A few weeks back, I posted about *CTS Corp. v. Waldburger*, a case then awaiting oral argument in the Supreme Court. As you may recall (or as you can read here, with links to relevant documents), *Waldburger* involves hazardous waste contamination, and a provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that may or may not allow certain plaintiffs to bring private tort claims for latent injuries. The UCLA Wells Environmental Law Clinic authored an *amicus* brief in this case, on behalf of the Natural Resources Defense Council (NRDC). Last week, I had the opportunity to observe the arguments.

As a quick recap of the case, neighbors to a retired manufacturing facility site brought a nuisance suit against the former owners of the facility, after finding industrial carcinogens in their water supply. The district court threw out the case, based on a North Carolina "statute of repose" that bars claims brought more than ten years after a defendant's last culpable actions took place. The Fourth Circuit Court of Appeals reversed, holding that CERCLA Section 309 preempts the state statute. Section 309 delays commencement of state time bars for hazardous waste suits until a defendant's injuries become apparent, which may be many years after the usual expiration of either a statute of limitations (commencing at injury or awareness of injury), or a statute of repose (commencing at the defendant's last action). Section 309 explicitly names only "statutes of limitations."

As I mentioned in the earlier post, the case has been steadily attracting attention, notably for its impact on consolidated cases regarding contamination at the Marine base Camp Lejeune. A rally of about 60 people marched to the court the day of arguments, including the famed Erin Brockovich and Jerry Ensminger, a former Marine whose daughter was killed after exposure to contamination at Camp Lejeune. The issues involved are compelling—most people don't want to see toxic tort plaintiffs lose a case simply because their injuries didn't show up fast enough.

Unsurprisingly, oral argument focused largely on Congress' intent in enacting Section 309, and what to make of the absence of the phrase "statute of repose" in the text. One interpretation, advanced by the facility owners, is that Congress meant the section to apply only to statutes of limitations, but not to statutes of repose. They've cited the distinctions that have been drawn between the two—casting statutes of repose as a substantive limit on a plaintiff's legal rights (somewhat akin to a state's decision to grant a cause of action in the first place), while statutes of limitations are meant as a procedural device to encourage diligent and expeditious pursuit of claims.

The other interpretation, from the plaintiff neighbors, is that Congress meant Section 309 to apply to statutes of repose. Section 309 is sensibly read to include statutes of repose as well

as statutes of limitations. Indeed, the distinction is noted rarely today, and was hardly ever made back in 1986 when Section 309 was enacted. Furthermore, preserving statutes of repose contradicts Section 309's singular purpose—namely, ensuring that plaintiffs who suffer latent injuries are not barred from bringing suit before they even knew they have been injured.

The court seemed intrigued by the distinction between statutes of limitations and statutes of repose. Justices Scalia and Kennedy both admitted to not having been aware of the difference before the case; Justice Ginsburg knew statutes of repose as "built-in statute of limitations." Indeed, most lawyers would probably say "statute of limitations" when talking about a statute of repose. The justices expressed doubt that Congress itself had known the difference when it enacted Section 309.

Ultimately, though, it's not just the names that count. As Justice Scalia observed at argument, "It's not a matter of terminology; it's a matter of reality"—that is, it's not the label of "repose" or "limitations" that matters, but the underlying distinctions. (However, Scalia later appeared to favor a fairly tightly textualist reading of the statute to exclude statutes of repose, so he hasn't thrown out words entirely). As the facility owner has pointed out, there are some differences, at least today. At argument, several justices seemed sympathetic to the idea of statutes of repose as a complement to statutes of limitations (North Carolina and other states with statutes of repose maintain separate traditional statutes of limitations, which are typically a few years shorter). Justice Alito seemed particularly uncomfortable with the notion of a cause of action with no clear end to liability. Chief Justice Roberts seemed concerned with the policy distinctions between the two forms of statute.

However, the court shouldn't lose sight of the similarities of the two statutes. Indeed, the similarities probably count more toward preserving Congress's intent for Section 309. Legislative history shows that Congress was concerned with one problem in particular, that state tort plaintiffs suffering long-latency injuries were losing their causes of action before their injuries could even be discovered. Given the typical latency periods for the injuries at issue—mainly cancer and concealed property damage, either of which may show up only decades later—either form of time limitation results in plaintiffs losing their causes of action too soon. After all, as Shakespeare might have said:

> What's in a name? That which we call repose
>
> By any other name would still defeat

A plaintiff's claim for latent injuries.

The court's decision is expected before the court winds up its term in June. Updates on the case can be found here.

(For readers interested in more discussion on *Waldburger,* I've also written about the case in an editorial for the legal publication Daily Journal, dated May 1. Access to the publication is password-protected, however, so you'll need a subscription to view it on their site. However, the text of this article is also available here.)