CERCLA SECTION 309 AND BEYOND: STATUTES OF LIMITATIONS, RULES OF REPOSE, AND THE BROAD IMPLICATIONS OF *CTS CORP. V. WALDBURGER* OUTSIDE THE CONTEXT OF ENVIRONMENTAL LAW

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On June 9, 2014, the U.S. Supreme Court, in CTS Corp. v. Waldburger*, held 7-2 that CERCLA Section 309 preempts only state statutes of limitations, not rules of repose. Previously, there was a split among federal courts of appeals as to whether CERCLA Section 309, a liberal discovery rule applying to certain toxic tort claims, preempted state statutes of repose. The Fifth Circuit had held that section 309 did not preempt state statutes of repose because the provision's plain language, including the repeated use of "statute of limitations," precluded a contrary interpretation. The Ninth and Fourth Circuits, however, held that CERCLA Section 309 preempted state statutes of repose in light of the Act's legislative history and the ambiguity of the term "statute of limitations" at the time of CERCLA's enactment. Federal courts have used these CERCLA Section 309 cases, as well as* CTS Corp. v. Waldburger*, to resolve the same question of statutory interpretation found in statutes relating to securities law, including the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and the Housing and Economic Recovery Act of 2008.*

This Note analyzes the circuit split regarding the proper interpretation of CERCLA Section 309, as well as the potentially far-reaching impact of CTS Corp. v. Waldburger *outside of the environmental context. It begins by examining the legislative history of CERCLA Section 309 and the distinction between and meaning of "statutes of repose" and "statutes of limitations." Next, this Note analyzes judicial interpretation of CERCLA Section 309, from the early cases to* CTS Corp. v. Waldburger*. It then evaluates the judicial use of the CERCLA Section 309 cases to resolve the same question of statutory construction presented in statutes relating to securities law and the recent housing crisis.*

This Note acknowledges that in considering whether the term "statute of limitations" encompasses rules of repose in various securities law extender provisions, the courts must consider the Supreme Court's analytical approach to CERCLA Section 309 in CTS Corp. v.

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Waldburger. *Nevertheless, this Note urges that courts should still conduct their own independent, rigorous analysis of the provision at issue. Such an approach will ensure the proper interpretation of unique extender provisions enacted by Congress at different times throughout history.*

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I. INTRODUCTION

Imagine that throughout the 1980s, Green Corp. operated a facility in Pleasantville where it stored chemical X—reasonably anticipated to be a human carcinogen—in sizeable quantities and manufactured products using chemical X. In 1989, Green Corp. closed the facility and sold it to Developer Associates. Green Corp. promised Developer Associates that no threat to human health or the environment remained from its former operations. In turn, Developer Associates built residential homes on the land.

You purchased a home from Developer Associates in 1995 and have lived there ever since. The year is now 2015—twenty-six years after the closure of Green Corp.'s Pleasantville facility—and you and your neighbors have just received word from the state environmental department that the well water in your community contains highly concentrated levels of chemical X. Alarmed and dismayed, you join with other landowners to bring a meritorious nuisance claim against Green Corp. In

response, Green Corp. files a motion to dismiss, contending that the relevant state statute of repose bars lawsuits brought ten years after a defendant has last acted. If the state statute of repose applies, then the court will dismiss your suit. There exists, however, a federal limitations period, applicable to state law nuisance claims, that establishes a discovery rule (i.e., a limitations period) which commences on the date the plaintiff knew or reasonably should have known that her injuries were caused by the hazardous substance at issue. This federal limitations period preempts state statutes when state law provides a commencement date earlier than the federal discovery rule. Thus, it seems likely that the federal discovery rule will apply to your case, and the court will deny Green Corp.'s motion to dismiss. Yet there remains one problem: the federal limitations period refers only to "statutes of limitations" and is silent with respect to its applicability to statutes of repose.[1] Are you and your neighbors out of luck?

In certain statutory contexts, a court's interpretation of the term "statutes of limitations" means the difference between a plaintiff having her day in court and a limitations period barring her claim. At heart is the question of whether "statutes of limitations" refers only to statutes of limitations or to both statutes of limitations and rules of repose. It seems a silly question to ask when the modern definition and understanding of both types of laws appears, at least at first glance, to be clear. Today, a statute of limitations is defined as a "statute establishing a time limit for suing in a civil case, based on the date when the claim accrued," such as when a plaintiff discovered the injury or when the injury occurred.[2] Meanwhile, a statute of repose means "[a] statute barring any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury."[3] For decades, however, Congress, courts, and scholars alike have confused the terms and used them interchangeably, leaving a lasting effect on the treatment that courts have given the question in the twenty-first century.

At the center of this issue is section 309 of the Comprehensive Environmental Response, Compensation, and Liability Act[4] ("CERLCA") (the "Act"), a statute designed to respond to "releases or threatened releases of hazardous substances that may endanger public health or the environment."[5] Added to CERCLA in 1986 by the Superfund Amendments and Reauthorization Act,[6] CERCLA Section 309 is Congress' attempt to remedy the procedural barriers to recovery that limitations periods present for personal injuries caused by exposure to

1. Comprehensive Environmental Response, Compensation, and Liability Act § 309, 42 U.S.C. § 9658(a)(1) (2012).

2. BLACK'S LAW DICTIONARY 1546 (9th ed. 2009).

3. *Id.*

4. § 9658.

5. *CERCLA Overview*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/superfund/policy/cercla.htm (last updated Dec. 12, 2011).

6. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601–9657 (1988)).

hazardous waste. In particular, Congress recognized that exposure to hazardous wastes sometimes caused diseases and harm with long latency periods—i.e., harmed persons may not discover their injuries for twenty years or more.[7] Nondiscovery statutes of limitations and rules of repose, which begin to run at the time of exposure, will preclude most actions before plaintiffs even know of their injuries.[8] While the provision's legislative history suggests that CERCLA Section 309 was meant to address both statutes of limitations and rules of repose,[9] the language only mentions the former.

CERCLA Section 309 creates a liberal discovery rule that applies when plaintiffs bring a state cause of action "for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant, or contaminant, released into the environment from a facility."[10] Where section 309 applies, it requires:

> [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.[11]

Under section 309, the phrase "applicable limitations period" means "the period specified in a statute of limitations during which a civil action . . . may be brought."[12] Furthermore, the provision defines "federally required commencement date" as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."[13]

Though it is incontrovertible that CERCLA Section 309 preempts state statutes of limitations, there has been, until recently, a split among federal courts of appeals as to whether the provision also preempts state statutes of repose.[14] In June 2014, however, the U.S. Supreme Court ruled that CERCLA Section 309 preempts only state statutes of limita-

7. STAFF OF S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES: A REPORT TO CONGRESS IN COMPLIANCE WITH SECTION 301(E) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (P.L. 96-510) BY THE "SUPERFUND SECTION 301(E) STUDY GROUP" 43 (Comm. Print 1982) [hereinafter S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., INJURIES AND DAMAGES].

8. *Id.*

9. *See* H.R. REP. NO. 99-962, at 261 (1986) (Conf. Rep.); S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., INJURIES AND DAMAGES, *supra* note 7, at 256.

10. 42 U.S.C. § 9658(a)(1) (2012).

11. *Id.*

12. *Id.* § 9658(b)(2).

13. *Id.* § 9658(b)(4)(A).

14. *Compare* Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355, 365 (5th Cir. 2005) (holding that CERCLA did not preempt the Texas statute of repose), *with* Waldburger v. CTS Corp., 723 F.3d 434, 438 (4th Cir. 2013) (holding that CERCLA preempts North Carolina's statute of repose), *and* McDonald v. Sun Oil Co., 548 F.3d 774, 779 (9th Cir. 2008) (holding that CERCLA preempts Oregon's statute of repose).

tions, not statutes of repose.[15] The decision has already had far-reaching implications beyond CERCLA and environmental law. This is because federal courts have used the CERCLA Section 309 cases to resolve the same question of statutory interpretation found in statutes relating to securities law, including the Financial Institutions Reform, Recovery, and Enforcement Act of 1989[16] ("FIRREA") and the Housing and Economic Recovery Act of 2008 ("HERA").[17]

Part II of this Note presents the legislative history of CERCLA and the Superfund Section 301(e) Study Group's finding that state limitations periods posed a significant barrier to recovery for plaintiffs in hazardous waste litigation. Next, Part II relates the history, purpose, and language of CERCLA Section 309. Part II then examines the distinction between and meaning of "statutes of limitations" and "statutes of repose" as understood today as well as at the time Congress drafted CERCLA Section 309.

Part III of this Note initially analyzes the early cases interpreting CERCLA Section 309 to illustrate how courts avoided addressing the question of whether the provision preempted state statutes of repose. Next, Part III examines the courts of appeals' divergent approaches to resolving this question of statutory interpretation: namely, the *Burlington Northern* and *McDonald-Waldburger* analyses comprising the circuit split. It then reviews the Supreme Court's recent decision in *CTS Corp. v. Waldburger*. Part III then evaluates the judicial use of the *McDonald-Waldburger* approach to resolve the same question of statutory construction presented in statutes relating to securities law and the recent housing crisis, as well as the impact of *CTS Corp. v. Waldburger*.

Finally, in the wake of *CTS Corp. v. Waldburger*, Part IV proposes that courts should still conduct their own rigorous analysis of the term "statute of limitations" as used in the HERA and FIRREA extender provisions because each statute is different and warrants independent review.

II. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

On December 11, 1980, President Jimmy Carter signed CERCLA[18] into law "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the

15. CTS Corp. v. Waldburger, 1345 S. Ct. 2175, 2187 (2014). To avoid confusion with the Fourth Circuit's decision in *Waldburger v. CTS Corp.*, I will hereafter refer to the Supreme Court's ruling by its full name, *CTS Corp. v. Waldburger*.

16. *See, e.g.*, Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246, 1252 (10th Cir. 2013).

17. *See, e.g.*, Fed. Hous. Fin. Agency v. Countrywide Fin. Corp. (*In re* Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.), 900 F. Supp. 2d 1055, 1063 (C.D. Cal. 2012).

18. Presidential Statement on Signing the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 16 WEEKLY COMP. PRES. DOC. 2797, 2797 (Dec. 11, 1980) [hereinafter *Presidential Statement on CERCLA*].

cleanup of inactive hazardous waste disposal sites."[19] The 96th Congress enacted CERCLA in response to highly publicized toxic waste disasters, such as New York's Love Canal,[20] which brought to the forefront the need for cleanup of hazardous wastes in the United States—"a problem," noted President Carter, "that had been neglected for decades or even generations."[21] Though CERCLA is often criticized for its hurried passage and lack of clarity,[22] the purpose of this strict liability statute is clear: "[T]o promote the timely cleanup of hazardous waste sites" and to place the environmental cleanup costs incurred on parties responsible for the contamination.[23] Since CERCLA is a remedial statute, courts have typically construed the statute broadly, where ambiguous, to effectuate its principal goals.[24]

Congress did not amend CERCLA to include section 309 until 1986, when it passed the Superfund Amendments and Reauthorization Act.[25] Yet in order to place CERCLA Section 309 and the question of whether the provision preempts state statutes of repose in the proper context, it is important to consider first the legislative history of CERCLA, the findings of the Superfund Section 301(e) Study Group, CERCLA Section 309, and the distinctions between statutes of repose and statutes of limitations.

A. Legislative History of CERCLA and the Superfund Section 301(e) Study Group

The version of CERCLA passed by the House and Senate in the "last days before the demise of the 96th Congress" was the result of compromise.[26] It was a compromise among three major bills brought before the House and Senate: H.R. 85,[27] H.R. 7020,[28] and S. 1480.[29] The first

19. *Id.*

20. For a brief history of the Love Canal incident and subsequent responses by the government, including the passage of CERCLA, see Eric R. Pogue, *The Catastrophe Model of Risk Regulation and the Regulatory Legacy of Three Mile Island and Love Canal*, 15 PENN. ST. ENVTL. L. REV. 463, 473–76 (2007) ("Love Canal is universally regarded as the impetus for the passage of [CERCLA] . . . .").

21. *Presidential Statement on CERCLA*, *supra* note 18, at 2798.

22. Rhodes v. Cnty. of Darlington, S.C., 833 F. Supp. 1163, 1174 (D.S.C. 1992); *see* Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 202 (1996) (noting the unusual absence in CERCLA of "an explicit declaration of congressional goals and policies"); *infra* Part II.A.

23. Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 602 (2009) (internal quotation marks omitted).

24. *See, e.g.*, B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992) ("Because it is a remedial statute, CERCLA must be construed liberally to effectuate its two primary goals . . . ."). *See generally* Watson, *supra* note 22, at 201–02 (exploring the judiciary's disproportionate use of the remedial purpose canon in construing ambiguous provisions in CERCLA).

25. Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99–499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601–9657 (1988)).

26. 126 Cong. Rec. 30,932 (statement of Sen. Randolph), *reprinted in* S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510: TOGETHER WITH A SECTION-BY-SECTION INDEX 685 (Comm. Print 1983) [hereinafter S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., A LEGISLATIVE HISTORY].

27. H.R. 85, 96th Cong. (1979).

bill, H.R. 85, was more limited in purpose and scope than CERCLA.[30] Though passed by the House, Congress postponed further consideration of the bill until the following legislative session.[31] The Senate Committee on Environment and Public Works reported S. 1480 to the floor in 1980, but it was met with great opposition.[32] In turn, leading proponents of S. 1480 revised the bill and reintroduced it on the Senate floor. On November 24, during the second legislative session, the Senate passed the revised version of S. 1480.[33] The House then replaced the language in its second bill, H.R. 7020, with the language of the Senate bill.[34]

Consequently, Congress enacted H.R. 7020 as amended, which "embodie[d] the[] features of the Senate and House bills where there ha[d] been positive consensus . . . [while] eliminat[ing] those provisions which were controversial."[35] One such class of provisions, which Congress eliminated from earlier bills following contentious debates, concerned remedies for property damage and personal injuries caused by hazardous waste disposal.[36] For example, S. 1480 contained a provision that compensated victims for their medical expenses, but the Senate deleted the provision after a motion to table the bill spurred the need for further compromise.[37]

In place of a federal cause of action for individuals harmed by the release of hazardous substances, Congress enacted CERCLA Section 301(e),[38] which created the Superfund Section 301(e) Study Group ("Study Group"). This blue-ribbon panel[39] consisted of twelve members—three from each of the following organizations: the American Bar Association, the Association of American Trial Lawyers, the American Law Institute, and the National Association of State Attorneys General.[40] Congress created the Study Group to research and "determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of

28. H.R. 7020, 96th Cong. (1980).

29. S. 1480, 96th Cong. (1979).

30. Rhodes v. Cnty. of Darlington, S.C., 833 F. Supp. 1163, 1173 (D.S.C. 1992).

31. *Id.*

32. *See* Alfred R. Light, *New Federalism, Old Due Process, and Retroactive Revival: Constitutional Problems with CERCLA's Amendment of State Law*, 40 U. KAN. L. REV. 365, 369 (1992) [hereinafter Light, *New Federalism*].

33. *See id.* at 369–70.

34. United States v. Reilly Tar & Chem. Corp., 546 F. Supp 1100, 1111 (D. Minn. 1982). Unfortunately, there are no committee reports concerning the eleventh hour compromise prepared by members of the Senate. New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985).

35. S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., A LEGISLATIVE HISTORY, *supra* note 26.

36. S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., INJURIES AND DAMAGES, *supra* note 7, at 16.

37. S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., A LEGISLATIVE HISTORY, *supra* note 26, at vii.

38. 42 U.S.C. § 9651(e) (2012).

39. A blue-ribbon panel is one "made up of people who have special knowledge, abilities, etc." *Blue-Ribbon*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/blue-ribbon (last visited Jan. 4, 2015).

40. 42 U.S.C. § 9651(e)(2).

hazardous substances into the environment."[41] The provision mandated that the panel submit a study to Congress within twelve months—by December 11, 1982.[42] The Study Group held periodic meetings across the country from June of 1981 until the following summer.[43]

The panel limited the focus of its investigation to follow the emphasis of CERCLA—i.e., to "deal[] primarily with legal remedies for injuries and damage caused by exposure to hazardous wastes."[44] In doing so, the Study Group relied on federal and state statutory sources as well as state common law sources from all fifty states.[45] The report announced recurring problems that faced plaintiffs in hazardous waste litigation under existing common law and statutory remedies and provided Congress with a corresponding set of recommendations to overcome the existing barriers to recovery.[46] Importantly, courts have accorded the report great weight when construing CERCLA Section 309.[47]

In analyzing the existing common law and statutory remedies, the Study Group found, in part, that statutes of limitations presented a significant barrier to recovery for plaintiffs in hazardous waste litigation.[48] The issue centered on when the statute began to run, and the panel determined that a plaintiff's ability to recover often depended on whether the relevant jurisdiction had a liberal discovery rule[49]—i.e., a rule instructing that a limitations period begins to run when "the plaintiff discovers (or reasonably should have discovered) the injury giving rise to the claim."[50] This problem was a function of the type of injuries sustained from exposure to hazardous waste. The Study Group explained:

> Exposure to certain hazardous wastes may result in cancer, neurological damage, and in mutagenic and teratogenic changes. Most of these types of injuries have long latency periods, sometimes 20 years or longer. With long latency periods, a rule which starts the running of the statute from the time of exposure will defeat most actions before the plaintiff knows of his injury.[51]

The Study Group was not alone in its findings; several contemporary scholars had also recognized that those injured by exposure to hazardous waste faced "difficulties inherent in the judicial system," including the running of the statute of limitations in jurisdictions without liberal

41. *Id.* § 9651(e)(1).
42. *Id.*
43. S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., INJURIES AND DAMAGES, *supra* note 7, at 18–19.
44. *Id.* at 41.
45. *Id.* at 40.
46. *Id.* at 42.
47. Van R. Delhotal, *Re-Examining CERCLA Section 309: Federal Preemption of State Limitations Periods*, 34 WASHBURN L.J. 415, 421 (1995) (citing 3550 Stevens Creek Assocs. v. Barclays Bank, 915 F.2d 1355, 1362 n.14 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991)).
48. S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., INJURIES AND DAMAGES, *supra* note 7, at 45.
49. *Id.* at 43.
50. BLACK'S LAW DICTIONARY, *supra* note 2, at 533.
51. S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., INJURIES AND DAMAGES, *supra* note 7.

discovery rules.[52] Additionally, this problem extended to statutes of repose applying to toxic waste injuries because these laws also barred a plaintiff's right to recovery prior to the discovery of an injury.[53] Though many states had adopted a discovery rule of varying degrees, the Study Group maintained that the issue remained a substantial barrier to recovery in jurisdictions that had not because nondiscovery rule statutes of limitations and repose could bar a plaintiff from suing before her symptoms even manifest.[54]

In response to this and other barriers, the panel made ten recommendations for action to Congress, two of which addressed the barrier created by nondiscovery rule statutes of limitations.[55] In the ninth recommendation, the Study Group advocated that all states adopt a liberal discovery rule providing that "an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause."[56] Moreover, the panel emphasized, "[t]he [ninth] Recommendation is intended also to cover the repeal of the *statutes of repose* which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one."[57] Additionally, though less important for the purposes of this Note, the tenth recommendation advised that plaintiffs should be allowed to recover under state law for economic injury resulting from property and environmental damages.[58]

B. The Superfund Amendments and Reauthorization Act and CERCLA Section 309

In drafting the Superfund Amendments and Reauthorization Act ("SARA"),[59] Congress, in part, sought to "increase[] the focus on human health problems posed by hazardous waste sites" in light of the Study Group's findings and recommendations.[60] In the debates leading up to the enactment of SARA, Congress again considered various proposals by

52. *See, e.g.*, William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 920–21 (1981); *see also Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1602 (1986) ("[C]ommon law tort doctrine is inadequate to provide remedies for the growing number of toxic waste victims.").

53. *Developments in the Law: Toxic Waste Litigation*, *supra* note 52, at 1609–10. In general, a statute of repose is "a statute barring any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury," BLACK'S LAW DICTIONARY , *supra* note 2, at 1546, whereas a statute of limitations is "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued." *Id.*; *see infra* Part II.C.

54. S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., INJURIES AND DAMAGES, *supra* note 7, at 43–45, 133–34 nn.4–10 (surveying statutes of limitations and discovery rules in the United States).

55. Delhotal, *supra* note 47, at 423. The remaining eight recommendations concerned a proposed system of no-fault recovery. *Id.*

56. S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., INJURIES AND DAMAGES, *supra* note 7, at 256.

57. *Id.* (emphasis added).

58. *Id.* at 267.

59. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499, 100 Stat. 1613 (1986).

60. *See SARA Overview*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/superfund/policy/sara.htm (last updated Dec. 12, 2011).

members of the House and Senate that would have created a federal cause of action for individuals harmed by the release of hazardous substances.[61] Some senators proposed that Congress incorporate federal causes of action for personal injury and property damage into the existing CERCLA liability scheme, while other congressmen submitted that the federal causes of action work independent of the statute.[62] Congress, however, rejected these proposals for a second time. Instead, it compromised yet again and added section 309[63] to CERCLA on October 17, 1986, when SARA became law and amended the Act.

Section 309, entitled "Actions Under State Law for Damages from Exposure to Hazardous Substances," creates a liberal discovery rule that applies when a plaintiff brings a state cause of action "for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant, or contaminant, released in the environment from a facility."[64] If section 309 applies, the statute directs a court to compare the relevant state limitations period to that of section 309 as follows:

> [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.[65]

Therefore, where a state statute of limitations is more favorable to plaintiffs than section 309, state law will apply.[66] The provision defines "applicable limitations period" as "the period specified in a statute of limitations during which a civil action . . . may be brought."[67] Additionally, "federally required commencement date" means "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."[68] Furthermore, SARA Section 203(b) establishes that section 309 is retroactive—i.e., it "shall take effect with respect to actions brought after December 11,

61. Delhotal, *supra* note 47, at 420. *See generally* Alfred R. Light, *A Comparison of the 301(e) Report and Some Pending Legislative Proposals*, 14 ENVTL. L. REP. 10133 (1984) [hereinafter Light, *A Comparison*] (comparing the then-current congressional proposals to implement the recommendations of the Study Group with the actual report recommendations).

62. Light, *New Federalism*, *supra* note 32, at 371.

63. 42 U.S.C. § 9658 (2012).

64. *Id.* § 9658(a)(1); *see also* Light, *New Federalism, supra* note 32, at 372.

65. 42 U.S.C. § 9658(a)(1) (emphasis added).

66. *Id.* § 9658(a)(2).

67. *Id.* § 9658(b)(2).

68. *Id.* § 9658(b)(4)(A).

1980"[69]—and thus potentially breathes life into some previously time-barred claims.[70]

In the brief portion of the House and Conference Committee report concerning CERCLA Section 309, Congress declared, "[t]his section addresses the problem identified in the 301(e) study."[71] Though noting that the problem revolved around nondiscovery rule state statutes of limitations, Congress also broadly defined the Study Group's findings as the fact that "certain State statutes deprive plaintiffs of their day in court."[72] Consistent with the Study Group's analysis, Congress explained that the problem presented a barrier to plaintiffs in cases of long-latency disease caused by exposure to hazardous substances.[73] In turn, while the report ensures that section 309 addresses the problem identified by the Study Group, it leaves several questions unanswered, including whether the provision preempts state statutes of repose.[74]

C. Statutes of Repose v. Statutes of Limitation

Prior to analyzing the divergent answers that courts have reached regarding whether CERCLA Section 309 preempts state statutes of repose, it is necessary to consider the distinction between and meaning of "statutes of limitations" and "statutes of repose" as understood today, as well as at the time Congress drafted section 309.

Today, a statute of limitations is defined as "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued," such as when a plaintiff discovered the injury or when the injury occurred.[75] In turn, statutes of limitations typically serve as a bar to a right of action.[76] Under such laws, the limitations period begins to run when the cause of action accrues.[77] If a plaintiff fails to file an action within the limitations period, she waives her right to a remedy[78] regardless of whether her claim is meritorious.[79] Thus, statutes of limitations operate to facilitate court filings and affect procedural, rather than substantive, rights of the plaintiff.[80] Furthermore, a majority of jurisdictions now recognize a discovery rule exception to statutes of limitations in the context of tort actions for latent injuries to property or persons.[81] This

69. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499, § 203(b), 100 Stat. 1613, 1696 (1986); Light, *New Federalism*, *supra* note 32, at 373.

70. THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION § 17.05(4)(b), at 9 (Susan M. Cooke ed., 2013).

71. H.R. REP. NO. 99-962, at 261 (1986) (Conf. Rep.).

72. *Id.*

73. *Id.*

74. Delhotal, *supra* note 47, at 424.

75. BLACK'S LAW DICTIONARY, *supra* note 2, at 1546.

76. 54 C.J.S. *Limitations of Actions* § 19 (2013).

77. THE LAW OF HAZARDOUS WASTE, *supra* note 70, § 17.05(4), at 3 n.17.

78. Andrew A. Ferrer, Note, *Excuses, Excuses: The Application of Statutes of Repose to Environmentally-Related Injuries*, 33 B.C. ENVTL. AFF. L. REV. 345, 347 (2006).

79. 54 C.J.S. *Limitations of Actions* § 19 (2013).

80. Ferrer, *supra* note 78.

81. THE LAW OF HAZARDOUS WASTE, *supra* note 70, at 6.

equitable exception is often "conditioned on the plaintiff's diligent efforts to investigate his or her injuries."[82]

With the increased liberalization of statutes of limitations, however, several jurisdictions have adopted statutes of repose to offset the effect of discovery rules.[83] Presently, a statute of repose is defined as "a statute barring any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury."[84] Generally, such statutes are specific, rather than general, in nature, and apply only to particular pockets of liability.[85] For example, most states now have statutes of repose pertaining to actions within the scope of CERCLA Section 309, such as "actions for negligent injury to the person or property of another."[86] As with statutes of limitations, statutes of repose bar causes of action after a defined period.[87] The limitations period—traditionally longer than in statutes of limitations—commences "at the time the defendant engaged in the conduct that culminated in the plaintiff's injury."[88] Consequently, it establishes an outer limit on the limitations period.[89] If an injury occurs outside of the limitations period, it is not actionable; the effect of the statute of repose is that "the cause of action never accrues."[90] Unlike statutes of limitations, then, statutes of repose extinguish a plaintiff's substantive right—not simply her remedy.[91] In effect, they preclude a cause of action from arising.[92] Therefore, under certain circumstances involving exposure to hazardous wastes, statutes of repose may bar a cause of action before the statute of limitations period has begun or before a cause of action has even arisen.[93]

Additionally, statutes of repose and statutes of limitations are driven by discrete justifications and policies.[94] Whereas statutes of limitations address whether a suit should be barred by a plaintiff's delay in bringing an action, statutes of repose center on "whether the delay between a defendant's actions and the plaintiff's resulting injury should bar a suit to recover for those injuries."[95] Proponents of statutes of repose maintain that the limitations period protects against the evidentiary challenges

82. *Id.* at 7.

83. *Id.* § 17.05(4)(d), at 10.

84. BLACK'S LAW DICTIONARY, *supra* note 2, at 1546.

85. THE LAW OF HAZARDOUS WASTE, *supra* note 70, § 17.05(4)(d), at 10. Statutes of repose often apply in the context of products liability suits and medical malpractice. *Id.*

86. Peter E. Seley & Coral A. Shaw, Comment, McDonald v. Sun Oil*: The Ninth Circuit's Constitutionally Questionable Expansion of CERCLA's Toxic Tort Discovery Rule*, 39 ENVTL. L. REP. 10197, 10197–98 (2009).

87. 54 C.J.S. *Limitations of Actions* § 28 (2013).

88. THE LAW OF HAZARDOUS WASTE, *supra* note 70, § 17.05(4), at 3 n.17.

89. *Id.*

90. 54 C.J.S. *Limitations of Actions* § 28 (2013).

91. *Id.* § 29.

92. *Id.*

93. *Id.* § 28 (citing, *inter alia*, McDonald v. Sun Oil Co., 548 F.3d 774 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2825 (2009)).

94. Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 ARIZ. ST. L.J. 1015, 1018 (1997).

95. *Id.* at 1018 n.25.

that can arise in long-delayed litigation, including lost documents, failing memories, and unavailable witnesses.[96] Others emphasize that statutes of repose ensure fairness to defendants who would otherwise be subject to long-lasting liability[97] and inequitable treatment in court.[98] In the context of latent disease actions, however, commentators sometimes argue that statutes of repose do not serve these traditional justifications, but rather have the same effect as the old statutes of limitations—i.e., those that do not incorporate a variation of the discovery rule.[99]

Though statutes of limitations and statutes of repose have distinct purposes, prior to and at the time of SARA's enactment, courts often confused the terms or used them interchangeably.[100] In *United States v. Kubrick*,[101] for example, the Supreme Court explained,

> "[s]tatutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' These enactments [statutes of limitations] are statutes of repose . . . ."[102]

Additionally, in *Bolick v. American Barmag Corp.*,[103] the Supreme Court of North Carolina remarked, "[a]lthough the term 'statute of repose' has traditionally been used to encompass statutes of limitations, in recent years it has been used to distinguish ordinary statutes of limitations from those that begin 'to run at a time unrelated to the traditional accrual of the cause of action.'"[104] The court proceeded to acknowledge, however, that several jurisdictions, including their own, had enacted statutes having both a substantive and a procedural effect on a plaintiff's rights,[105] which eliminates one of the primary distinctions between the two types of acts.

In addition to courts, scholars were also unclear of the distinction between statutes of limitations and statutes of repose around the time of SARA's enactment. For example, in 1981 Professor Francis E. McGovern wrote, "[i]n the most general sense, a statute of repose and a

96. THE LAW OF HAZARDOUS WASTE, *supra* note 70, § 17.05(4), at 3; Ferrer, *supra* note 78, at 354.

97. Ferrer, *supra* note 78, at 354.

98. *See* Jan Allen Baughman, Comment, *The Statute of Repose: Ohio Legislators Attempt to Lock the Courthouse Doors to Product-Injured Persons*, 25 CAP. U. L. REV. 671, 678 (1996).

99. *See, e.g.*, Gregory L. Ash, Comment, *Toxic Torts and Latent Diseases: The Case for an Increased Risk Cause of Action*, 38 U. KAN. L. REV. 1087, 1095 (1990).

100. McDonald v. Sun Oil Co., 548 F.3d 774, 781 & n.3 (9th Cir. 2008) (citing a number of cases in which courts have confused the terms).

101. 444 U.S. 111 (1979).

102. *Id.* at 117 (citations omitted). *But see* Bauld v. J. A. Jones Const. Co., 357 So. 2d 401, 402 (Fla. 1978) ("We recognize the fundamental difference in character of [statutes of repose] from . . . a statute of limitations. Rather than establishing a time limit within which action must be brought, measured from the time of accrual of the cause of action, these provisions cut off the right of action after a specified time measured from the delivery of a product or the completion of work.").

103. 293 S.E.2d 415 (N.C. 1982).

104. *Id.* at 417–18 (internal citations omitted).

105. *Id.* at 418.

statute of limitation are identical . . . ."[106] He explained that courts, at the time, used at least five distinct definitions of "statute of repose"[107] and concluded, "[m]ost courts do not use the term . . . with consistent precision."[108] Ten years later, another scholar, Lisa K. Mehs, similarly declared, "[t]he phrase 'statutes of repose' has no standard definition and has been used inconsistently by courts."[109] She observed that courts were increasingly adopting discovery rules in latent disease cases because they recognized the unfairness of applying statutes of repose in such cases.[110] She then explained that variations of the discovery rule hinged on the "different time periods which a court could adopt to determine the *date of accrual* for statute of repose purposes."[111] Statutes of repose, however, operate without concern to the date of accrual and commence "at the time the defendant engaged in the conduct that culminated in the plaintiff's injury."[112] Statutes of limitations, by contrast, begin to run at the date of accrual.[113] In turn, even where scholars attempted to draw distinctions between statutes of repose and statutes of limitations, they, like the courts, often confused the terms.

III. ANALYSIS

CERCLA Section 309 imposes a liberal discovery rule that applies when plaintiffs bring a state cause of action "for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released in the environment from a facility."[114] Where section 309 applies, it requires:

> [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.[115]

Under section 309, the phrase "applicable limitations period" means "the period specified in a statute of limitations during which a civil action . . . may be brought."[116] Moreover, the provision defines "federally required commencement date" as "the date the plaintiff knew (or reasonably

106. Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 582 (1981).

107. *Id.*

108. *Id.* at 587.

109. Lisa K. Mehs, Comment, *Asbestos Litigation and Statutes of Repose: The Application of the Discovery Rule in the Eighth Circuit Allows Plaintiffs to Breathe Easier*, 24 CREIGHTON L. REV. 965, 966 (1991) (citing, *inter alia*, Sch. Bd. of Norfolk v. U.S. Gypsum Co., 360 S.E.2d 325, 327 (Va. 1987)).

110. *Id.* at 973–74.

111. *Id.* at 974 (emphasis added) (citation omitted).

112. THE LAW OF HAZARDOUS WASTE, *supra* note 70, § 17.05(4), at 3 n.17.

113. *Id.*

114. 42 U.S.C. § 9658(a)(1) (2012).

115. *Id.*

116. *Id.* § 9658(b)(2).

should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."[117]

While it is clear that CERCLA Section 309 preempts state statutes of limitations, federal circuit and district courts had been, until June 2014, split as to whether the provision also preempted state statutes of repose. First, early cases interpreting CERCLA Section 309 often avoided addressing the issue of whether the provision preempted state statutes of repose in addition to statutes of limitations by concluding that the plaintiff's cause of action fell outside the scope of CERCLA Section 309.[118] Throughout the 1990s, however, district courts began to take up the question and came down on both sides of the issue.[119] Second, in 2005, the Fifth Circuit became the first court of appeals to address the issue, holding that CERCLA Section 309 did not preempt Texas' statute of repose for products liability claims because the plain language of section 309 precluded such an interpretation.[120] Third, the Ninth Circuit in 2008[121] and the Fourth Circuit in 2013[122] both held that CERCLA Section 309 preempted Oregon and North Carolina's statutes of repose, respectively, by focusing on the ambiguity of the text as well as the provision's legislative history. Fourth, in 2014, the U.S. Supreme Court resolved the circuit split and held that CERCLA Section 309 does not preempt state statutes of repose.[123] Finally, federal court have used the Ninth and Fourth circuits' approach to answer the same question of statutory interpretation presented in various statutes relating to securities law and the recent housing crisis.[124] Thus, the Supreme Court's decision in *CTS Corp. v. Waldburger* will have broad implications for similar statutory provisions found outside the context of environmental law.

A. The Early Cases

In the years following the enactment of CERCLA Section 309, federal courts were often able to avoid determining whether the provision preempted state statutes of repose by finding that section 309 did not apply to the claim at hand.[125] In *Covalt v. Carey Canada Inc.*, for example, the Seventh Circuit determined that whether CERCLA Section 309 preempted Indiana's statute of repose hinged on whether the asbestos to which the plaintiff was exposed was "released in the environment from a

117. *Id.* § 9658(b)(4)(A).

118. Seley & Shaw, *supra* note 86, at 10198.

119. *See infra* Part III.A.

120. *See* Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355 (5th Cir. 2005); *infra* Part III.B.

121. McDonald v. Sun Oil Co., 548 F.3d 774, 779 (9th Cir. 2008); *see infra* Part III.C.

122. Waldburger v. CTS Corp., 723 F.3d 434, 444 (4th Cir. 2013); *see infra* Part III.C.

123. CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014); *see infra* Part III.D.

124. *See, e.g.*, Fed. Hous. Fin. Agency v. Countrywide Fin. Corp. (*In re* Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.), 900 F. Supp. 2d 1055, 1063 (C.D. Cal. 2012).

125. *E.g.*, Covalt v. Carey Can. Inc., 860 F.2d 1434, 1435 (7th Cir. 1988).

facility," as required by section 309.[126] Plaintiff had worked with asbestos at an asbestos manufacturing plant in Indiana between 1963 and 1971.[127] He alleged that defendant corporation had supplied the plant with raw asbestos without informing him or the plant of its dangers.[128] More than ten years later, in 1986, doctors diagnosed plaintiff with asbestosis and lung cancer.[129] In response, he filed the suit shortly thereafter.[130] Defendant maintained that Indiana's repose statute barred plaintiff's claim, but plaintiff countered, among other things, that CERCLA Section 309 preempted Indiana's statute of repose.[131] If CERCLA Section 309 applied to plaintiff's claim, the otherwise barred suit would be timely.[132] After finding section 309's legislative history inconclusive, the Seventh Circuit concluded, "[t]he interior of a place of employment [was] not 'the environment' for purposes of CERCLA," and thus, section 309 did not apply to plaintiff's claim.[133]

During the 1990s, however, courts began to grapple with the issue of whether CERCLA Section 309 preempts state statutes of repose.[134] For example, in *A.S.I., Inc. v. Sanders*, plaintiff corporations brought suit against the Sanders family to recover damages and cleanup costs associated with toxic contamination, which occurred during the family's former ownership of a QMI Aerospace plant.[135] On the property, investigations revealed widespread pollution, including wastewater discharges, soil contamination, and fifty-six drums of hazardous waste stored without proper permits.[136] The Sanders family moved for summary judgment, contending, in part, that Kansas' ten-year statute of repose barred plaintiffs' claim.[137] The district court concluded that while the ten-year statute of repose barred plaintiffs' action, the suit was still timely as to certain defendants because CERCLA Section 309 preempted the state statute.[138] Importantly, the court distinguished its inquiry from that of other courts, such as the Seventh Circuit in *Covalt*, which had interpreted section 309 as not preempting repose statutes.[139] The court reasoned, "[t]here is no suggestion in any of the reported cases that the mere fact that a statute of

126. *Id.* at 1436; *see* 42 U.S.C. § 9658(a)(1) (2012).
127. *Covalt*, 860 F.2d at 1435.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 1439; *see also* First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862 (4th Cir. 1989) (holding that CERCLA Section 309 does not apply to private asbestos removal actions); Knox v. AC & S, Inc. 690 F. Supp. 752, 757 (D. Ind. 1988) ("Although 'environment' is defined in terms of ambient air, an evaluation of the term environment in terms of the overall purpose and scope of CERCLA indicates that the case at bar [involving worker's exposure to asbestos] is not properly considered within the purview of . . . § 9658.").
134. *E.g.*, A.S.I., Inc. v. Sanders, 835 F. Supp. 1349, 1358 (D. Kan. 1993).
135. *Id.* at 1351.
136. *Id.* at 1352.
137. *Id.* at 1354.
138. *Id.* at 1358.
139. *Id.*

repose might be deemed 'substantive' law in a certain context immunizes the statute from preemption under CERCLA."[140] It further noted, "[t]he cases treat state statutes of limitations and statutes of repose identically," and determined that nothing foreclosed its construction of section 309 in the present case.[141] As compared to the circuit courts in *Burlington*, *McDonald*, and *Waldburger*, the district court's analysis in *Sanders* focused much less on the language of section 309 and its legislative history and more on the existing case law surrounding the provision.

Several cases in the early years also challenged the constitutionality of CERCLA Section 309 on grounds of federalism.[142] In *Bolin v. Cessna Aircraft Co.*,[143] the District Court of Kansas upheld section 309 against Tenth Amendment and Commerce Clause challenges in 1991.[144] The case involved an action by homeowners against defendant aircraft manufacturer for allegedly contaminating the homeowners' groundwater supply with trichloroethylene, a likely human carcinogen.[145] Plaintiffs' claims fell within the scope of CERCLA Section 309, but defendant contended that the provision violated the tenth amendment as an unconstitutional impingement on state sovereignty,[146] and represented an invalid exercise of Congress' commerce power.[147] The district court rejected both arguments. First, the court reviewed Tenth Amendment jurisprudence, including *Garcia v. San Antonio Metropolitan Transit Authority*,[148] and concluded that the Tenth Amendment does not provide the court with a "standard by which to determine whether § 9658 deprives states of a 'core' or 'essential' attribute of state sovereignty. Because defendant has offered nothing to suggest a defect in the political process underlying the enactment of § 9658, the court must reject this challenge."[149] Additionally, the court found that CERCLA Section 309 represented a permissible exercise of Congress' commerce power because the provision was an essential component of CERCLA's regulatory scheme and "a rational means of regulating the release of hazardous substances."[150] In 2002, despite previously expressing concern about CERCLA Section 309's federalism implications,[151] the Second Circuit also held that the provision did

140. *Id.*

141. *Id.*

142. Robin Kundis Craig, *Federalism Challenges to CERCLA: An Overview*, 41 SW. L. REV. 617, 633 (2012).

143. 759 F. Supp. 692 (D. Kan. 1991).

144. *Id.* at 706, 709.

145. *Id.* at 697.

146. *Id.* at 705.

147. *Id.* at 706.

148. 469 U.S. 528 (1985). "We . . . reject . . . a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" *Id.* at 546–47.

149. *Bolin*, 759 F. Supp. at 706.

150. *Id.* at 707–08.

151. ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351, 360 n.5 (2d Cir. 1997) ("[CERCLA Section 309] appears to purport to change state law, and is therefore of questionable constitutionality."); *see also* Craig, *supra* note 142, at 635.

not violate the Tenth Amendment nor exceed Congress' power under the Commerce Clause.[152]

Following the enactment of CERCLA Section 309, federal courts often sidestepped the question of whether section 309 preempted state statutes of repose by finding that the provision did not apply to the plaintiff's particular claim. In this line of cases, the courts construed statutory phrases other than "applicable limitations period" to reach their conclusions.[153] Soon, though, courts began confronting the issue, but situated it within the context of decisions like *Covalt v. Carey Canada, Inc.*, rather than delving into section 309's legislative history and text.[154] Furthermore, courts consistently upheld CERCLA Section 309 in the face of constitutional challenges on federalism grounds, setting the stage for the decisions discussed below.[155]

B. Burlington Northern*: No Preemption of State Statutes of Repose*

In 2005, the Fifth Circuit became the first federal court of appeals to answer directly the question of whether CERCLA Section 309 preempts state statutes of repose. In *Burlington Northern & Santa Fe Railway Co. v. Poole Chemical Co.*,[156] the Fifth Circuit held that section 309 did not preempt Texas' statute of repose for products liability cases.[157] Following this decision, several state[158] and federal[159] courts have adopted and continue to adopt[160] the Fifth Circuit's holding and reasoning, which focused principally on the plain language of section 309 and secondarily—and inadequately—on its legislative history.

In *Burlington Northern*, the Fifth Circuit considered whether CERCLA Section 309 preempted Texas' statute of repose for buyer's products liability cases.[161] Skinner Tank Company ("Skinner"), a manufacturer and seller of storage tanks, had sold two aboveground tanks to Poole Chemical Company ("Poole") in October 1988.[162] In 2003, one of the tanks broke, releasing 200,000 to 300,000[163] gallons of chemicals onto Poole's land and an adjacent railroad right-of-way owned by Burlington Northern & Santa Fe Railway Co. ("Burlington").[164] Burlington undertook emergency remedial efforts to restore its right-of-way and sued

152. *See* Freier v. Westinghouse Elec. Corp., 303 F.3d 176, 178 (2d Cir. 2002).

153. *CERCLA Section 309 and State Law Limitations Periods*, LAW360 (July 20, 2010), http://www.bakerbotts.com/file_upload/documents/CERCLASection309AndStateLawLimitationsPeriods.pdf.

154. *See* Covalt v. Carey Can. Inc., 860 F.2d 1434, 1439 (7th Cir. 1988).

155. *See* Craig, *supra* note 142, at 618.

156. 419 F.3d 355 (5th Cir. 2005).

157. *Id.* at 365; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.012 (West 2013).

158. *See, e.g.*, Clark Cnty. v. Sioux Equip. Corp., 753 N.W.2d 406, 416 (S.D. 2008).

159. *See, e.g.*, Evans v. Walter Indus., Inc., 579 F. Supp. 2d 1349, 1364 (N.D. Ala. 2008).

160. *See, e.g.*, Coleman v. H.C. Price Co., No. 11-2937, 2013 WL 64613 (E.D. La. Jan. 4, 2013).

161. Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355, 358 (5th Cir. 2005).

162. *Id.*

163. Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., No. Civ.A.5:04–CV–047–C, 2004 WL 1926322, at *2 (N.D. Tex. Aug. 27, 2004).

164. *Burlington N.*, 419 F.3d at 358.

Poole under CERCLA for the cost—$2.1 million—of the cleanup.[165] Poole filed a third-party complaint against several defendants, including Skinner, contending that the tank purchased in 1988 was defective.[166] In response, Skinner moved for summary judgment and argued that Texas' fifteen-year statute of repose for products liability claims barred Poole's claims because it did not file the complaint within fifteen years of the sale.[167] Poole maintained, in part, that CERCLA Section 309 preempted Texas' repose statute, and thus, the limitations period did not begin to run until January 2003.[168] The district court, however, disagreed and ruled in favor of Skinner.[169] Poole subsequently appealed the court's grant of summary judgment.[170]

In affirming the district court's decision, the Fifth Circuit held that CERCLA Section 309 did not preempt Texas' state statute of repose.[171] The court began its analysis by looking to the plain language of section 309, which it found to be dispositive.[172] It emphasized that CERCLA Section 309 defines "commencement date" as the "date specified in a statute of limitations" and reasoned, "[l]iterally, Section 9658 states that it only preempts state law when the applicable state *statute of limitations* 'provides a commencement date which is earlier than [section 309]'—no mention of . . . statutes of repose."[173] Though acknowledging that courts had not always clearly differentiated between statutes of limitations and statutes of repose in the context of section 309, the Fifth Circuit maintained that the distinction was substantial.[174] "Unlike a statute of limitations," the court explained, "a statute of repose establishes a 'right not to be sued,' rather than a 'right to sue' . . . [and] life cannot thereafter be breathed back into [a statute of repose following the expiration of its repose period]."[175] According to the court, the relevant Texas law was a statute of repose, specifically drafted to safeguard manufacturers from prolonged vulnerability to lawsuits.[176] In turn, absent express congressional intent to the contrary, the plain language bound the Fifth Circuit to its decision.[177]

The Fifth Circuit then analyzed CERCLA Section 309's legislative history to determine whether there was an express congressional intent contrary to the court's conclusion that section 309 did not preempt

165. *Id.*
166. *Id.*
167. *Id.* The statute provides that in general, "a claimant must commence a products liability action against a manufacturer or seller of a product before the end of 15 years after the date of the sale of the product by the defendant." TEX. CIV. PRAC. & REM. CODE ANN. § 16.012(b) (West 2003).
168. *See Burlington N.*, 419 F.3d at 361; *Burlington N.*, 2004 WL 1926322, at *10.
169. *Burlington N.*, 419 F.3d at 358.
170. *Id.*
171. *Id.* at 365.
172. *See id.* at 362.
173. *Id.* (quoting 42 U.S.C. § 9658(b)(3) (2012)).
174. *See id.* at 362–63.
175. *See id.* at 363.
176. *See id.* at 363–64.
177. *Id.* at 364.

Texas' repose statute.[178] The court explained that Congress "fixed" the problem identified by the Study Group—nondiscovery rules presented a barrier to plaintiffs with long-latency diseases caused by exposure to hazardous waste—by preempting state statutes of limitations with the liberal discovery rule set out in CERCLA Section 309.[179] In turn, the Fifth Circuit concluded, "CERCLA's legislative history indicates Congress intended for Section 9658 to preempt a state statute of limitations that deprives a plaintiff who suffers a long-latency disease . . . but not to preempt a state statute of repose . . . ."[180] This interpretation, in the court's opinion, comported with "common sense"—a canon of statutory construction.[181]

The court's analysis of CERCLA Section 309's legislative history, however, was rather incomplete. Section 309 does not truly fix the problem identified by the Study Group, as the Fifth Circuit remarked, if it preempts state statutes of limitations only. For example, in *A.S.I., Inc. v. Sanders*, the district court concluded that but for CERCLA Section 309's preemption of Kansas' statute of repose, the state statute would have barred plaintiffs' claim, leaving the plaintiff-corporations without remedy for the widespread pollution on their property caused by the defendant family.[182] Indeed, nondiscovery statutes of repose can have the same effect as traditional statutes of limitations—namely, such statutes can bar a plaintiff's claim before she ever realizes that it exists—in the very contexts Congress sought to address with the enactment of Section 309: actions "for personal injury, or property damages, which are caused . . . by exposure to any hazardous substance . . . ."[183] The Study Group itself explicitly recognized in its report the need for an expansive interpretation of section 309's applicability, which would include the preemption of state statutes of repose. It declared,

> The [ninth] Recommendation [concerning procedural barriers posed to long-latency injuries sustained from exposure to hazardous waste] is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitations in barring plaintiff's claim before he knows that he has one.[184]

Curiously, however, the Fifth Circuit does not consider this portion of the legislative history in *Burlington*.

Following the Fifth Circuit's fleeting analysis of CERCLA Section 309's legislative history, the court further reasoned that section 309 did not preempt Kansas' statute of repose because *Burlington* did not involve the type of discovery that Congress intended section 309 to

178. *See id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *See* A.S.I., Inc. v. Sanders, 835 F. Supp. 1349, 1358 (D. Kan. 1993).
183. 42 U.S.C. § 9658(a)(1) (2012). *See also* Ash, *supra* note 99, at 1094.
184. S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., INJURIES AND DAMAGES, *supra* note 7, at 256.

address.[185] It explained, "[t]he case does not implicate a long-latency disease or involve a situation where the time for filing a claim expired before the plaintiff learned that a hazardous substance caused his injury."[186] Rather, Poole knew about its injury just as the tank ruptured, but did not file its complaint until more than a year after the incident.[187] Apart from CERCLA Section 309's text and legislative history, then, the court concluded that there was no preemption because the plaintiff's injury fell outside the scope of the problem identified by the Study Group and addressed in section 309. Poole's injury was immediately discoverable—not latent—and thus a traditional statute of repose, such as Kansas', operated, as it should, to save the defendant Skinner from protracted vulnerability to liability and inequitable treatment in court. In this respect, the Fifth Circuit is correct: CERCLA Section 309 should not preempt state statutes of limitations or rules of repose where those laws function as they are intended and the underlying action is outside the purview of the problem identified by Congress.

Since *Burlington*, a number of courts have followed the lead of the Fifth Circuit and held that CERCLA Section 309 does not preempt state statutes of repose. These courts often emphasize the substantive difference between statutes of repose and statutes of limitations as evidence of Congress' intent to preclude repose statutes from the reach of section 309. In *Evans v. Walter Industries*,[188] a case concerning alleged property damages caused by the discharge of pollutants and hazardous substances, the district court's "no-preemption" analysis focused on the "inherent differences" between the two types of statutes and the way in which the Eleventh Circuit and Supreme Court of Alabama had drawn distinctions between the State's statutes of limitations and rules of repose in recent years.[189] Upon reviewing the Fifth Circuit's reasoning in *Burlington*, the district court concluded, "[we] must presume that Congress knew the difference between statutes of limitations and rules of repose and chose not to include repose within the plain language of Section 9658."[190] It further noted, "[t]he concept of repose and the distinctions between statutes of limitation had been around for at least a century before the amendments to CERCLA in 1986."[191] The court drew these conclusions, of course, without revisiting section 309's legislative history or contemporary cases and scholarship, which serve to illustrate the confused understanding of statutes of repose and limitations at the time of SARA's enactment.[192]

185. *See Burlington N.*, 419 F.3d at 364–65.
186. *Id.* at 365.
187. *See id.*
188. 579 F. Supp. 2d 1349 (N.D. Ala. 2008).
189. *See id.* at 1360–63 (discussing, *inter alia*, Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209 (11th Cir. 2001) and Am. Gen. Life & Accident Ins. Co. v. Underwood, 886 So. 2d 807 (Ala. 2004)).
190. *Id.* at 1363.
191. *Id.*
192. *See supra* Part II.C.

Nonetheless, courts continue to adopt the Fifth Circuit's approach.[193] It is sometimes met, however, with disagreement. In *Clark County v. Sioux Equip. Corp.*,[194] for example, Justice Sabers of the Supreme Court of South Dakota dissented from the majority's finding that CERCLA Section 309 did not preempt the State's statute of repose in a products liability case.[195] Similar to the district court in *Evans*, the court in *Clark County* emphasized the substantive differences between statutes of limitations and repose and espoused the Fifth Circuit's reasoning that the plain language of section 309 overpowered "purported legislative intent" to the contrary gleaned from legislative history.[196] In his dissent, Justice Sabers believed this interpretation was a "technical, strict construction" of CERCLA Section 309, which undermined the promotion of justice, the intention of Congress, and the general canon that remedial statutes, like CERCLA, should be interpreted broadly in favor of a remedy.[197] "If Congress amended CERCLA because 'certain State statutes deprive plaintiffs of their day in court,'" lamented Justice Sabers, "then a statute of repose should be interpreted to be 'the applicable limitations period for [the] action.'"[198]

Two other aspects of the court's analysis compound Justice Sabers' concerns. First, the court noted that the facts in *Clark County* mirrored those of *Burlington*.[199] In *Clark County*, the defendant set up a fuel storage and dispensing system on plaintiff's property, which ultimately ruptured and released fuel into the environment.[200] Since the facts were rather identical to *Burlington*, *Clark County* did not implicate the type of delayed discovery that Congress sought to address with section 309. Thus, the court should have reached its conclusion on narrower grounds without construing the provision and eroding congressional intent. Second, plaintiffs relied on two cases from 1994—*Buggsi, Inc. v. Chevron, U.S.A., Inc.*[201] and *Chatham Steel Corp. v. Brown*[202]—in which district courts determined that CERCLA Section 309 preempted state statutes of repose. The court in *Clark County* disregarded this authority because both cases were decided prior to *Burlington* and contrary to other federal district court decisions in accord with the Fifth Circuit.[203] Additionally, the court placed particular emphasis on the fact that both decisions

193. *See, e.g.*, Coleman v. H.C. Price Co., No. 11–2937, 2013 WL 64613, at *3 (E.D. La. Jan. 4, 2013) ("This Court is bound by the Fifth Circuit's opinion[] in . . . *Burlington* . . . .").

194. 753 N.W.2d 406 (S.D. 2008).

195. *Id.* at 417–18 (Sabers, J., dissenting).

196. *Id.* at 416.

197. *Id.* at 417 (Sabers, J., dissenting).

198. *Id.* at 417–18 (internal citation omitted).

199. *Id.* at 414.

200. *Id.* at 408.

201. 857 F. Supp. 1427 (D. Or. 1994).

202. 858 F. Supp. 1130 (N.D. Fla. 1994).

203. *Clark County*, 753 N.W.2d at 415–16. In particular, the court in *Clark County* relied on *McDonald v. Sun Oil Co.*, 423 F. Supp. 2d 1114 (D. Or. 2006), to discredit *Buggsi, Inc.* and *Chatham Steel Corp. Id.* Just months after *Clark County*, however, the Ninth Circuit reversed *McDonald*, in part, holding that CERCLA Section 309 preempted Oregon's state statute of repose. *McDonald v. Sun Oil Co.*, 548 F.3d 774, 783 (9th Cir. 2008).

"failed to distinguish between statutes of repose and statutes of limitations."[204] This recognition by the court, however, only reinforces the notion that few courts understood the distinction between the two types of statutes—and even used the terms interchangeably—years after SARA's enactment. The modern understanding of this distinction should not inform a court's construction of CERCLA Section 309. Rather, courts should seek to give effect to congressional intent by examining the provision's language in reference to its context and legislative history.[205]

In *Burlington*, the Fifth Circuit became the first federal court of appeals to answer directly the question of whether CERCLA Section 309 preempts state rules of repose, holding that section 309 did not preempt Texas' statute of repose for products liability cases. The court reasoned that the plain language of section 309 precluded a contrary interpretation. It also incompletely reviewed section 309's legislative history to bolster its conclusion. In *Burlington*'s wake—and as recently as January 2013—various state and federal courts have adopted the Fifth Circuit's holding and rationale, which demonstrates the continued vitality of the Fifth Circuit's interpretation to the issue at hand.

C. McDonald *and* Waldburger*: Preemption of State Statutes of Repose*

In 2008, three years after *Burlington*, the Ninth Circuit reached a divergent conclusion regarding the question of whether CERLCA Section 309 preempts state statutes of repose. In *McDonald v. Sun Oil*[206] the Ninth Circuit held that section 309 preempted Oregon's state statute of repose for negligent injury to person or property.[207] In 2013, the Fourth Circuit, in *Waldburger v. CTS Corp.*,[208] followed the Ninth Circuit's lead, along with several district courts.[209] Whereas the Fifth Circuit in *Burlington* focused principally on the plain language of section 309 in reaching its decision,[210] the Ninth and Fourth circuits concluded that the statutory language was ambiguous and thus engaged in a deep analysis of section 309's legislative history and context. Recently, the Supreme Court ruled that CERCLA Section 309 does not preempt state statutes of repose.[211] Nonetheless, analyzing *McDonald* and *Waldburger*, each in turn, will lay the foundation for discussing the use of these cases to resolve the same question of statutory interpretation and preemption in contexts outside of CERCLA and environmental law. Indeed, the Supreme Court's deci-

204. *Clark County*, 753 N.W.2d at 416.

205. *See, e.g.*, Holloway v. United States, 526 U.S. 1, 7 (1999) ("[T]he meaning of statutory language, plain or not, depends on context.") (internal quotation marks omitted).

206. 548 F.3d 774 (9th Cir. 2008).

207. *Id.* at 779; *see also* OR. REV. STAT. ANN. § 12.115 (West 2014).

208. 723 F.3d 434 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 896 (2014).

209. *See* Mechler v. United States, No. 12–1183–EFM, 2013 WL 3989640, at *6 (D. Kan. Aug. 2, 2013); Moore v. Walter Coke, Inc., No. 2:11–cv–1391–SLB, 2012 WL 4731255, at *15 (N.D. Ala. Sept. 28, 2012).

210. *See supra* Part III.B.

211. CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2187 (2014).

sion in *CTS Corp. v. Waldburger* will have far-reaching effects on statutes enacted as recently as 2008.[212]

In *McDonald*, the Ninth Circuit examined, among other things, whether CERCLA Section 309 preempted Oregon's statute of repose for negligent injury to person or property.[213] From 1936 to 1973, defendant Sun Oil Co. owned and periodically operated the Horse Heaven Mine in Oregon.[214] In 1973, it conveyed the property, including the rights to surface materials used for construction purposes, such as calcine, to plaintiffs Thomas and Marian McDonald.[215] The property contained a large amount of these calcine tailings, which are waste byproducts of mercury processing.[216] Though a representative of defendant assured Thomas McDonald prior to the sale that there was no mercury remaining in the calcine, the contrary was evidently true.[217] In the following years, McDonald moved the calcine for road building and commercial purposes on several occasions.[218] In 2001, however, the Oregon Department of Environmental Quality ("DEQ") solicited information regarding potential contamination at the property, and, a year later, concluded that the McDonalds' handling of the calcine caused an environmental release.[219] In turn, DEQ ordered the McDonalds to remediate the property and seek approval prior to shifting or removing the calcine piles in the future.[220] The McDonalds sued defendant, in part, for negligence, alleging that Sun Oil "knew or should have known that the mining waste was hazardous" and failed to warn the McDonalds of the risks in 1973.[221] On motion for summary judgment, defendant contended that the ten-year Oregon Statute of Repose barred this claim, while the McDonalds maintained that CERCLA Section 309 preempted the state statute.[222] The district court agreed with defendant and the Fifth Circuit's analysis in *Burlington*[223] and held that CERCLA Section 309 did not preempt the Oregon Statute of Repose.[224]

212. *See, e.g.*, Fed. Deposit Ins. Corp. v. Countrywide Sec. Corp. (*In re* Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.), 966 F. Supp. 2d 1018, 1023 (C.D. Cal. 2013) (relying on the analysis in *McDonald* to hold that the use of the word "limitations" in the Housing and Economic Recovery Act of 2008 includes statutes of repose and the provision-at-issue increases the limitation period for state law claims).

213. McDonald v. Sun Oil Co., 548 F.3d 774, 779 (9th Cir. 2008). *See also* OR. REV. STAT. § 12.115 (2013) ("In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of.").

214. *McDonald*, 548 F.3d at 777.

215. *Id.* at 777–78.

216. *Id.* at 778.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. McDonald v. Sun Oil Co., 423 F. Supp. 2d 1114, 1126 (D. Or. 2006). For the negligence claim, plaintiffs sought $1,200,000 in damages for the "loss of value in the calcine currently as compared to the value it would have if usable for roads" as well as for costs to remediate and/or investigate the property. *Id.*

222. *Id.* at 1126–27.

223. *See supra* Part III.B.

224. *McDonald*, 423 F. Supp. 2d at 1127.

On appeal, the Ninth Circuit reversed the decision below and found for the first time that CERCLA Section 309 preempted a state's statute of repose.[225] Though noting that statutes of repose and limitations are now considered "distinct legal concepts with distinct effects," the Ninth Circuit determined that the term "statute of limitations" in section 309 did not have a plain meaning, but rather was ambiguous at the time of its enactment.[226] In focusing on the term's original meaning, the court reasoned that "considerable uncertainty" existed in 1986 regarding the difference between the two types of statutes.[227] It cited a plethora of cases and scholarship contemporary to the enactment that misinterpreted the terms or used them interchangeably.[228] Therefore, the court determined that it was necessary to examine CERCLA Section 309's legislative history in order to determine Congress' intent.

Before analyzing CERCLA Section 309's legislative history, however, the Ninth Circuit discussed the district court's misplaced reliance on *Burlington*. It criticized the Fifth Circuit in *Burlington* for failing to examine the meaning of "statutes of limitations" at the time of enactment.[229] Additionally, whereas the plaintiff's discovery of the defective tank in *Burlington* occurred before the rule of repose barred the claim, here the McDonalds discovered that the calcine was hazardous after the statute's expiration.[230] Thus, "[section] 309's policies against destroying a plaintiff's claims before they could be asserted," the court explained, "were not [at] issue" in *Burlington*.[231] Contrary to some scholars' critique of *McDonald* as a constitutionally questionable expansion of section 309's scope,[232] that distinction between *Burlington* and *McDonald* might suggest that the Fifth Circuit envisioned a qualified, rather than absolute, preemption of state statutes of repose: i.e., preemption only where state statutes of repose extinguish a plaintiff's claims before they can be asserted.

The Fifth Circuit then engaged in a deep analysis of section 309's legislative history to demonstrate that Congress intended the term "statute of limitations" to include statutes of repose.[233] It focused on two pieces of legislative history: the Superfund Section 301(e) Study Group's committee print and the House Conference Report No. 99-962.[234] The committee print identified the problem for long-latent diseases created by nondiscovery rule limitations periods, and its recommendation was "intended also to cover the repeal of [certain state] statutes of

225. *See McDonald*, 548 F.3d at 779.
226. *Id.* at 779–81.
227. *Id.* at 781.
228. *Id.* at 781 & nn.3–4.
229. *Id.* at 782.
230. *Id.*
231. *Id.*
232. *See, e.g.*, Seley & Shaw, *supra* note 86, at 10200 ("[T]he Ninth Circuit has raised serious constitutional questions about the extermination of toxic tort defendants' due process rights.").
233. *See McDonald*, 548 F.3d at 782–84.
234. *Id.* at 782–83; *see supra* Part II.A.

repose . . . ."[235] Additionally, the House Conference Report stated, "this section addresses the problem identified in the 301(e) study," i.e., the committee print.[236]

Taken together with the ambiguity of the term "statute of limitations" in 1986, the Fifth Circuit found the reports to be conclusive evidence that Congress intended CERCLA Section 309 to preempt state statutes of repose. "Congress's primary concern in enacting [section] 309 was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of it—precisely the type of circumstance involved in this case," the court reasoned.[237] "This predicament can be caused by either statutes of limitation or statutes of repose, and is . . . most likely to occur where statutes of repose operate."[238] Additionally, to bolster its holding and refute one of Sun Oil's counterarguments,[239] the Fifth Circuit conducted an electronic search of the United States Code. The court failed to find even one use of the phrase "statute of repose," which it believed was further proof that the term "statute of limitations" was ambiguous and perhaps remains ambiguous today.[240]

In July 2013, the Fourth Circuit, in *Waldburger v. CTS Corp.*,[241] agreed with the Ninth Circuit's analysis and held that section 309 preempted North Carolina's ten-year statute of repose for real property claims.[242] The site at issue in *Waldburger* was defendant CTS Corp.'s former plant in Asheville, North Carolina, where it had stored sizeable quantities of and manufactured products using various hazardous chemicals.[243] In 1987, CTS sold the plant to Mills Gap Road Associates, who eventually sold portions of the property to plaintiff-landowners.[244] In 2009, plaintiffs learned that their well water contained high levels of chemicals that have carcinogenic effects.[245] Consequently, they brought a nuisance action against defendant.[246] CTS Corp. moved to dismiss the suit, contending that North Carolina's statute of repose barred the claim.[247] Though plaintiffs countered that CERCLA Section 309 preempted North Carolina's rule of repose, the district court granted defendant's motion to dismiss.[248]

235. *McDonald*, 548 F.3d at 782.
236. *Id.* at 783.
237. *Id.*
238. *Id.*
239. Sun Oil contended, "Congress could not have been ignorant of statutes of repose because it has enacted several of them," and cited four sections of the United States Code that contain limitations periods. *Id.* These provisions would constitute statutes of repose under the modern definition. *Id.*
240. *Id.* at 784.
241. 723 F.3d 434 (4th Cir. 2013).
242. *Id.* at 444.
243. *Id.* at 440.
244. *Id.*
245. *Id.* at 437.
246. *Id.*
247. *Id.* at 441.
248. *Id.*

In holding that section 309 preempted North Carolina's ten-year rule of repose for real property claims, the Fourth Circuit reaffirmed *McDonald*'s conclusion that the phrase "statute of limitations" was ambiguous.[249] The court employed the canon of statutory construction in which it determines whether a plain meaning exists "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[250] This approach, of course, is in stark contrast to that of *Burlington* in which the Fifth Circuit found dispositive the absence of the phrase "statute of repose" in section 309.[251] While the Fourth Circuit agreed with *Burlington* and the court below that such an interpretation was reasonable, it concluded that so too was a reading of the text that included repose limitations, like that of North Carolina.[252] The court reasoned that CERLCA Section 309 applied to North Carolina's rule of repose because the State statute fit CERCLA's definition of "'applicable limitations period' . . . that is specified in the State statute of limitations or under common law . . . ."[253] Additionally, as a nondiscovery rule of repose, North Carolina's statute provided a commencement date earlier than the federally required commencement date set forth in section 309.[254] Here, as in *McDonald*, the Fourth Circuit's analytical posture suggests a qualified preemption of state rules of repose that requires a case-by-case examination of the particular state statute at issue. Moreover, to buttress its conclusion that the phrase in section 309 was ambiguous, the Fourth Circuit discussed the historical confusion among courts and scholars between "statute of limitations" and "statute of repose," as presented by the Ninth Circuit in *McDonald*.[255]

Finding that the language in section 309 was ambiguous, the Fourth Circuit looked to other evidence of congressional intent to interpret the statute and to conclude ultimately that section 309 preempted North Carolina's statute of repose. As in *McDonald*, and unlike the analytical treatment in *Burlington*, the court reviewed the Superfund Section 301(e) Study Group's committee print and the House Conference Report No. 99–962 to demonstrate that Congress enacted section 309 to address a problem posed by both statutes of limitations and rules of repose.[256]

In contrast to *Burlington* and *McDonald*, however, the remedial purpose of CERCLA drove the Fourth Circuit towards a liberal construction of section 309. Whereas most federal environmental protection

249. *Id.* at 442.

250. *Id.* (internal quotation marks omitted).

251. Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355, 362 (5th Cir. 2005).

252. *Id.*

253. *Id.*; *see* 42 U.S.C. § 9658(a)(1) (2012). CERCLA defines "applicable limitations period" as "the period specified in a statute of limitations during which a civil action referred to an subsection (a)(1) of this section may be brought." *Id.* § 9658(b)(2).

254. *Waldburger*, 723 F.3d at 442; *see* 42 U.S.C. § 9658(b)(4)(A).

255. *Waldburger*, 723 F.3d at 443.

256. *Id.* at 439, 443.

statutes regulate human activity prospectively, CERCLA centers on remediation and correction, making it "a tort-like backward-looking statute."[257] In turn, the Fourth Circuit reasoned, "CERCLA, as all remedial statutes, must be given a broad interpretation to effect its ameliorative goals"—objectives that section 309 sought to further by removing barriers to recovery for latent harms caused by environmental contamination.[258] Given this interpretative instruction, the Fourth Circuit rejected the lower court's narrow reading of the statute because, though "textually sound," it "thwart[ed] Congress's unmistakable goal of removing barriers to relief from toxic wreckage."[259] Furthermore, the court found the reasoning of *Burlington* unconvincing because the Ninth Circuit did not face the type of situation—i.e., one involving delayed discovery of the harm—that Congress sought to address in section 309.[260]

Importantly, the Fourth Circuit chose to confront and refute the legitimate concern that future corporations and various entities would likely raise following this decision: namely, that the court's interpretation of CERCLA Section 309 would subject them to endless liability for past contaminating actions.[261] The court opened, however, by explaining that its decision did not relax a plaintiff's burden of proof.[262] Rather, cases with latent harms still presented plaintiffs with several inherent challenges to recovery, including the fading of evidence over time and the complication of intervening causes, often characteristic of environmental harms.[263] Additionally, the court noted that its holding did not subject defendants to an unending prospect of litigation because it did not alter the State's statute of limitations that requires plaintiffs to file suit within three years of discovery.[264] In turn, there would still be a temporal limit to filing suit. Finally, the Fourth Circuit believed that its decision was consonant with the balancing of party interests contemplated by Congress' Superfund Section 301(e) Study Group.[265]

Yet in her sizeable dissenting opinion, Judge Thacker believed the plain and unambiguous language of section 309, its legislative history, and a presumption against preemption should have pointed the court to a contrary holding.[266] First, she maintained that the dictionary definition of "statute of limitations"[267] available to Congress at the time of section

257. *Id.* at 443 (quoting WILLIAM MURRAY TABB & LINDA A. MALONE, ENVIRONMENTAL LAW: CASES & MATERIALS 637 (1st ed. 1992)).

258. *Id.* (internal quotation marks omitted).

259. *Id.* at 444.

260. *Id.*

261. *See id.* at 444–45.

262. *Id.* at 444.

263. *Id.* at 444–45.

264. *Id.* at 445; *see* N.C. GEN. STAT. ANN. § 1–52 (West 2014).

265. *Waldburger*, 723 F.3d at 445.

266. *Id.* (Thacker, J., dissenting).

267. "A statute prescribing limitations to the right of action on certain described causes of action or criminal prosecutions; that is, declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued. *Statutes of limitation are statutes of repose*, and are such legislative enactments as prescribe the

309's enactment proved that though statutes of limitations were "a subset of statutes of repose," not all statutes of repose were statutes of limitations.[268] In her view, this demonstrated that Congress did not intend the definition of "statutes of limitations" in section 309 to include rules of repose.[269] Second, to Judge Thacker, the legislative history of CERCLA Section 309 confirmed that Congress knew the distinction between the two types of time-bar statutes and purposely chose to preempt statutes of limitations only.[270] For example, since the Section 301(e) Study Group Report mentions statutes of repose and statutes of limitations separately, Congress was on notice of the distinction and chose only to reference statutes of limitations in drafting section 309.[271] This analysis, however, is undercut by the House Conference Report No. 99–962—which Judge Thacker failed to address—that made clear that Congress adopted section 309 to "address[ ] the problem identified in the . . . study [Section 301(e) Study Group Report]."[272] The "problem identified" in the Study Group's report included barriers posed by nondiscovery statutes of repose—not simply statutes of limitations.[273] Finally, Judge Thacker contended that if section 309 is vulnerable to two plausible constructions, courts typically "accept the reading that disfavors pre-emption."[274] Yet in spite of Judge Thacker's dissent, various district courts have followed the approach espoused in *McDonald* and *Waldburger* on the question of whether section 309 preempts state rules of repose.[275]

Following *Burlington*, the Ninth Circuit in *McDonald v. Sun Oil* reached the opposite conclusion regarding the question of whether CERCLA Section 309 preempts state statutes of repose. It held that section 309 preempted Oregon's state statute of repose for negligent injury to person or property.[276] In 2013, the Fourth Circuit followed the Ninth Circuit's approach, as have a number of district courts.[277] Though the Fifth Circuit's analysis in *Burlington* centered on the plain language of section 309, the Ninth and Fourth circuits found that the statutory language was ambiguous and subsequently engaged in an in-depth examination of CERCLA Section 309's legislative history and context.[278] Federal courts have since relied on *Burlington*, *McDonald*, and *Waldburger* to help resolve the same question of statutory interpretation and preemp-

periods within which actions may be brought upon certain claims or within which certain rights may be enforced.'" BLACK'S LAW DICTIONARY 835 (5th ed. 1979) (emphasis added).

268. *Waldburger*, 723 F.3d at 449 (Thacker, J., dissenting).

269. *Id.*

270. *Id.* at 450.

271. *Id.* at 452.

272. H.R. REP. NO. 99-962, at 261 (1986) (Conf. Rep.).

273. S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., INJURIES AND DAMAGES, *supra* note 7, at 256.

274. *Waldburger*, 723 F.3d at 453 (quoting Riegel v. Medtronic, Inc., 552 U.S. 312, 335 (2008)).

275. *See* Mechler v. United States, No. 12–1183–EFM, 2013 WL 3989640, at *1 (D. Kan. Aug. 2, 2013); Moore v. Walter Coke, Inc., No. 2:11–cv–1391–SLB, 2012 WL 4731255, at *1 (N.D. Ala. Sept. 28, 2012).

276. McDonald v. Sun Oil Co., 548 F.3d 774, 782 (9th Cir. 2008).

277. *See Waldburger*, 723 F.3d at 438; *Mechler*, 2013 WL 3989640, at *7.

278. *See Waldburger*, 723 F.3d at 443; *McDonald*, 548 F.3d at 779.

tion found in other statutes, including FIRREA and HERA. Yet before reviewing these cases, it is important to examine the U.S. Supreme Court's recent ruling in *CTS Corp. v. Waldburger*, which effectively resolved the circuit split regarding CERCLA Section 309.

D. CTS Corp. v. Waldburger*: The Supreme Court Weighs In*

In June 2014, the U.S. Supreme Court reversed the Fourth Circuit's holding in *Waldburger* and abrogated *McDonald*, concluding that CERCLA Section 309 preempts state statutes of limitations only, not statutes of repose.[279] After exploring the distinctions between statutes of limitations and rules of repose,[280] the Court noted that section 309 deviates from CERCLA's general rule of applying time limitations established under state law.[281] In turn, the Court proceeded from the presumption that "state law [would] not [be] pre-empted unless it fit[] into the precise terms of the exception."[282]

While reaching the same end as the Fifth Circuit in *Burlington*,[283] the Court largely followed the analytical means of the Fourth and Ninth circuits by delving deeper into the legislative history and context of CERCLA Section 309. The Court acknowledged that Congress had historically used the term "statute of limitations" in passing rules of repose, and, therefore, it was necessary to consider section 309's legislative history.[284] The Court found, however, that both the 1982 Study Group and Congress recognized the difference between the two limitations periods when discussing and drafting section 309.[285] In its report, the Study Group had singled out statutes of repose as a "distinct category" that section 309 should preempt in addition to statutes of limitations.[286] Yet "when Congress did not make the same distinction [in the actual text of section 309]," the Court continued, "it is proper to conclude that Congress did not exercise the full scope of its pre-emption power."[287]

Beyond the legislative history, the Court provided additional textual support to bolster its conclusion that section 309 preempts only state statutes of limitations. For example, it pointed out that the text of the provision refers to the "covered period" in singular form—"the applicable limitations period" and "such period shall commence."[288] The Court noted, however, that "[t]his would be an awkward way to mandate the pre-emption of two different time periods with two different purposes."[289]

279. CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2187 (2014).
280. *Id.* at 2182–85.
281. *Id.* at 2185.
282. *Id.*
283. *See supra* Part III.B.
284. *Waldburger*, 134 S. Ct. at 2185.
285. *Id.*
286. *Id.* at 2186.
287. *Id.*
288. *Id.* at 2186–87.
289. *Id.* at 2187.

Additionally, the Court indicated that section 309 "provides for equitable tolling" for certain plaintiffs, though statutes of limitations alone "have been subject to [such] tolling."[290] The Court also observed that it construes express preemption provisions, like section 309, narrowly, particularly "when Congress has legislated in a field traditionally occupied by the States,"[291] and that section 309 did not impliedly preempt state statutes of repose.[292]

Various justices of the Court filed separate opinions. Justice Scalia, with whom Chief Justice Roberts, Justice Thomas, and Justice Alito joined, concurred with the majority, but believed that the proper way in which to construe express preemption provisions was to give the language its ordinary, plain meaning.[293] Justice Ginsburg, with whom Justice Breyer joined, dissented from the majority. She maintained, much like the Fourth and Ninth circuits before her, that the language and legislative history of section 309 prompted the interpretation that the provision preempted state statutes of repose.[294]

As discussed below, prior to *CTS Corp. v. Waldburger*, federal courts had relied on the courts of appeals' decisions in *Waldburger* and *McDonald* to determine the meaning of the term "statute of limitations" in various statutes relating to securities law. Thus, the Court's recent ruling, which reversed *Waldburger* and abrogated *McDonald*, will have a significant impact outside the context of environmental law.

E. The Use of McDonald *and* Waldburger *Outside of the Environmental Law Context*

The significance of the historical circuit split surrounding section 309 and the U.S. Supreme Court's recent decision in *CTS Corp. v. Waldburger* transcends CERCLA and environmental law. In recent years, federal courts have used the *McDonald-Waldburger* analytical framework to resolve the same question of statutory interpretation found in a number of statutes pertaining to securities law and the recent housing crisis. In particular, federal district courts located within the Ninth Circuit have expressly used the *McDonald-Waldburger* approach to answer the question of whether the term "statute of limitation" extends to include rules of repose in the context of the HERA[295] and FIRREA.[296] To a lesser degree, courts within the Second and Tenth Circuits have also

290. *Id.* at 2187–88.
291. *Id.* at 2188–89.
292. *Id.* at 2188.
293. *Id.* at 2189 (Scalia, J., concurring).
294. *Id.* at 2189–91 (Ginsburg, J., dissenting). The practical effect of the majority's ruling also troubled Justice Ginsburg. *Id.* at 2191 ("[T]he Court allows those responsible for environmental contamination, if they are located in the still small number of States with repose periods, to escape liability for the devastating harm they cause . . . .").
295. *See* Fed. Hous. Fin. Agency v. Countrywide Fin. Corp. (*In re* Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.), 900 F. Supp. 2d 1055, 1063 (C.D. Cal. 2012).
296. *See* Fed. Deposit Ins. Corp. v. Countrywide Sec. Corp. (*In re* Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.), 966 F. Supp. 2d 1018, 1026 (C.D. Cal. 2013).

used the *McDonald-Waldburger* approach, either secondarily or implicitly, to interpret the extender provisions in FIRREA[297] and HERA.[298] In each case, the court's decision on this issue determined whether claims brought by the particular federal agency were timely or barred. In turn, analyzing the federal district and appellate courts' reliance on *McDonald* and *Waldburger* will illustrate how the Supreme Court's ruling in *CTS Corp. v. Waldburger* will have far-reaching implications for similar statutory provisions outside the context of environmental law.

In *Federal Housing Finance Agency v. Countrywide Financial Corp.*,[299] the U.S. District Court for the Central District of California considered, among other things, whether HERA Section 4617(b)(12)(A), which extends some limitation periods for action taken by the Federal Housing Finance Agency ("FHFA"), applied to "statutes of repose" in addition to "statutes of limitation."[300] In 2008, Congress passed HERA, creating FHFA and empowering the Director of FHFA to place government-sponsored enterprises,[301] such as Fannie Mae and Freddie Mac,[302] into conservatorship and to appoint FHFA as conservator.[303] When the Director of FHFA placed Fannie Mae and Freddie Mac into conservatorships in September of 2008, FHFA, as conservator, assumed all of the legal rights of the two enterprises.[304] Subsequently, in 2011, FHFA brought twelve causes of action based on federal and state securities and common law against various defendants, including Countrywide Financial Corporation, for injuries allegedly flowing from false statements included in documents filed with the Securities and Exchange Commission.[305] These documents related to $26.6 billion worth of resi-

297. *See* Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246, 1264 (10th Cir. 2013).

298. *See* Nat'l Credit Union Admin. Bd. v. Morgan Stanley & Co., No. 13 Civ. 6705(DLC), 2014 WL 241739, at *6 (S.D.N.Y. Jan. 22, 2014).

299. 900 F. Supp. 2d 1055.

300. *Id.* at 1061.

301. *See, e.g.*, *id.* at 1058 ("[P]rivate corporations chartered by Congress to provide stability in the United States mortgage market, assist in the provision of affordable housing and increase liquidity of mortgage investments.").

302. For a theoretical overview of how Fannie Mae and Freddie Mac impact the secondary mortgage market, making it more liquid and helping to decrease interest rates paid by homeowners and other mortgage borrowers, see HOUSING AND MORTGAGE MARKETS AND THE HOUSING GOVERNMENT-SPONSORED ENTERPRISES IN 2008, FED. HOUS. FIN. AGENCY, *available at* http://www.fhfa.gov/PolicyProgramsResearch/Research/PaperDocuments/20091210_RP_HousingMortgageMarketsEnterprises_2008_508.pdf.

303. *Fed. Hous. Fin. Agency*, 900 F. Supp. 2d at 1058 (citing 12 U.S.C. § 4617(a)(1) (2012)). FHFA defines a conservatorship as

> [t]he legal process (for entities that are not eligible for Bankruptcy court reorganization) in which a person or entity is appointed to establish control and oversight of a company to put it in a sound and solvent condition. In a conservatorship, the powers of the company's directors, officers, and shareholders are transferred to the designated conservator.

Conservatorship FAQs, FED. HOUS. FIN. AGENCY, http://fhfaoig.gov/LearnMore/FAQ#FHFA4 (last visited Jan. 4, 2015).

304. *Fed. Hous. Fin. Agency*, 900 F. Supp. 2d at 1058. The goal of the conservatorship was to "preserv[e] and conserv[e] the assets and property of Fannie Mae and Freddie Mac." *FHFA FAQs*, FED. HOUS. FIN. AGENCY, http://fhfaoig.gov/LearnMore/FAQ#FHFA4 (last visited Jan. 4, 2015).

305. *Fed. Hous. Fin. Agency*, 900 F. Supp. 2d at 1059.

dential mortgage-backed securities ("RMBS") purchased by Fannie Mae and Freddie Mac between 2005 and 2008.[306]

Because FHFA did not sue within three years of the purchases, defendants maintained that certain rules of repose—namely, Section 13 of the Securities Act of 1933[307] as well as the D.C.[308] and Virginia[309] securities acts—barred seven of the twelve counts.[310] In response, FHFA contended that the claims were timely under HERA Section 4617(b)(12)(A), which sets the "applicable statute of limitations with regard to any action brought by [FHFA] as conservator" at periods longer than the three federal and state statutes of repose.[311]

In holding that the term "statute of limitations" in HERA Section 4617(b)(12)(A) referred to both statutes of limitation and rules of repose, thus making FHFA's claims timely,[312] the district court relied wholly on the *McDonald-Waldburger* analytical framework. This is, perhaps, not terribly surprising, given that the court is located within the Ninth Circuit. The court began its analysis by reviewing the modern understanding of and distinction between "statutes of limitations" and "statutes of repose," as told primarily by the Ninth Circuit in *McDonald*.[313] As in *McDonald*, the court then articulated that statutory construction starts with the language itself to discern "the ordinary meaning of the [provision] at the time Congress enacted" the statute.[314] It revisited the Ninth Circuit's application of this inquiry in *McDonald* and concluded, "[t]he Court adopts the same approach as the court in *McDonald* and looks to other Congressional statutes and case law to construe the context around the use of the term 'statute of limitation' in 2008."[315] In doing so, the district court found that Congress and federal judges used the term "limitation" to refer to both statutes of limitations and rules of repose in statutes and judicial opinions spanning from 1986 to 2008—i.e., the time between the enactment of CERCLA and HERA.[316] This view, however, is at odds with observations made by the Supreme Court in *CTS Corp. v. Waldburger* that there is a modern distinction between statutes of limitations and statutes of repose.[317]

Whereas the courts of appeals in *McDonald* and *Waldburger* engaged in a deep analysis of CERCLA Section 309's legislative history fol-

306. *Id.*
307. 15 U.S.C. § 77m (2012).
308. D.C. CODE § 31–5606.05(f) (2014).
309. VA. CODE ANN. § 13.1–522(D) (West 2014).
310. *Fed. Hous. Fin. Agency*, 900 F. Supp. 2d at 1061.
311. *Id. See also* 12 U.S.C. § 4617(b)(12)(A) (2012).
312. *Fed. Hous. Fin. Agency*, 900 F. Supp. 2d at 1066, 1068.
313. *Id.* at 1061–62 (citing McDonald v. Sun Oil, Co., 548 F.3d 774 (9th Cir. 2008)).
314. *Id.* at 1062–63 (quoting *McDonald*, 548 F.3d at 780) (internal quotation marks omitted).
315. *Id.* at 1063.
316. *Id.* at 1063–66 (discussing, for example, *In re* WorldCom Sec. Litig., 496 F.3d 245, 250 (2d Cir. 2007) as well as a provision of the 2002 Sarbanes-Oxley Act entitled "Statute of Limitations for Securities Fraud" that modifies both statutes of limitation and rules of repose).
317. *See* CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182–84 (2014) (exploring the distinctions between statutes of limitations and rules of repose).

lowing the examination of the language's meaning,[318] here the district court merely pointed cursorily to HERA's purpose before holding that the provision applied to both statutes of limitation and statutes of repose.[319] It concluded that extending HERA Section 4617(b)(12)(A) to statutes of repose was consistent with the purpose of HERA because Congress passed the extender provision to give FHFA more time to pursue any and all claims it inherited as the newly-appointed conservator of Fannie Mae.[320]

Moreover, the district court relied almost exclusively on *McDonald* when refuting several of defendants' counterarguments. For example, defendants drew attention to the fact that HERA Section 4617(b)(12)(A) uses the term "accrue," a word traditionally associated with statutes of limitations rather than rules of repose.[321] The court did not believe this outweighed other contextual evidence present because, as stated by the Ninth Circuit in *McDonald*, "[u]se of the word 'accrue' . . . is not dispositive."[322] Additionally, Countrywide argued that California district courts had previously held extender statutes similar to HERA applicable only to statutes of limitations.[323] The court replied, however, "[t]he court in [the cases cited by defendants] relies heavily on the fact that *McDonald* is not controlling precedent. In this Court's view, *McDonald* is controlling as the Ninth Circuit's approach in interpreting statutes that refer to periods of limitation."[324] Finally, Countrywide maintained that Congress could have clearly mentioned rules of repose in the provision at issue, since it had done so in other statutes.[325] In refuting this argument, the court conducted an electronic search of the U.S. Code, much like the one undertaken in *McDonald*, to show that only one provision had used the word "repose."[326] Further, the court quoted the Ninth Circuit's decision in *McDonald* to demonstrate that the results of this search provided "additional evidence that the term 'statute of limitations' was ambiguous."[327]

Similarly, in *Federal Deposit Insurance Corp. v. Countrywide Securities Corp. (In re Countrywide Financial Corp. Mortgage-Backed Securities Litigation)*[328] the same district court in California reached an

318. *See supra* Part III.D.

319. Unlike the Ninth Circuit in *McDonald*, here the district court adhered to a principle established previously in the Circuit: "To the extent that a statute is ambiguous in assigning a limitations period for a claim, we will interpret it in a light most favorable to the government." *Fed. Hous. Fin. Agency*, 900 F. Supp. 2d at 1066 (quoting FDIC v. Former Officers and Dirs. of Metro. Bank, 884 F.2d 1304, 1309 (9th Cir. 1989)).

320. *Id.* at 1066–67.

321. *Id.* at 1064; *see supra* text accompanying notes 75–78, 90.

322. *Fed. Hous. Fin. Agency*, 900 F. Supp. 2d at 1064 (citing McDonald v. Sun Oil Co., 548 F.3d 774, 783 (9th Cir. 2008)).

323. *Id.* at 1065.

324. *Id.* (citation omitted). Now, of course, *CTS Corp. v. Waldburger* is the controlling precedent. As I recommend below, however, that ruling should not necessarily change the California district court's interpretation.

325. *Id.*

326. *Id.*

327. *Id.* (citing *McDonald*, 548 F.3d at 783–84).

328. 966 F. Supp. 2d 1018 (C.D. Cal. 2013).

opposite conclusion regarding whether FIRREA's extender provision[329]––nearly identical to the one in HERA—preempted the Texas Securities Act's ("TSA") statute of repose.[330] Enacted in 1989, FIRREA permitted the Federal Deposit Insurance Corporation ("FDIC") to act as receiver for failed banks.[331] In light of the 2007 and 2008 financial crisis, FDIC was appointed as receiver to several failed depository institutions, including Guaranty Bank.[332] As receiver, FDIC assumed all of the legal rights of Guaranty Bank, such as the right to sue on claims formerly held by the failed bank.[333] In turn, and similar to the agency in *Federal Housing Finance Agency*, the FDIC brought suit against several financial institutions associated with the marketing, packaging, and sale of RMBS purchased by Guaranty Bank.[334] The agency contended that the offering documents included "material misstatements," in violation of both the federal and Texas securities acts.[335] The court quickly concluded that the violations asserted under sections 11 and 12 of the federal Securities Act were time-barred and dismissed the causes of action with prejudice.[336]

Since Guaranty Bank purchased all of the relevant RMBS certificates five years before the depository institution entered into receivership, on its face, the Texas Securities Act barred the claim, providing that "[n]o person may sue . . . more than five years after the sale" at issue.[337] Even so, FDIC maintained that FIRREA Section 1821(d)(14) extended the state statute of repose by at least three years following the date of receivership.[338] The FIRREA extender provision, however, made no mention of rules of repose, instead referring only to "the applicable statute of limitations."[339]

Upon making the initial determination that the Texas Securities Act's five-year limitations period was a rule of repose, the district court held that FIRREA's extender provision did not preempt the state statute of repose.[340] It began with a presumption against preemption, and, as in *Federal Deposit Insurance Corp. v. Countrywide Securities Corp.*, used the *McDonald-Waldburger* analytical approach to reach its conclusion.[341]

329. 12 U.S.C. § 1821(d)(14) (2012).

330. *In re Countrywide Financial Corp*, 966 F. Supp. 2d at 1025.

331. *Id.* at 1020. The Federal Deposit Insurance Act defines "receiver" as "a receiver, liquidating agent, conservator, commission, person, or other agency charged by law with the duty of winding up the affairs of a bank or savings association or of a branch of a foreign bank." 12 U.S.C. § 1813(j) (2012).

332. *In re Countrywide Financial Corp*, 966 F. Supp. 2d at 1025.

333. *Id.* (citing 12 U.S.C. § 1821(d)(2)(A)).

334. *Id.*

335. *Id.* at 1021. *See also* TEX. REV. CIV. STAT. ANN. art. 581–33(H)(2)(a) (West 2014).

336. *In re Countrywide Financial Corp*, 966 F. Supp. 2d at 1021–22.

337. *Id.* at 1022 (quoting TEX. REV. CIV. STAT. ANN. art. 581–33(H)(2)(b)).

338. *Id.*

339. 12 U.S.C. § 1821(d)(14)(A) (2012).

340. *In re Countrywide Financial Corp.*, 966 F. Supp. 2d at 1023–24, 1030.

341. *Id.* at 1025–26. "This Court previously held that *McDonald v. Sun Oil Co.* provides the analytical approach for interpreting whether the term 'statute of limitation' includes periods of repose." *Id.* at 1026 (citing Fed. Hous. Fin. Agency v. Countywide Fin. Corp. (*In re* Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.), 900 F. Supp. 2d 1055, 1065 (C.D. Cal. 2012)).

In the attempt to ascertain the "ordinary meaning of the term 'statute of limitation'" in 1989—at the time of FIRREA's enactment—the court leaned on the findings of the Ninth Circuit in *McDonald* as well as its own findings in *Federal Deposit Insurance Corp*.[342] As a result, the court concluded without conducting an independent analysis of its own that the language in FIRREA's extender provision was ambiguous with regard to whether "statute of limitation" included rules of repose.[343]

In the second step of the *McDonald-Waldburger* framework, the district court turned to FIRREA's legislative history and compared it directly to the committee print and conference report considered in *McDonald*. This is contrasted by the court's superficial exploration of the legislative history in *Federal Deposit Insurance Corp*. The court found only one relevant piece of legislative history: a statement from a senator relating that FIRREA's extender provision "should be construed to maximize potential recoveries by the Federal Government by preserving . . . claims that would otherwise have been lost due to the expiration of hitherto applicable limitations periods."[344] The court, however, did not find this statement sufficient to defeat the presumption against preemption, and believed that it paled in comparison to the legislative history analyzed in *McDonald*.[345] "In stark contrast to *McDonald*," the district court reasoned, "FIRREA's legislative history neither mentions statutes of repose nor implies a concern for their effects."[346] Finally, the court assessed whether FIRREA's extender provision impliedly preempted Texas' Securities Act. It determined that the extender provision did not, and thus held that all of FDIC's claims were time-barred.[347]

Significantly, on October 30, 2014, the Supreme Court of Nevada held that FIRREA's extender statute "expressly preempts any shorter state statutory time limitation . . . regardless of whether the state statute is a statute of limitations or repose."[348] The U.S. Supreme Court's recent analysis in *CTS Corp. v. Waldburger* did not change the state court's interpretation because it concluded that FIRREA's extender provision was fundamentally different from CERCLA Section 309.[349] The court noted that the relationship between FIRREA's tolling provisions and its covered period is distinct from the one in section 309 and thus "do[es] not indicate what Congress intended to preempt."[350] Additionally, Congress used the phrase "period applicable under State law" to indicate the period covered by FIRREA's extender statute; the court concluded that this broad and undefined language "convey[ed] the intent to preempt any

342. *Id.* at 1026.
343. *Id.* at 1026–27.
344. *Id.* at 1026 (internal quotation marks omitted).
345. *Id.*
346. *Id.* at 1026–27.
347. *Id.* at 1026-31.
348. Fed. Deposit Ins. Corp. v. Rhodes, 336 P.3d 961, 968 (2014).
349. *Id.* at 966.
350. *Id.* ("[T]hese tolling provisions are unlike the tolling language in *CTS Corp.* that expressly applied to and defined language in the federal statute that displaced a state statute of limitations.").

applicable state time limitation, including state statutes of repose."[351] Though at odds with *Federal Deposit Insurance Corp*., the Nevada Supreme Court was simply unconvinced by the California district court's conclusion and reasoning that a federal statute may not preempt a state statute of repose.[352] In the wake of *CTS Corp. v. Waldburger*, the Nevada Supreme Court's ruling is important because it demonstrates a commitment to conduct an independent, rigorous analysis of the term "statute of limitations" as used in federal laws other than CERCLA.

Outside of the Ninth Circuit, the Tenth Circuit has also used *McDonald* and *Waldburger*, though to a lesser extent, to construe FIRREA's other extender provision. Recently, for example, the Tenth Circuit considered, in part, whether the FIRREA extender provision pertaining to the National Credit Union Administration ("NCUA") supplanted the rule of repose set forth in Section 13 of the federal Securities Act, even though the provision referred only to "statute of limitations."[353] In holding that the NCUA extender provision applied to Section 13's rule of repose, the Tenth Circuit drew on *McDonald* and *Waldburger* to convey the historical confusion and misuse of the terms "statute of limitations" and "statute of repose" around the time of FIRREA's enactment.[354] When it examined the statute's legislative purpose and history, however, the court did not compare its findings to that of *McDonald* and *Waldburger*, as the district court had done in *Federal Deposit Insurance Corp*.[355] Nonetheless, after refuting several arguments raised by defendants, the court concluded and buttressed its holding of preemption by noting that its interpretation was in accord with the majority of the courts' construction of CERCLA Section 309, a similar extender provision.[356]

Following *CTS Corp. v. Waldburger*, the U.S. Supreme Court granted certiorari, vacated the Tenth Circuit's decision, and remanded the case for reconsideration.[357] Upon reconsideration, however, the Tenth Circuit reinstated its original opinion.[358] First, the court found that *CTS Corp. v. Waldburger* did not alter its conclusion that the NCUA extender provision preempts state statutes of repose by "establish[ing] a universal time frame for all actions brought by [the agency]."[359] Just like the

351. *Id.* at 967.

352. *Id.*

353. Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246, 1266 (10th Cir. 2013); *see also* 12 U.S.C. § 1787(b)(14) (2012).

354. *Nomura Home Equity Loan, Inc.*, 727 F.3d at 1258–59 (citing *McDonald* and *Waldburger* throughout).

355. *Id.* at 1262–64.

356. *Id.* at 1266 n.20 ("A majority of courts have concluded that similar extender statutes referring to 'statutes of limitation' encompass statutes of repose.") (citing *Waldburger*, *McDonald*, and extended critiques of the Fifth Circuit's contrary holding in *Burlington*).

357. Nomura Home Equity Loan, Inc. v. Nat'l Credit Union Admin. Bd., 134 S. Ct. 2818 (2014) (mem.).

358. Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 764 F.3d 1199, 1203 (10th Cir. 2014).

359. *Id.* at 1207.

Nevada Supreme Court in *Rhodes*,[360] the Tenth Circuit emphasized that the structure and text of the NCUA extender statute differed from CERCLA Section 309.[361] Whereas section 309's "federally required commencement date" created a "narrow exception to the regular rule," the NCUA extender provision established "the exclusive time framework for all [agency] enforcement actions and replaces all other time periods."[362]

Second, the Tenth Circuit reaffirmed its broad interpretation of the term "statute of limitations" as used in the NCUA extender statute, finding inapposite the U.S. Supreme Court's analysis of section 309's surrounding language, statutory context, and statutory purpose.[363] The Tenth Circuit noted that the NCUA extender provision refers broadly to the "period applicable under State law," in contrast to section 309's use of the narrower phrase "applicable *limitations* period."[364] Unlike section 309, the extender statute also does not have a tolling provision.[365] Additionally, the court concluded that since Congress has used "statute of limitations" broadly in provisions throughout FIRREA, its reference in the extender statute warrants an expansive interpretation.[366] Lastly, the court reasoned that FIRREA's broad statutory purpose "demonstrates Congress meant any ambiguity in the term 'statute of limitations' to be construed broadly."[367]

In contrast to the Tenth Circuit, and before *CTS Corp. v. Waldburger*, the U.S. District Court for the Southern District of New York refused to follow the *McDonald-Waldburger* analytical framework in considering the proper construction of the NCUA extender provision.[368] Instead, the court adhered to the Second Circuit's plain meaning interpretation of an identical extender provision, HERA Section 4617(b)(12)(A), to reach the same conclusion as the Tenth Circuit in *Nomura Home Equity Loan, Inc*.[369] Both HERA Section 4617(b)(12)(A) and the NCUA extender provision provided, "*the* applicable statute of limitations with regard to *any action* brought by the [NCUA] as conservator . . . *shall be* . . . ."[370] Due to the indistinguishable language, the court applied the Second Circuit's analysis of HERA Section 4617(b)(12)(A) in *FHFA v. UBS Americas Inc*.[371] There, the Second Circuit held that HERA Section 4617(b)(12)(A) applied to both federal and state claims because the words "the," "any action," and "shall be" conveyed this

360. Fed. Deposit Ins. Corp. v. Rhodes, 336 P.3d 961, 966 (2014).
361. *Nomura Home Equity Loan, Inc.*, 764 F.3d at 1208.
362. *Id.* at 1208–09 (internal quotation marks omitted).
363. *Id.* at 1209–17.
364. *Id.* at 1212 (internal quotation marks omitted) (emphasis added in original).
365. *Id.* at 1213.
366. *Id.* at 1214.
367. *Id.* at 1217.
368. *See* Nat'l Credit Union Admin. Bd. v. Morgan Stanley & Co., No. 13 Civ. 6705(DLC), 2014 WL 241739, at *6 (S.D.N.Y. Jan. 22, 2014), *denying reconsideration*, 2014 WL 5017822.
369. *See id.* at *4–5.
370. 12 U.S.C. § 1787(b)(14)(A) (2012) (emphasis added).
371. 712 F.3d 136 (2d Cir. 2013).

plain, unambiguous meaning.[372] Finding that legislatures and courts typically used the term "statute of limitations" to refer to rules of repose, it concluded that the provision extended to statutes of repose, too.[373] In turn, the district court adopted these determinations, holding that the NCUA extender provision applied to both federal and state statutes of repose.[374]

Defendant cited *Federal Deposit Insurance Corp*. and contended that the NCUA extender provision should not apply to statutes of repose given the presumption against congressional preemption of state law.[375] The court disagreed, stating, "[t]he [*Federal Deposit Insurance Corp*.] court's conclusion was dictated by prior Ninth Circuit law [*McDonald v. Sun Oil*] holding that . . . 'statute of limitation' was ambiguous regarding whether it included statutes of repose when Congress passed FIRREA in 1989."[376] It maintained that the Second Circuit's analysis controlled, thus refusing to follow the *McDonald-Waldburger* analytical framework.[377]

The U.S. Supreme Court's ruling in *CTS Corp. v. Waldburger* will hold significant beyond CERCLA Section 309. Specifically, federal district courts located within the Ninth Circuit have utilized the *McDonald-Waldburger* framework to resolve the question of whether the term "statute of limitation" extends to include rules of repose in statutes like HERA and FIRREA.[378] Additionally, other courts, including the Tenth Circuit, have used the *McDonald-Waldburger* approach to interpret the same extender provisions.[379] In each case, the courts' resolution of this issue established whether claims brought by the particular federal agency were timely or barred. Moreover, both the Supreme Court of Nevada and Tenth Circuit have found that various extender provisions in FIRREA preempt state rules of repose, despite the U.S. Supreme Court's decision in *CTS Corp. v. Waldburger*. Since disagreement within and among circuits persists, analyzing these cases demonstrates how the Court's recent ruling has and will continue to have significant implications for extender provisions in federal statutes other than CERCLA.

IV. RECOMMENDATION

In determining whether the term "statute of limitations" encompasses rules of repose in the HERA and FIRREA extender provisions,

372. *Id.* at 141–42.

373. *Id.* at 142–44.

374. *Nat'l Credit Union Admin. Bd.*, 2014 WL 241739, at *5.

375. *Id.* at *6.

376. *Id.* (internal quotation marks omitted) (citing McDonald v. Sun Oil Co., 548 F.3d 774, 781 (9th Cir. 2008)).

377. *Id.*

378. *See, e.g.*, Fed. Deposit Ins. Corp. v. Countrywide Sec. Corp. (*In re* Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.), 966 F. Supp. 2d 1018, 1027 (C.D. Cal. 2013); Fed. Hous. Fin. Agency v. Countrywide Fin. Corp. (*In re* Countrywide Fin. Corp. Mortgage–Backed Sec. Litig.), 900 F. Supp. 2d 1055, 1071 (C.D. Cal. 2012).

379. *See*, *e.g.*, Nat. Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246 (10th Cir. 2013).

courts must consider the U.S. Supreme Court's analysis in *CTS Corp. v. Waldburger*. This Note proposes, however, that courts should still conduct their own independent, rigorous analysis of the provision at issue, like the Nevada Supreme Court and Tenth Circuit have, rather than relying on the findings of *CTS Corp. v. Waldburger*, because each statute is different. Indeed important distinctions exist between CERCLA Section 309 and the HERA and FIRREA extender provisions, even beyond those considered in *Rhodes* and *Nomura Home Equity Loan, Inc*. First, the nature of the underlying claims, including the type of harm and identity of the plaintiffs, differs greatly in actions applicable to CERCLA Section 309 and the HERA and FIRREA extender provisions. Second, unlike CERCLA Section 309, the HERA and FIRREA extender provisions establish a nondiscovery rule limitations period. Third, the dates of enactment vary, particularly between CERCLA Section 309 and HERA Section 4617(b)(12)(A). This is significant because the understanding and meaning of "statute of limitations" and "statute of repose" has changed over time.

First, the differing nature of the underlying claims in actions applicable to CERCLA Section 309 and the HERA and FIRREA extender provisions warrants an independent judicial analysis of the securities extender provisions. Take, for example, the type of harm. CERCLA Section 309's limitations period applies to state law claims for personal injury or property damage "caused or contributed to by exposure to any hazardous substance . . . released into the environment from a facility."[380] These environmental harms are distinct because exposure to hazardous wastes may cause injuries, like cancer, with long latency periods.[381] CERCLA Section 309 addresses a barrier to recovery peculiar to temporally distant injuries because traditional statutes of limitations and rules of repose can bar a plaintiff from suing before her symptoms even manifest.[382] Indeed the temporally distant nature of the harm was important to the courts of appeals' holdings in *Burlington*, *McDonald*, and *Waldburger*.[383]

By contrast, the HERA and FIRREA extender provisions apply to "any action" taken by the relevant federal agency.[384] This is the precise language that the Second Circuit and District Court for the Southern District of New York seized upon in holding that HERA Section 4617(b)(12)(A) had plain, unambiguous meaning.[385] The securities fraud

380. 42 U.S.C. § 9658 (2012).

381. *See supra* text accompanying note 7.

382. *See supra* notes 52–54, 57 and accompanying text.

383. *See* Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355, 364–65 (5th Cir. 2005); McDonald v. Sun Oil Co., 548 F.3d 774, 782–83 (9th Cir. 2008); Waldburger v. CTS Corp., 723 F.3d 434, 443–44 (4th Cir. 2013).

384. *See, e.g.*, 12 U.S.C. § 1787(b)(14) (2012).

385. *See supra* text accompanying notes 370–74. The Tenth Circuit also pointed to use of the phrase "any action" in contrasting a FIRREA extender provision from CERCLA Section 309. Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 764 F.3d 1199, 1208 (10th Cir. 2014).

claims brought by these federal agencies[386] are not inherently the result of temporally distant injuries: i.e., there is no barrier to agencies having knowledge of their claims prior to expiration of federal and state statutes of repose applicable to securities law. In turn, we may conclude that the discrete functions of statutes of repose and statutes of limitations[387] work well in the context of the HERA and FIRREA extender provisions, leading courts to a narrow construction of the term "statute of limitations" that excludes rules of repose.[388] At the very least, courts should take into consideration this distinction in the type of harm.

Additionally, the difference in identity of the plaintiffs may lend itself to an independent judicial analysis of the securities extender provisions. Whereas CERCLA Section 309 applies to state law claims brought by individuals,[389] HERA and FIRREA extender provisions apply to actions brought by federal agencies on behalf of failed financial institutions.[390] Since agencies are units of government created by statute[391]—in other words, created by Congress—courts should consider whether it is best for Congress itself to amend the HERA and FIRREA extender provisions if the legislature intended for "statute of limitations" to include rules of repose.

Second, the determination as to whether the HERA and FIRREA extender provisions preempt statutes of repose is distinct from the inquiry into CERCLA Section 309's meaning because the type of limitations period contemplated in these statutes differ from one another. On the one hand, CERCLA Section 309 creates a broad discovery rule that preempts only nondiscovery state statutes of limitations.[392] As noted, it seeks to remove the barrier to recovery posed by nondiscovery limitations periods for plaintiffs suffering from temporally distant injuries in hazardous waste litigation. On the other hand, the HERA and FIRREA extender provisions are nondiscovery, traditional limitations periods: i.e., they prescribe a limit "beginning on the date on which [a] claim accrues"[393] rather than on the date the plaintiff knew or should have known that the source of harm caused the injury. Thus, extending the HERA and FIRREA provisions to rules of repose contemplates preemption of all limitations periods—discovery and nondiscovery rules alike. This, in turn, has a far greater preemptive effect than holding similarly in the context of CERCLA Section 309. Courts have not, but should consider

386. *See supra* Part III.E.

387. *See supra* Part II.C.

388. *But see Nomura Home Equity Loan, Inc.*, 764 F.3d 1199; Fed. Deposit Ins. Corp. v. Rhodes, 336 P.3d 961 (2014).

389. *See* 42 U.S.C. § 9658 (2012).

390. *See* 12 U.S.C. § 1787(b)(14) (applying to actions taken by the NCUA); 12 U.S.C. § 1821(d)(14) (2012) (applying to actions taken by the FDIC); 12 U.S.C. § 4617(b)(12)(A) (2012) (applying to actions taken by the FHFA).

391. LISA SCHULTZ BRESSMAN ET AL., THE REGULATORY STATE 1 (2d ed. 2013).

392. *See* 42 U.S.C. § 9658.

393. *E.g.*, 12 U.S.C. § 4617(b)(12)(A)(i)(I).

this important distinction when interpreting extender provisions other than CERCLA Section 309.

Third, the dates of enactment vary, particularly between CERCLA Section 309 (1986) and HERA's extender provision (2008). This is significant given the development in the usage and meaning of "statute of limitations" and "statute of repose" over the years.[394] In *Federal Housing Finance Agency*, the District Court for the Central District of California attempted to show that between 1986 and 2008, Congress and courts continued to use the terms interchangeably.[395] Yet this is contrary to observations made in *CTS Corp. v. Waldburger* that there is now a clear distinction between statutes of limitations and statutes of repose.[396] The Ninth Edition of *Black's Law Dictionary*, published in 2009, also elucidates this distinction in meaning.[397] Regardless of whether the proper inquiry into statutory language entails focusing on the plain meaning of the provision at the time Congress enacted it, or simply determining the modern understanding and meaning of the terms, the result should be the same for HERA's extender provision. Courts, such as the one in *Federal Housing Finance Agency*, should accord greater respect to the modern usage and meaning of "statute of limitations" and "statute of repose" when construing recently enacted extender provisions under the framework set forth in *CTS Corp. v. Waldburger*.

V. CONCLUSION

Historically, Congress, courts, and scholars have confused the terms "statute of limitations" and "statute of repose." Yet in the context of federal extender provisions, a court's conclusion as to whether the term "statute of limitations" encompasses "statute of repose" will often mean the difference between a plaintiff having her day in court and a limitations period barring her claim. In turn, this Note explored the historical circuit split regarding whether CERCLA Section 309, which uses the term "statute of limitations," preempts state rules of repose. Additionally, it examined *CTS Corp. v. Waldburger* in which the U.S. Supreme Court held that CERCLA Section 309 preempts only state statutes of limitations. This decision has and will continue to have significant import for extender provisions found in other federal statutes. This Note has addressed how courts have used the federal appellate CERCLA Section 309 cases, as well as *CTS Corp. v. Waldburger*, to analyze the same issue of statutory interpretation found in various federal securities laws, including FIRREA and HERA. In the wake of the Supreme Court's ruling, this question is still very much developing and unresolved. As this Note recommends, however, these courts should still conduct their own

394. *See supra* Part II.C.

395. Fed. Hous. Fin. Agency v. Countrywide Fin. Corp. (*In re* Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.), 900 F. Supp. 2d 1055, 1063–66 (C.D. Cal. 2012).

396. CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182–84 (2014).

397. *See* BLACK'S LAW DICTIONARY, *supra* note 2, at 1546.

independent, rigorous analysis of the extender provision at issue, rather than relying solely on the holding in *CTS Corp. v. Waldburger*. Indeed the Nevada Supreme Court and Tenth Circuit have already taken such an approach. Since the understanding and meaning of "statute of limitations" and "statute of repose" has evolved, this approach will ensure the proper interpretation of unique extender provisions enacted by Congress at different times throughout history.