Fifth Circuit Addresses Application of CERCLA Discovery Rule to State Toxic Tort Claims

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In *Barnes v. Koppers Inc.*, decided June 30, 2008, the Fifth Circuit Court of Appeals addressed the conditions that must be met before the tolling provision provided in the Comprehensive Environmental Response, Compensation and Liability Act ("CERLCA") may preempt a state's statutes of limitations in toxic tort cases. In *Barnes*, the plaintiff, the child of the owner of a home adjacent to a wood treatment plant, asserted state-law tort claims against the plant alleging that it had released contamination that caused her mother’s death from breast cancer. On a motion for summary judgment, the district court rejected the defendants’ argument that the plaintiff’s negligence and conspiracy claims were time-barred under Mississippi’s three-year statute of limitations because the claims were filed more than three years after plaintiff’s mother was diagnosed with breast cancer, and Mississippi’s statute of limitations is triggered by the date of discovery of the injury.

The defendants appealed the trial court’s award in favor of plaintiff, again arguing that the plaintiff’s claims were time-barred. The plaintiff argued in response that her claims were tolled under Mississippi’s latent discovery statute until she learned of the alleged cause of her mother’s breast cancer. In the alternative, the plaintiff claimed that Mississippi’s statute of limitations was preempted by CERLCA’s tolling provision which provides that in "any action brought under State law for personal injury...caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant,...if the applicable limitations period for such action...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." 42 U.S.C. § 9658(a)(1). The federally required commencement date is the date a plaintiff knows or reasonably should have known that the personal injury claimed was caused by the hazardous substance concerned. *Id.* § 9658(b)(4).

In reversing the district court, the Fifth Circuit explained that for the CERLCA tolling provision to prevent a state limitations period from commencing until a plaintiff knows or should know of both her injury and its cause, the plaintiff still "must prove that her claims arose from a ‘release’ of ‘hazardous substances’ into the environment, as well as other case-specific preconditions establishing that the defendant's ‘facility’ falls within CERLCA." In this case, however, the *Barnes* court held that the plaintiff could not rely on CERLCA’s tolling provision to save her suit from dismissal as untimely because she had not shown that the required conditions for a CERLCA cleanup were satisfied; that is, she had not established that the plant’s emissions gave rise to CERLCA coverage. Notably, the *Barnes* decision,
which is a case of first impression for the Fifth Circuit, did not require that an underlying CERCLA suit be pending or that the plaintiff’s state law claims be filed in conjunction with a CERCLA suit before considering application of CERCLA’s tolling provision to toll the state’s limitations period.