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New Wave of State Law Air Pollution Torts?

The U.S. Supreme Court's denial of certiorari in Bell v. Cheswick could pave the way for more state common law air pollution tort suits and greater exposure for emitters.

A new wave of state common law air pollution tort claims may be upon us, given the U.S. Supreme Court's recent announcement it would not review an August 2013 decision by the U.S. Court of Appeals for the Third Circuit that the Clean Air Act (CAA) does not preempt such claims. In the year since the Third Circuit's decision, a number of other courts have reached the same result and allowed air pollution tort claims to move forward. These decisions spell uncertainty for emitters, who must look beyond the requirements in their government-issued air permits to determine if their emissions are lawful. Even if they are in full compliance with the CAA, sources — including fossil fuel-fired power plants, petroleum refineries, and emitters of greenhouse gases (GHGs) — can be liable for claims that their emissions constitute a nuisance or trespass. As these state law tort claims can potentially result in larger damages awards than CAA citizen suits, plaintiffs may bring more of these air pollution tort claims in the future.

Background to *Bell v. Cheswick Generating Station*

The decision at the vanguard of what could be a new wave of pollution tort claims came in the case captioned *Bell v. Cheswick Generating Station*. Named plaintiff Kristie Bell and more than 1,500 residents of Springdale, Pennsylvania filed a class action complaint in the U.S. District Court for the Western District of Pennsylvania in April 2012 against the Cheswick Generating Station, a 570 megawatt coal-fired power plant in Springdale. The class claims that the plant emits harmful and noxious odors and particulate matter, including fly ash and coal combustion byproducts, and that the odors and particulate matter cause property damage and make the residents "prisoners in their own homes." The suit alleges a number of theories under Pennsylvania tort law, including nuisance, negligence, recklessness and trespass. Notably, the complaint does not allege that the power plant is violating the CAA or the facility's CAA Title V operating permit.

Initially, the plant operator prevailed in asking the district court to dismiss the suit. The court found that "permit[ting] the [residents'] common law claims would be inconsistent with the dictates of the Clean Air Act," and therefore any state law tort claims concerning air emissions from the power plant are preempted by the federal CAA. The court reasoned that the residents' state law tort claims would impermissibly interfere with the federal CAA's comprehensive regulatory system. Further, the court found that because the CAA already allows for citizen suits to enforce compliance with CAA requirements, allowing state law tort claims would be an unnecessary "parallel track."

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The Third Circuit's Decision in *Bell*

The Third Circuit disagreed and reversed the district court's dismissal of the case. In an August 2013 decision, the Third Circuit found that allowing state law tort claims is consistent with Supreme Court precedent, that Congress did not evince an intent to preempt state law tort claims, and that such claims would not disrupt the CAA's regulatory scheme.

In arguing to the Third Circuit that the CAA preempts state law tort claims, the plant operator relied heavily on *American Electric Power Co. v. Connecticut* (*AEP*), a 2011 Supreme Court decision holding that the CAA displaces federal common law tort claims concerning GHG emissions from power plants. *AEP* left open the question of whether, in addition to displacing the federal common law, the CAA preempts state common law tort claims concerning air emissions. Noting that "legislative displacement of federal common law does not require the same sort of clear and manifest congressional purpose demanded for preemption of state law," the Third Circuit rejected the power plant operator's argument that *AEP* is dispositive.

The Third Circuit then turned to the question of whether Congress intended for the CAA to preempt state common law tort claims. The Third Circuit found nothing in the CAA indicating congressional intent to preempt such claims. The power plant operator argued to the Third Circuit that the CAA is a comprehensive regulatory program designed to produce uniform and predictable standards. The operator also argued that subjecting CAA-compliant plants to various state law nuisance requirements would defeat the CAA's purpose. In doing so, the plant operator was forced to distinguish the case from *International Paper Co. v. Ouellette*, in which the Supreme Court held that the Clean Water Act (CWA) does not preempt certain state common law tort claims against dischargers. The power plant operator argued that the CWA contains a more robust savings clause than the CAA, and that while the CWA's savings clause preserves certain state common law tort claims concerning discharges to water, the CAA's savings clause does not preserve any state common law tort claims concerning emissions to air.

The Third Circuit sided with the residents. The court held that there is "no meaningful difference between the Clean Water Act and the Clean Air Act for the purposes of our preemption analysis." Thus, the CAA, like the CWA, preserves state common law tort claims, with one important caveat: the claims must be brought under the law of the state where the emitter is located. The Third Circuit explained that subjecting plants to only their home state's nuisance laws would ensure that such state law tort suits would not unduly complicate the CAA's comprehensive regulatory system, because plants would only have to look to one additional authority — their home state's laws — to determine the applicable standards.

The Third Circuit also rejected the plant operator's argument that pollution control is a political question that is nonjusticiable. The plant operator argued that the CAA requires careful balancing of environmental costs and economic benefits, and such policy decisions are best left exclusively to the legislative branch. The court disagreed with this argument, stating that courts have often heard suits addressing property damage from air emissions.

The Supreme Court's Denial of Certiorari in *Bell*

The power plant operator's petition to the Supreme Court reiterated the same arguments it made before the Third Circuit, including the arguments that *AEP* effectively eliminates state common law air pollution suits and that the CAA leaves no room for and would be disrupted by such suits. The operator further argued that the Third Circuit's decision would hinder the predictability of emission requirements, trigger a deluge of lawsuits, cause a negative economic impact on the energy industry and promote inefficient stop-gap pollution control. The Supreme Court denied the petition on June 2 without comment. This ruling

allows the suit to move forward in the Western District of Pennsylvania, where the parties are in the early stages of discovery, preparing to litigate the case on the merits.

Cases in the Wake of *Bell*

The Supreme Court's denial of review means that *Bell v. Cheswick Generating Station* is binding law for power plants and other emitters in Delaware, New Jersey and Pennsylvania. Perhaps more importantly, courts in other jurisdictions have been following the Third Circuit's reasoning and holding that the CAA does not preempt state law tort claims.

Cerny v. Marathon Oil Co.

In *Cerny v. Marathon Oil Co.*, plaintiffs Michael and Myra Cerny filed a complaint on May 21, 2013, in the 218th District Court of Karnes County, Texas, alleging that Marathon's oil field operations emit "noxious chemicals, noxious odors, and harmful chemical compounds." The Cernys argue that these emissions cause health problems, harm their dog, and damage the flora and fauna on their property. The Cernys' complaint sets forth nuisance and negligence claims under state law. Marathon removed the suit to the U.S. District Court for the Western District of Texas. When the Cernys moved to remand the case to state court, Marathon opposed the motion, arguing that the CAA's comprehensive regulatory scheme preempts state law tort claims. The court, which is located within the Fifth Circuit, rejected Marathon's arguments. Emphasizing that it views *Bell* as persuasive, the court found that the CAA does not preempt the Cernys' state law claims. The federal court remanded the case to state court on October 7, 2013.

Merrick v. Diageo Americas Supply, Inc.

The U.S. District Court for the Western District of Kentucky, which is located in the Sixth Circuit, held in a March 2014 decision in *Merrick v. Diageo Americas Supply, Inc.* that the CAA does not preempt state law air emission tort claims. Named plaintiff Bruce Merrick filed on June 15, 2012, a class action complaint against Diageo, which owns a whiskey distillery in Louisville, Kentucky. Plaintiffs, who are all residents or property owners located near the distillery, claim that Diageo's whiskey aging process releases ethanol into the atmosphere. The residents further claim that this airborne ethanol combines with condensation on their property and causes black "whiskey fungus" to cover "everything exposed to the outdoors." The class' complaint asserts causes of action in negligence, nuisance, and trespass and asks the court to require Diageo to install ethanol-control technology at its distillery.

Diageo sought dismissal of the claims, citing two factually similar cases from Kentucky's state trial courts, which both held that allowing plaintiffs to press state law claims could "undermine [the CAA's] regulatory structure." However, the Western District of Kentucky disagreed with Diageo and the reasoning of the Kentucky trial courts, explicitly endorsing the Third Circuit's analysis in *Bell* as more persuasive. The court held that the CAA does not preempt plaintiffs' state law claims. In a March 18, 2014, decision, the court allowed the nuisance and trespass claims to move forward, as well as plaintiffs' request for injunctive relief, but dismissed the negligence claims. Diageo has since petitioned the U.S. Court of Appeals for the Sixth Circuit to review the decision.

Freeman v. Grain Processing Co.

On June 13, 2014, the Supreme Court of Iowa denied a motion for summary judgment in *Freeman v. Grain Processing Co.*, rejecting the argument that the CAA preempts state law tort claims. In *Freeman*, eight residents of Muscatine, Iowa filed a class action suit on behalf of local homeowners against Grain Processing, which owns a corn milling facility. The class claims that the mill emits noxious odors, particulate matter, acetaldehyde, sulfur dioxide, starch and hydrochloric acid, putting the residents' health at risk and causing them to "suffer persistent irritations, discomforts, annoyances, [and] inconveniences."

The class asserts theories of negligence, nuisance, and trespass and seeks damages for the lost use and enjoyment of its properties, punitive damages and injunctive relief.

In moving to dismiss, Grain Processing argued that allowing the plaintiffs' claims to proceed would "upset the [CAA's] balance between environmental protection and economic disruption" and disrupt the predictability of the CAA. Grain Processing also argued that Congress's amendments to the CAA in 1990 made the CAA more comprehensive than the CWA was when the U.S. Supreme Court held that the CWA preempted only federal common law in its 1987 *Ouellette* decision. Grain Processing urged the court to take the 2011 *AEP* decision as controlling authority and hold that the amended and more expansive CAA preempts state common law claims. Lastly, Grain Processing claimed that the CAA's savings clause authorizes state government action against emitters but does not preserve claims by private parties.

The Iowa Supreme Court discussed a broad segment of CAA preemption precedent, including *Bell*, and found that the CAA's cooperative federalism framework is its "hallmark," suggesting that state law requirements are sometimes permitted to be more stringent than federal CAA requirements. The court further reasoned that state common law actions are intended to protect individual rights to specific property, in contrast to the CAA's more general air quality goals. Thus, were the CAA to preempt state law tort claims, plaintiffs may be left without a remedy for injuries to their property. Through this reasoning, the Iowa Supreme Court ultimately came to the same conclusion as the Third Circuit in *Bell* and held that the CAA does not preempt state law tort claims.

Little v. Louisville Gas & Elec. Co.

Most recently, on July 16, 2014, in a case captioned *Little v. Louisville Gas & Elec. Co.*, the U.S. District Court for the Western District of Kentucky (which also ruled on *Merrick* earlier this year) again found that the CAA's savings clause permits individuals to bring state common law tort claims against emitters. Named plaintiff Kathy Little and other residents of Louisville, Kentucky filed suit on December 16, 2013, against the Cane Run coal-fired power plant, alleging that it emits coal ash that covers residents' homes and properties. The plaintiffs allege violations of the CAA and the Resource Conservation and Recovery Act, and also bring state law claims of nuisance, trespass, negligence, negligence per se and gross negligence. The power plant owner moved to dismiss the claims. With respect to the state common law claims, the owner cited *Ouellette* and *AEP* in arguing that the CAA preempts state air emission tort claims. Approvingly citing *Bell* and *Merrick*, the court denied the motion to dismiss.

As these cases show, *Bell* has been cited frequently in recent CAA preemption cases, and all the reported decisions since *Bell* have reached the same conclusion as the Third Circuit — that the CAA does not preempt state law air emission tort claims. Many of the above-referenced courts even explicitly stated that they were relying on *Bell*'s reasoning. In terms of persuasive value, *Bell* is gaining influence in both state and federal courts.

The Motivation Behind State Law Tort Claims

One question many courts have not explicitly addressed is: why might plaintiffs prefer to bring state law tort claims instead of CAA citizen suits? The answer may have to do with remedies.

Under the citizen suit provision of the CAA (42 USC §7604), a successful plaintiff can force an emitter to comply with a CAA emission standard or limitation, but the plaintiff cannot recover any compensation other than attorney's fees. Although a court hearing a CAA citizen suit can impose civil penalties under §7604, these must be deposited into a special fund in the U.S. Treasury, and neither the plaintiffs nor their attorneys see any of this money (although a court can direct that up to US$100,000 be used for projects that benefit public health or the environment). In contrast, when plaintiffs sue under state tort law,

they can seek to recover for themselves the full range of damages permissible under state law, including actual damages for injury to property, depreciation in property value, punitive damages and injunctive relief.

Compliance with the CAA is Not a Safe Harbor

Practically speaking, compliance with the CAA is necessary but not sufficient. Under *Bell*, on top of this base requirement of complying with the CAA and permits issued under it, sources must also look to the standards of their home state's tort law, particularly prohibitions against creating a public nuisance. CAA compliance might still play a role, as the requirements imposed by the CAA (or requirements imposed by state pollution control agencies or local air districts) could in certain instances provide courts with benchmarks to determine whether there is an actionable nuisance or trespass. But CAA compliance is not an automatic safe harbor defense against state common law tort claims.

Over the past year, multiple courts in other circuits have reached the same conclusion as the Third Circuit did in *Bell*. With the U.S. Supreme Court's tacit approval, and the potential for significant damages, a new wave of state common law air pollution tort claims may be in the offing.

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