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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Justices Say Superfund Deal Doesn't Block State Law Claims

By **Juan Carlos Rodriguez**

Law360 (April 20, 2020, 10:58 AM EDT) -- Montana residents can sue Atlantic Richfield Co. under state law for money to clean up their properties on a Superfund site that's already covered by a settlement agreement with the U.S. Environmental Protection Agency, but any additional remedial action must be approved by the EPA, the U.S. Supreme Court said Monday.

Arco, a BP America Ltd. subsidiary, asked the high court to overturn the Montana Supreme Court's finding that the landowners can sue the company for trespass, nuisance and strict liability claims under state common law, and potentially be awarded restoration damages, over pollution from the Anaconda Smelter Superfund site, despite the company's settlement with the EPA. The EPA took Arco's side in the case.

In a split decision, the justices said the Comprehensive Environmental Response, Compensation and Liability Act does not preclude the landowners' right to assert state law claims like nuisance and trespass that don't arise under the act.

"The act does not strip the Montana courts of jurisdiction over this lawsuit," Chief Justice John Roberts said, writing for the majority. "It does not displace state court jurisdiction over claims brought under other sources of law."

Section 113(b) of the law gives federal district courts jurisdiction over controversies "arising under" the act, but the landowners' state law claims don't fit that definition, the majority said.

The justices noted that Section 113(h) allows federal courts in diversity cases to entertain state law claims "regardless of whether they are challenges to cleanup plans."

"Atlantic Richfield does not even try to explain why the act would permit such state law claims to proceed in federal court, but not in state court. The act permits federal courts and state courts alike to entertain state law claims, including challenges to cleanups," the majority said.

It said the company had a "knotty" interpretation of the act and that there's no clear language in CERCLA that would lead to the conclusion that Congress intended to strip state courts of hearing state law claims.

The residents live near the Anaconda site, where companies conducted copper concentrating and smelting operations that contaminated the water and soil with arsenic, lead, copper, cadmium and zinc. They have fought to keep their so-called restoration damages claim alive so it can proceed to trial alongside their other state law claims for nuisance and trespass.

According to the majority, though, the landowners are not allowed to begin any cleanup actions on their property outside of what the EPA has approved. If they want to do anything extra, they'll have to get the agency's approval, the high court said.

That's because the landowners are "potentially responsible parties" as defined by CERCLA. Under the act, potentially responsible parties are prohibited from taking remedial action without EPA approval. While the Montana high court found the residents aren't PRPs because they aren't actually responsible for any of the contamination, the justices said CERCLA doesn't make such a distinction.

Citing the high court's own 2007 ruling in U.S. v. Atlantic Research Corp., the majority said even parties not responsible for contamination may fall within the broad definitions of potentially responsible parties. The justices noted that "innocent" landowners may be shielded from liability under CERCLA's "innocent landowner" and "third party" defenses.

"Under the landowners' interpretation, property owners would be free to dig up arsenic-infected soil and build trenches to redirect lead-contaminated groundwater without even notifying EPA, so long as they have not been sued within six years of commencement of the cleanup," the majority said. "We doubt Congress provided such a fragile remedy for such a serious problem."

The landowners said that if they're considered PRPs, they'll forever be required "to get permission from EPA in Washington if they want to dig out part of their backyard to put in a sandbox for their grandchildren," but the Supreme Court said the law doesn't go that far.

"The grandchildren of Montana can rest easy … The act's definition of remedial action does not reach so far as to cover planting a garden, installing a lawn sprinkler, or digging a sandbox," the majority said.

But it does bar state law claimants from imposing a sitewide remedy on a company that goes beyond what the EPA has already approved, the justices said.

Atlantic Richfield is still potentially liable under state law for compensatory damages, including loss of use and enjoyment of property, diminution of value, incidental and consequential damages, and annoyance and discomfort, the majority said. And if the EPA agrees, companies may be liable for cleanup beyond what they already agreed to.

Justice Samuel Alito sided with the majority on the question of whether the landowners are potentially responsible parties, but would not endorse the finding that state courts have jurisdiction to entertain challenges to EPA-approved CERCLA plans. He said that because the EPA's approval will be necessary for the landowners to gain relief, that process should play out first.

Justices Neil Gorsuch and Clarence Thomas agreed that state courts can hear challenges to Superfund plans, but disagreed with the court's finding that the landowners are PRPs, saying the majority's opinion "strips away ancient common law rights from innocent landowners and forces them to suffer toxic waste in their backyards, playgrounds, and farms."

Joseph Palmore, a partner at Morrison & Foerster LLP who represents the landowners, praised the high court's ruling.

"We are pleased that the court rejected Arco's attempt to have our restoration damages remedy dismissed," Palmore said Monday. "We look forward to working with the EPA toward a clean-up that will protect the environment and safeguard the health and property of the residents."

Arco spokesperson Michael Abendhoff also took a positive view of the decision.

"Today, the U.S. Supreme Court confirmed Atlantic Richfield Co.'s long-held position that Superfund site landowners cannot implement an alternative cleanup plan the EPA has not approved. We look forward to continuing our work with the EPA, state of Montana and local communities to complete the EPA-approved cleanup plans that are underway," Abendhoff said.

The EPA said it's reviewing the decision.

Arco is represented by Lisa S. Blatt, John S. Williams, Sarah M. Harris, Charles L. McCloud, Meng Jia Yang and Thomas S. Chapman of Williams & Connolly LLP, Robert J. Katerberg and Elisabeth S. Theodore of Arnold & Porter and Jonathan W. Rauchway and Shannon W. Stevenson of Davis Graham & Stubbs LLP.

The government is represented by Noel J. Francisco, Malcolm L. Stewart and Christopher G. Michel of the Office of the Solicitor General and Eric Grant and Matthew R. Oakes of the U.S. Department of Justice's Environment and Natural Resources Division.

The landowners are represented by Joseph R. Palmore, Deanne E. Maynard, William F. Tarantino and Dustin C. Elliott of Morrison & Foerster LLP, Monte D. Beck and Justin P. Stalpes of Beck Amsden & Stalpes PLLC and Mark M. Kovacich, Ross T. Johnson and J. David Slovak of Kovacich Snipes PC.

The case is Atlantic Richfield Co. v. Christian et al., case number 17-1498, in the U.S. Supreme Court.

--Editing by Marygrace Murphy.

Update: This story has been updated with additional information about the ruling, as well as comment from an attorney for the landowners, the EPA and Arco.