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CLEAN AIR ACT

PREEMPTION

An emerging area of litigation addressing whether the federal Clean Air Act preempts state tort claims is raising issues in recent lawsuits filed against stationary sources of emissions. In the cases, judges are considering whether amorphous common-law standards conflict with the highly prescriptive, technical regulations promulgated by the Environmental Protection Agency and state regulators charged with implementing the CAA.

Litigating the Clean Air Act: Preemption of State Emissions Torts

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Several new cases address whether the federal Clean Air Act (CAA) preempts state tort claims filed against factories, oil and gas operations, power plants and other so-called ''stationary sources'' of emissions. In these cases, judges are considering whether amorphous common-law standards conflict with the highly prescriptive, technical regulations promulgated by the United States Environmental Protection Agency (EPA) and state regulators charged with implementing the CAA.

This emerging area of litigation raises important issues for companies managing legal risks arising from emissions. Recent preemption cases and practice pointers are discussed below.

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The opinions expressed here do not represent those of BNA, which welcomes other points of view.

North Carolina ex rel. Cooper v. Tenn. Valley Auth.

The recent spate of litigation over preemption of emissions torts began with *North Carolina ex rel. Cooper v. Tenn. Valley Auth.* [hereinafter *Cooper*].[1] There,

[1] *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 2010 BL 169712 (4th Cir. 2010).

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the U.S. Court of Appeals for the Fourth Circuit held that the CAA preempted the state of North Carolina's public nuisance suit against the Tennessee Valley Authority (TVA).

The district court had, on a common-law basis, entered a mandatory injunction ordering TVA to install emissions controls on coal-fired power plants in Alabama and Tennessee. In vacating the injunction, the Fourth Circuit explained at length the problems raised by a common law injunction against a highly regulated industry. The court held that the CAA preempted North Carolina's lawsuit because it sought to apply the law of North Carolina extra-territorially to out-of-state coal fired power plants. [2]

The Fourth Circuit also held that the CAA preempted judicial tort remedies because they conflict with the CAA's regulatory scheme in the core area of the National Ambient Air Quality Standards (NAAQS), the federal air quality standards established by EPA and administered by states through state implementation plans (SIP) and provisions addressing interstate transport of pollution.[3]

Characterizing the plaintiffs' suit as nothing more than a ''collateral attack'' on these well-established mechanisms for protecting air quality,[4] the court expressed concerns that North Carolina injunctions would encourage ''a balkanization of clean air regulations and a confused patchwork of standards.'' [5]

The court urged judicial restraint in CAA matters: ''Congress . . . thought the problem [of emissions standards] required a very high degree of specialized knowledge in chemistry, medicine, meteorology, biology, engineering, and other relevant fields that agencies rather than a court were likely to possess.''[6]

Finally, the court held that TVA's power plants were not nuisances under the laws of their home states because they complied with the CAA.[7]

Bell v. Cheswick Generating Station

The preemptive effect of the CAA on state tort claims arose again in *Bell v. Cheswick Generating Station*.[8]

In *Bell*, a putative class of residents near a Pennsylvania coal-fired power plant filed several tort claims alleging that the defendant electric utility was liable for property damage due to emissions from the plant.[9] The district court held that the CAA preempted the claims because holding otherwise would ''require an imperceptible determination regarding the reasonableness of an otherwise government regulated activity.''[10]

The Third Circuit reversed, holding that the putative class action could proceed. The court's analysis turned on the savings clause in Section 116 of the act, which provides that:

> Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution.[11]

The Third Circuit reasoned that this savings clause preserved the plaintiffs' claims because they were brought under the law of the power plant's home state.[12]

In reaching that result, the court relied heavily on *Int'l Paper Co. v. Oullette*,[13] where the Supreme Court found that a similarly worded savings clause in the Clean Water Act preserved in-state tort claims. While the Fourth Circuit in *Cooper* reasoned that the savings clauses could not preserve tort remedies that conflict with the CAA, the Third Circuit relegated the Fourth Circuit's reasoning to ''public policy considerations'' that had been adequately addressed by *Ouellette*'s holding that any tension between CAA permit obligations and requirements under state common law is a permissible aspect of a cooperative state-federal regulatory system.[14]

The Third Circuit may not have the last word in *Bell*. The defendant utility filed a petition for a writ of certiorari in the U.S. Supreme Court on February 20, 2014.[15] The response is currently due on April 25, 2014.

Cerny v. Marathon Oil Corp.

Cerny v. Marathon Oil[16] addressed the preemption of emissions torts in the oil and gas industry.

The plaintiffs sued an oil company for alleged torts arising from hydraulically fracturing natural gas wells, alleging that emissions from the natural gas production caused personal injuries.[17] The district court initially entered an order and opinion denying the plaintiffs' motion to remand the case to state court because the CAA completely preempted the state tort claims and therefore provided a basis for federal question jurisdiction.[18]

However, the court in *Cerny* reconsidered and granted plaintiffs' motion to remand. The court began by acknowledging that ''very few cases have considered whether the CAA preempts state common-law claims of nuisance and negligence based on air emissions so as to provide for federal question jurisdiction.'' Ultimately, the district court was persuaded by the Third Circuit's opinion in *Bell* and found that the CAA did not completely preempt state tort law claims.

Nonetheless, the court took great pains to preserve the defendant's ability to raise a preemption defense in state court: ''the Court's holding regarding complete preemption has no preclusive effect on the state court's

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[2] 615 F.3d at 296, 306-08 (citing *Int'l Paper Co. v. Oullette*, 479 U.S. 481, 25 ERC 1457 (1997)).

[3] 615 F.3d at 299-301.

[4] *Id.* at 301.

[5] *Id.* at 296.

[6] *Id.* at 305.

[7] *Id.* at 309-10.

[8] *Bell v. Cheswick Generating Station*, 734 F.3d 188, 77 ERC 1395, 2013 BL 221428 (3d Cir. 2013).

[9] *Id.* at 192-93.

[10] *Bell v. Cheswick Generating Station*, 903 F.Supp.2d 314, 2012 BL 267976 (W.D. Pa. 2012); *rev'd*, 734 F.3d 188, 77 ERC 1395, 2013 BL 221428 (3d Cir. 2013).

[11] 42 U.S.C. § 7416.

[12] 734 F.3d at 195-97.

[13] 479 U.S. 481,25 ERC 1457 (1997)

[14] 734 F.3d at 197-98 (citing *Ouellette*, 479 U.S. at 498-99).

[15] *See GenOn Power Midwest, L.P. v. Bell*, U.S., No. 13-1013, *cert. filed* Feb. 20, 2014.

[16] *Cerny v. Marathon Oil Corp.*, 2013 BL 274981, W.D. Tex., No. SA-13-CV-562-XR, Oct. 7, 2013.

[17] *See* Plaintiffs' First Amended Complaint, *Cerny*, W.D. Tex., No. SA-13-CV-562-XR, *am. compl. filed* Aug. 9, 2013.

[18] *Cerny*, 2013 BL 211251, W.D. Tex., No. SA-13-CV-562-XR, Aug. 6, 2013, *vacated by* 2013 BL 274981.

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consideration of the merits of a substantive preemption defense.''

Freeman v. Grain Processing Corp.

The CAA preemption defense prevailed in a recent Iowa State Court action brought against the owner of a corn processing facility.[19]

Residents near the facility filed a proposed class action under nuisance, negligence and trespass theories, alleging that the facility's emissions damaged 17,000 properties within a three-mile radius.[20]

The Iowa district court granted the defendant summary judgment based on conflict preemption because ''Plaintiffs are asking the jury to make a judgment about the reasonableness of Defendant's air emissions . . . a judgment that has been entrusted by Congress to the EPA.''[21]

Tracking *Cooper*, the court found that the CAA's saving clause did not preserve tort remedies that conflicted with the Act's regulatory scheme.[22] The court also relied upon the reasoning of the U.S. Supreme Court in *American Electric Power v. Connecticut*, which held that the CAA displaced federal common law claims against power plants for greenhouse gas emissions.[23]

In rejecting federal common law, the Supreme Court found that EPA's expertise and resources made it far better equipped than individual judges to determine an acceptable level of emissions.[24] Likewise, the state court found that EPA was in a better position to determine the proper amount of emissions from the defendant's facility.

The *Freeman* case is on appeal to the Iowa Supreme Court. The trial court granted summary judgment before the Third Circuit decided *Bell*, which indicates that the Iowa Supreme Court may have to reconcile that decision with *Cooper*.

Merrick v. Diageo Americas Supply Inc.

Most recently, the U.S. District Court for the Western District of Kentucky has weighed in on this issue in *Merrick v. Diageo Americas Supply Inc.*.[25]

Merrick concerned common law negligence, nuisance, and trespass claims against a Kentucky whiskey distillery, based on allegations that ethanol emissions from the distillery warehouses were escaping to nearby properties and causing the growth of ''whiskey fungus.''

The court expressly considered whether to follow the competing opinions from the Third and Fourth Circuits in *Bell* and *Cooper*, ultimately favoring *Bell* as a more faithful application of the Supreme Court's decision in *Ouellette*, as well as a factually more analogous case involving the application of the source state's common law.

Practical Considerations in Litigating CAA Preemption

CAA preemption of state claims is a broad topic, but a few practice tips bear emphasis.

Expertise in the CAA is critical. CAA regulations set emissions standards, impose monitoring obligations, and establish several other highly prescriptive requirements. Taking a ''deep dive'' into the regulations can help tell the story of why a tort claim might disrupt the carefully balanced regulatory scheme, a central factor in convincing the Fourth Circuit in *Cooper* to depart from the mechanical application of *Ouellette* as otherwise allowing any state common law claim to proceed no matter how disruptive to implementation of the CAA.

The split between *Bell* and *Cooper* on this point highlights a key aspect of *Ouellette*: the Supreme Court's assertion that to the extent application of state common law ''may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable.''[26]

As the Fourth Circuit recognized in *Cooper*, that prediction is not necessarily true in certain cases; common law nuisance claims operate ''at such a level of generality as to provide almost no standard of application,'' making it extremely difficult ''to derive any manageable criteria.''[27] While *Ouellette* and *Bell* may make it quite difficult to argue that the enactment of the CAA preempted the field of air quality regulation and '' 'left no room' for state causes of action'' in any circumstances,[28] *Cooper* suggests that a defendant can still successfully pursue an argument for conflict preemption by demonstrating that, in a given case, the Supreme Court's suggestion that state and federal law can be reconciled without undercutting the CAA is not applicable.

Building a detailed record and thoroughly educating the court about the workings of the CAA is important in such a case to show that a given air pollutant is already covered by ''the defined standards of the Clean Air Act'' and therefore need not be regulated through ''an ill-defined omnibus tort of last resort.''[29]

In litigating tort claims over oil and gas operations, for example, it would be important to understand the recent CAA regulations governing those operations, including the first federal emissions standards for natural gas wells that are hydraulically fractured.[30]

Having a sense of when to raise preemption issues is also important. Early resolution avoids the cost and burden of discovery. Yet a bare record on the pleadings might make it difficult to show a conflict with the CAA, at least until the case law is further developed. The successful preemption defenses in *Cooper* and *Freeman*

[19] *See Freeman v. Grain Processing Corp.*, No. LAVCV 021232 (Iowa Dist. Ct. Apr. 13, 2013).
[20] *Id.* at 1.
[21] *Id.* at 13.
[22] *Id.* at 14-17.
[23] *Am. Elec. Power v. Connecticut*, 131 S. Ct. 2527, 72 ERC 1609, 2011 BL 161239 (2011).
[24] *Id.* at 2539-40.
[25] *Merrick v. Diageo Ams. Supply, Inc.*, 2014 BL 76075, W.D. Ky, No. 3:12-CV-334-CRS, March 19, 2014.
[26] 479 U.S. at 499.
[27] 615 F.3d at 302.
[28] *Ouellette*, 479 U.S. at 492.
[29] *Cooper*, 615 F.3d at 302; *cf. Cerny*, 2013 BL 211251, W.D. Tex., No. SA-13–CV-562–XR, Aug. 6. 2013 (''Defendants do not provide the Court with any citation or argument as to how the Clean Air Act and any EPA regulations would be impacted by the allowance of Plaintiffs' state law claims.''), *vacated by* 2013 BL 274981.
[30] *See* 77 Fed. Reg. 49,489 (Aug. 16, 2012).

were both based on a complete record after summary judgment or trial.

Record-building is also important to other defenses where a preemption argument fails, as in *Bell* and *Merrick*. In particular, demonstrating compliance with applicable federal standards may be sufficient to show that a source's air emissions do not cause cognizable injury to a plaintiff, providing the basis for a challenge to the plaintiff's standing as an important threshold defense.

This line of argument has had mixed results in environmental cases, with the Second Circuit recently holding that a plaintiff could still theoretically demonstrate injury caused by contamination below an applicable Maximum Contaminant Level for drinking water.[31]

Given the fact-specific nature of this inquiry, a defendant must construct a record showing that applicable CAA standards are sufficiently protective and that it has fully complied with those standards. Additionally, the Second Circuit's decision suggests that even where a defendant can demonstrate compliance with a CAA permit, it may be necessary to provide context for what the relevant permit requirements mean in terms of protecting human health and the environment in order to convince a fact-finder that the plaintiffs have not been injured or that the defendant has met the applicable standard of care.

Since the CAA itself may not prove a barrier to a state common law claim, it is also important to be aware of the contours of a state's CAA implementation plan in order to determine whether the state's own statutory provisions regarding air pollution may displace a plaintiff's common law claim. For example, a number of state SIPs contain ''no more stringent than'' provisions that bar the imposition of any control requirements above the minimum ''floor'' set by the CAA. The Pennsylvania Code includes such provisions,[32] a fact that went unnoted by the Third Circuit in *Bell*.[33]

Conclusion

Strategic consideration of the CAA is necessary in litigating state common law claims over emissions from factories and other industrial facilities.

Barring further action by the Supreme Court, CAA preemption litigation will increase. Potential conflicts between the CAA and state obligations are inevitable because EPA's regulations are rapidly growing into areas of economic activity previously left to states, including emissions from hydraulically fractured wells.

The divergent preemption cases, exemplified by *Cooper* and *Bell*, fuel additional litigation.

Even where a preemption defense fails, the CAA may provide grounds for raising a standing defense or demonstrating that a defendant acted reasonably and within the standard of care.

Of course, the CAA is not dispositive in every state common law case. But ignoring the CAA is certain to benefit the opposing party by taking an important argument off the table.

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[31] *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 107, 77 ERC 1254, 2013 BL 198437 (2d Cir. 2013).

[32] *See* Pennsylvania Air Pollution Control Act, 1959 Act 787, sections 4.2, 6.6

[33] *See* 734 F.3d at 190 (noting that ''states are expressly allowed to employ standards more stringent than those specified by the federal requirements'').

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