Struggle over Federal Environmental Law Preemption of Public Nuisance Suits Heats Up in Kentucky

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It’s been a long wait for those who believe the federal Clean Air Act preempts public nuisance claims under state common law.

When the Supreme Court reversed and remanded *Connecticut v. American Electric Power* in 2011, it refused to rule on the preemption issue—leaving the question for the U.S. Court of Appeals for the Second Circuit to resolve on remand. Before that could happen, however, the plaintiffs withdrew their complaints—and the opportunity vanished.

When a federal district court granted dismissal of a public nuisance claim in *Bell v. Cheswick Generating Station*, the opportunity rose again. Hopes were high that the Third Circuit would affirm the dismissal, but alas, the court reversed. Nevertheless, the case rose to the Supreme Court on a petition for certiorari. Numerous *amicus curiae* briefs were submitted to support the petition, but the Supreme Court denied review. Many were left wondering whether the Supreme Court’s remand of the issue in *AEP* truly reflected the Court’s interest in the issue—or whether it was simply a matter of appellate housekeeping.

Hope arose again when an Iowa trial court decided that the CAA preempted Iowa public nuisance claims. Here, the conflict was even more exacerbated than in *Bell*—because the plaintiffs actually sought to force the replacement of equipment “grandfathered” by permits issued under the CAA. On appeal to the Iowa Supreme Court, however, the judgment was reversed as the Court followed *Bell* to a similar result. Although a petition for certiorari was filed with the U.S. Supreme Court, the Court once again denied review without comment.

But the battle for Clean Air Act preemption isn’t over. The controversy emerged yet again as a hot issue in state and federal courts in Kentucky. The Kentucky controversy spawned several nuisance lawsuits that targeted releases of ethanol from whiskey distilleries. Plaintiffs in those cases, who are nearby residents, claimed that the releases of ethanol into the atmosphere promoted the growth of “whiskey fungus”—which resulted in a “black film that covered virtually every outdoor surface.” They sought damages and an injunction to require the defendant to install ethanol control mechanisms not required by its CAA permits. In each case, the defendants moved to dismiss the nuisance claims, arguing that they were preempted by the CAA. The two Kentucky state trial courts rendered conflicting decisions, one of which refused dismissal, and one which granted it. The federal district court also granted
dismissal, but nevertheless certified the preemption issue for interlocutory appeal to the Sixth Circuit. Recently the Kentucky court of appeals reversed the dismissal granted by one of the trial courts. Following *Bell*, the appellate court held that the case was not preempted by the CAA. Like *Bell* and every other case that has refused to find CAA preemption, the Kentucky appellate court rested its decision on the United States Supreme Court’s decision in *International Paper Co. v. Ouellette*, where the Court held that the “savings clause” of the Clean Water Act demonstrated Congress' intent to preserve nuisance claims under state law. Courts that have relied on *Ouellete*’s use of the Clean Water Act to control preemption under the CAA have found “no meaningful differences” between the savings clauses in the two statutes—but there are significant differences between the statutes that dictate a different result. Given the plethora of litigation in Kentucky, which may reach the Kentucky Supreme Court, as well as the federal case that is now rising to the Sixth Circuit, it is important to understand those controlling differences.

Unlike the CAA, the CWA contains a unique and exceptionally broad savings clause that plainly preserves extraordinarily broad powers for the states. That clause provides that “nothing in this [Act] shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” Such language is conspicuously absent from the CAA—thus demonstrating Congress’ intent to circumscribe the power of states to regulate air pollution more narrowly.

Although the *Bell* court determined that the CWA’s language was excluded from the CAA because, unlike water, no “jurisdictional boundaries or rights” apply to air, that conclusion overlooks Supreme Court jurisprudence that, prior to the CAA’s passage, expressly recognized each state’s exclusive interest in its air resources:

The State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.

To the extent the CAA allows State legislatures and regulatory authorities to adopt more stringent emission standards, these “independent” interests of the States as parens patriae remain viable. Since the savings clause of the CAA is substantially narrower in focus than the expansive clause in the CWA, the preemption analysis must focus solely on the CAA’s language, not the broader clauses of the CWA.

Properly construed, nothing in the CAA purports to preserve claims under state common law, whether they are grounded in public nuisance or any other cause of action. Instead, the Act provides:
[N]othing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or (2) any requirement respecting control or abatement of air pollution.\textsuperscript{12}

Significantly, this section merely preserves the rights of sovereign entities, i.e. “States” and “political subdivisions” to set more conservative emission standards by statutes or regulations than those provided by CAA requirements. Similar terms are defined elsewhere in the Act, and there is no reason to presume they should have a different meaning here.\textsuperscript{13} Hence, the Supreme Court’s decision in \textit{Ouellette} regarding the CWA does not control cases under the CAA. Instead, the issue must be decided according to the CAA’s unique language.

If the Kentucky appellate courts and the Sixth Circuit focus on this critical distinction, they have an opportunity to correct the trail of errors that began with \textit{Bell} and continued with \textit{Freeman}. Such holdings will preserve the reliability and stability of the CAA’s permitting systems and avoid \textit{ad hoc} disruption of that salutary system by conflicting rulings in public nuisance cases under state common law.

\textbf{NOTES}

1. \textit{See AEP}, 131 S.Ct. at 2540 (None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand.’).


6. \textit{See Merrick v. Diageo Americas Supply, Inc} (W.D. Ky. 2014) (following \textit{Bell} and refusing to find preemption) The Western District of Kentucky sits in Jefferson County, so the conflict with Merrick v. Brown-Forman is within the same county by court sitting a few blocks from each other.


8. \textit{Id.} at 5-7.


11.  *Cf Massachusetts v. EPA* (recognizing that “in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.”).


13.  *See 42 U.S.C. § 7604(f)(defining emission “standard” and “limitation” solely as statutory or regulatory requirements).*

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