
True.
False.

18. Federal statutes will only preempt state statutes on the same subject matter when Congress has expressed a plain intent to preempt state law.
True.
False.

19. A court may infer preemption from federal regulation that is sufficiently comprehensive to leave no room for state regulation.
True.
False.

20. Federal law may be deemed to preempt state law to the extent it actually conflicts with federal law.
True.
False.

MCLE Answer Sheet #229

THE PROPERTIES OF PREEMPTION

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6.	☐ True	☐ False
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14.	☐ True	☐ False
15.	☐ True	☐ False
16.	☐ True	☐ False
17.	☐ True	☐ False
18.	☐ True	☐ False
19.	☐ True	☐ False
20.	☐ True	☐ False

tributees are liable for payment on a pro rata basis.[14]

Patchwork as the California protections may be, do they override CERCLA statutes of limitation? While a number of reported federal decisions have addressed whether specific statute of limitation provisions in CERCLA preempt state law, they reach conflicting results. The outcome appears in part to depend on the specific cause of action and statute of limitation at issue. Without respect to federal preemption, California statutes of limitation for damage to real property may range from as short as three years for negligently caused harm to 10 years for construction defects.[15]

The leading federal decision relating to CERCLA's three-year statute of limitations for contribution actions is *Witco Corporation v. Beekhuis*.[16] In *Witco,* the court of appeal considered whether Delaware's eight-month probate nonclaim filing statute insulated the executor of a probate estate and derivative trusts from claims for contribution for environmental cleanup. Witco Corporation had owned the land in question from 1972 to 1977, been aware of the environmental issues since at least 1985, and entered into a cleanup consent decree with the EPA in 1992. The decedent, Beekhuis, had owned and operated a corporation that had merged into a Witco subsidiary, eventually constituting Witco, an owner of the contaminated property. Beekhuis was presumably deemed a potentially responsible party because of his operation of the predecessor entity and his actions as an officer of Witco. Beekhuis and his insurer had allegedly been placed on notice of their liability in 1988.

The court in *Witco* cited language from *California Federal Savings and Loan Association v. Guerra* as setting forth the applicable standard for a finding of federal preemption:

> In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress. Federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to preempt state law by so stating in express terms. Second, congressional intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation....As a third alternative, those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because "compliance with both federal and state regulations is a physical impossibility," or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[17]

The *Witco* court noted that three federal district courts have found that the CERCLA statute of limitations affirmatively preempted state nonclaim statutes on the ground that preemption is necessary to implement the overriding federal policy that those who are responsible for improper disposal of chemical poisons should bear the expense of cleanup.[18] Nevertheless, the *Witco* court proceeded to reach a contrary result on four grounds. First, the court found nothing in CERCLA to indicate congressional intent to preempt state law governing claims against decedent's estates, which is an area traditionally reserved to state law. Second, the court found a justifiable inference that Congress intended to leave state law respecting decedent's estates unchanged. This reasoning is based on inclusion of an innocent landowner defense in Section 9607(b)(3). Third, the court found that after the running of the eight-month nonclaim period, an executor lacks capacity to be sued, and that state law on capacity is determinative under Rule 17(b) of the Federal Rules of Civil Procedure. Last, the court found that for pragmatic reasons (i.e. certainty governing the descent of property) Congress could not have intended to preempt state nonclaim statutes.

Witco is cited with approval in *Marsh v. Rosenbloom*, which rejects a claim that CERCLA preempted Delaware's statute barring claims against a corporation that are made more than three years after completion of the corporation's dissolution. Another case, *Boyle v. County of Kern,* holds that filing of a federal civil rights complaint within the claim filing period does not satisfy the nonclaim statute filing requirement.[19]

McDonald v. Sun Oil Company

In the context of claims for contribution, *Witco* makes a strong argument against federal preemption of state nonclaim statutes. This provides some reassurance to a probate practitioner, but several contrary federal decisions leave the issue unsettled. Further, the Ninth Circuit's decision in *McDonald v. Sun Oil Company* puts *Witco* into some doubt.[20] In particular, it is doubtful that *Witco* can be extended to Section 366.2, which is not specifically tied to administration of estates and would not support *Witco*'s argument regarding an executor's lack of capacity to be sued.

In *McDonald*, the court considered whether Section 9658 preempts an Oregon statute of repose that limits the right to bring suit without respect to knowledge of accrual of a claim.[21] Specifically, the court found that the Oregon statute that precluded action for negligent injury to a person or property more than 10 years from the date of the act or omission complained of was preempted by Section 9658. The court found in favor of pre-

Ruling on Preemption

Federal courts are frequently called upon to determine whether a federal statute preempts a parallel state statute. When doing so, courts typically consider three factors. First, if Congress has expressed a plain intent to preempt state law pertaining to a subject matter governed by the supremacy clause of the U.S. Constitution, this is dispositive. Second, in the absence of a clearly expressed intent, the court may infer preemption from federal regulation that is sufficiently comprehensive to leave no room for state regulation. Third, federal law may be deemed to preempt state law to the extent it actually conflicts with federal law.[1]

Some recent decisions reflect the range of judicial reasoning on preemption. In *In re Western States Wholesale Natural Gas Antitrust Litigation*,[2] the court held that the federal Natural Gas Act was not intended to preempt state police power to enforce state antitrust laws on retail sales of natural gas. In *Movsesian v. Victoria Versicherung AG,*[3] the court held that a California statute vesting state courts with jurisdiction over insurance actions by Armenian Genocide victims and extending statutes of limitation for victims' claims was preempted by the U.S. Constitution's grant of exclusive authority in foreign affairs to the federal government. In *Castro v. Collecto Inc.,*[4] the court held that a four-year statute of limitation under Texas law was not conflict-preempted by a two-year limit in the Federal Communications Act, as applied to a claim respecting unlawful collection practices relating to cellular phone bills.—**R.S.C.**

[1] California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987).
[2] In re W. States Wholesale Natural Gas Antitrust Litig., 715 F. 3d 716 (9th Cir. 2013).
[3] Movsesian v. Victoria Versicherung AG, 670 F. 3d 1067 (9th Cir. 2011).
[4] Castro v. Collecto Inc., 634 F. 3d 779 (5th Cir. 2011).

emption notwithstanding a relatively minor injury to the plaintiff in the form of $70,000 in cleanup costs.

The court in *McDonald* explicitly rejected an argument that, as a statute of repose rather than a statute of limitation, the Oregon statute was not intended to be preempted. In holding that Section 9658 was intended to apply to both statutes of repose and statutes of limitation, the court defined statutes of limitation and repose:

> Statutes of limitations and repose are distinct legal concepts with distinct effects. "A statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated….On the other hand, statutes of repose are designed to bar actions after a specified period of time has run from the occurrence of some event other than the injury which gave rise to the claim." Statutes of limitations preclude[ ] the plaintiff from proceeding….A statute of repose, however…can bar a suit even before the cause of action could have accrued.…In proper circumstances, it can be said to destroy the right itself. It is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace.[22]

In reaching this result, the court in *McDonald* explicitly rejected a contrary finding by the Fifth Circuit in *Burlington Northern & Santa Fe Railway Company v. Poole Chemical Company*[23] that Section 9658 was not intended to apply to statutes of repose. The holding in *McDonald* has subsequently been followed by the Fourth Circuit in *Waldburger v. CTS Corporation*,[24] a case decided on similar facts.

McDonald is noteworthy because Section 366.2 and the nonclaim statutes are arguably statutes of repose. It is entirely conceivable that, if asked to rule on the issue of preemption pursuant to Section 9658 as applied to the California statutes, the Ninth Circuit could reach a contrary result. Nevertheless, *McDonald* at least may be cited as dicta to support the proposition that California state law negligence claims predicated on release of pollutants are not barred by Section 366.2 or the nonclaim statutes and that pursuant to Probate Code Section 9658, the claims are governed by a hybrid federal-state statute of limitation that runs from the date of discovery. Further, the willingness of the *McDonald* court to treat CERCLA preemption of statutes of repose in a manner identical to statutes of limitation raises a question as to whether the Ninth Circuit would reach a result contrary to *Witco* regarding claims of contribution for costs of removal or remedial action.

Practitioners representing administrators of decedents' estates routinely rely on Section 366.2 and the nonclaim statutes in providing their clients assurance that money or assets may be safely distributed without concern for later claims. Unfortunately, CERCLA casts a cloud over the ability of any executor or trustee to distribute real property with assurance that all viable claims have been satisfied or are barred. Moreover, even purely personal liabilities of the decedent may survive. That being said, it is clear that, for trustees, use of the notice to creditors mechanism set forth in Sections 19100 et seq. potentially provides significant protection. Use of this procedure would appear far preferable to passive reliance on the one-year statute of limitations of Section 366.2. ■

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[1] Code Civ. Proc. §366.2.
[2] Prob. Code §§9000 *et seq*. (probate estates); Prob. Code §§19000 *et seq*. (trust estates).
[3] 42 U.S.C.A. §§9601-9675.
[4] PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F. 3d 161 (4th Cir. 2013).
[5] For a discussion of whether executors and trustees will be treated as innocent landowners, *see* United States v. Newmont USA Ltd., 504 F. Supp. 2d 1050, 1067 (E.D. Wash. 2007) (noting 42 U.S.C.A. §9607).
[6] *See* 42 U.S.C.A. §9607, §9613.
[7] Angeles Chem. Co. Inc. v. Spencer & Jones, 44 Cal. App. 4th 112 (1996).
[8] Code Civ. Proc. §366.2(a).
[9] *See* Bradley v. Breen, 73 Cal. App. 4th 798 (1999); Dawes v. Rich, 60 Cal. App. 4th 24, 32-36 (1997); *cf*. Battuello v. Battuello, 64 Cal. App. 4th 842 (1998).
[10] Dacey v. Taraday, 196 Cal. App. 4th 962, 984-87 (2011).
[11] *Id*. at 983; Prob. Code §9000; Code Civ. Proc. §§338(b), 337.15.
[12] Prob. Code §9050.
[13] Prob. Code §9103.
[14] Prob. Code §§19103(d), 19400 *et seq*.
[15] Code Civ. Proc. §§338(b), 337.15.
[16] Witco Corp. v. Beekhuis, 38 F. 3d 682 (1994); 42 U.S.C.A. §9613(g)(3).
[17] Witco Corp. v. Beekhuis, 38 F. 3d 682, 687 (1994) (quoting California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987)). *See also* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. and Bargaining Bd., 467 U.S. 461, 478 (1984); Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 156 (1982); *but see* Maryland v. Louisiana, 451 U.S. 725, 746 (1981); *see also* 42 U.S.C. §9613(g)(3).
[18] *See* Freudenberg-NOK Gen. P'ship v. Thomopoulos, 1991 WL 325290, at *2 (D. N.H. 1991); Soo Line R.R. Co. v. B.J. Carney & Co., 797 F. Supp. 1472 (D. Minn. 1992); Steego Corp. v. Ravenal, 830 F. Supp. 42 (D. Mass. 1993).
[19] Marsh v. Rosenbloom, 499 F. 3d 165 (2nd Cir. 2007); Boyle v. County of Kern, No. 1:2003cv05162 (E.D. Cal. Feb. 7, 2003).
[20] McDonald v. Sun Oil Co., 548 F. 3d 774 (2008).
[21] *See* 42 U.S.C. §9658(a)(1).
[22] McDonald, 548 F. 3d at 779-80 (citing Underwood Cotton Co., Inc. v. Hyundai, 288 F. 3d 405, 408-09 (9th Cir. 2002)).
[23] Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F. 3d 355, 363 (5th Cir. 2005).
[24] Waldburger v. CTS Corp., 2013 WL 3455775 (4th Cir. 2013).

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