COMMENT

Four Things You Need to Know About Courts' Rejection of Clean Air Act Preemption of State Common-Law Claims

by Matthew Morrison and Bryan Stockton

Matthew Morrison is a Partner, and Bryan Stockton is an Associate, with Pillsbury Winthrop Shaw Pittman LLP.

I. Introduction

In two decisions released in November 2015, *Merrick v. Diageo Americas Supply, Inc.*, and *Little v. Louisville Gas & Electric Co.*, the U.S. Court of Appeals for the Sixth Circuit unambiguously held that the Clean Air Act (CAA)[1] does not preempt state common-law claims brought against regulated sources of air emissions in the same state.[2] As we noted in an April 2015 *Environmental Law Reporter* comment,[3] a facility that is otherwise in compliance with CAA emission requirements can still face lawsuits by neighboring landowners for traditional torts such as nuisance and trespass. Because these Sixth Circuit decisions closely follow other similar decisions from the U.S. Court of Appeals for the Second and Third Circuits and the Iowa Supreme Court, *Merrick* and *Little* are not outliers, but instead reflect a growing base of precedent across multiple states.

Many practitioners and observers had expected courts to treat state common-law claims the way the U.S. Supreme Court dealt with *federal* common-law claims—as being preempted by the CAA.[4] In light of these decisions, emitting sources may want to factor in potential exposure to state common-law claims when reevaluating their compliance strategies.

II. Four Take-Away Points

Here are four things you should know about these CAA preemption cases.

A. *Wide Variety of Industrial and Utility Sources Implicated*

The decisions apply to state common-law claims brought against a source within the same state. Plaintiffs in the two latest cases had complained that the offending sources were emitting dust and particulates onto their property. In *Merrick*, fugitive ethanol emissions from whiskey warehouses fostered growth of whiskey fungus on neighboring properties[5]; in *Little*, plaintiffs complained of dust and coal ash from the stack, sludge plant, and landfill of a power plant.[6] The fact patterns were, in the words of the Sixth Circuit, "materially indistinguishable"[7] from a similar Third Circuit case, *Bell v. Cheswick Generating Station*,[8] and an Iowa Supreme Court case, *Freeman v. Grain Processing Corp.*[9]

In *Bell*, a putative class of individuals living near the coal power plant sued under state common-law nuisance, negligence and recklessness, and trespass law, alleging that the coal plant emitted odors, ash, and contaminants on their property.[10] In *Freeman*, Iowa residents alleged that harm-

Authors' Note: The authors work in the firm's Environment, Land Use, and Natural Resources practice in Washington, D.C. Mr. Morrison was formerly a Deputy Director in the U.S. Environmental Protection Agency (EPA) enforcement program and a Senior Counsel in the Environmental Enforcement Section of the U.S. Department of Justice.

1. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
2. Merrick v. Diageo Americas Supply, Inc., No. 14-6198, 2015 U.S. App. LEXIS 19096 (6th Cir. Nov. 2, 2015); Little v. Louisville Gas & Elec. Co., No. 14-6499, 2015 U.S. App. LEXIS 19095 (6th Cir. Nov. 2, 2015).
3. Matthew Morrison & Bryan Stockton, *What's Old Is New Again: State Common-Law Tort Actions Elude Clean Air Act Preemption*, 45 ELR 10261, 10282 (Apr. 2015).
4. *See* American Elec. Power Corp. v. Connecticut, 131 S. Ct. 2527, 2540, 41 ELR 20210 (2011).
5. *Merrick*, 2015 U.S. App. LEXIS 19096, at *2.
6. *Little*, 2015 U.S. App. LEXIS 19095, at *3.
7. *Merrick*, 2015 U.S. App. LEXIS 19096, at *13.
8. 734 F.3d 188, 196-97, 43 ELR 20195 (3d Cir. 2013), *reh'g en banc denied*, No. 12-4216 (3d Cir. Sept. 23, 2013), *cert. denied sub nom.* GenOn Power Midwest, L.P. v. Bell, 134 S. Ct. 2696 (2014).
9. 848 N.W.2d 58, 69 (Iowa 2014), *cert. denied*, No. 14-307, 2014 WL 4542764, at *1 (U.S. Dec. 1, 2014).
10. *Bell*, 734 F.3d at 196-97.

ful pollutants and noxious odors emitted onto their land from a nearby corn wet-milling facility posed a nuisance. Additionally, although the Sixth Circuit did not mention the decision, the Second Circuit reached a similar conclusion in a 2013 ruling. In that case, the Second Circuit held that the CAA did not preempt claims against Exxon Corp. for groundwater contamination caused by historical use of methyl tertiary butyl ether (MBTE) (which was a means of complying with the CAA's Reformulated Gasoline Program oxygenate requirement).[11] The holdings in these cases could be applied to other regulated activities with dust, contamination, or fugitive emission impacts transcending property boundaries.

B. The Sixth Circuit's Rulings Were Unambiguous Only as to CAA Preemption of Intrastate Common-Law Claims

The Sixth Circuit based its decisions on the text of the CAA. The CAA's so-called states' rights saving clause provides that "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."[12] Because state courts act for the "State" and "any requirement respecting control or abatement of air pollution" includes the common law of the courts, "[s]tate common law standards are thus 'requirements' adopted by 'States,' such that the Clean Air Act states' rights savings clause preserves them against preemption."[13] No such saving clause exists in the CAA for federal common-law claims, which courts distinguish from state common-law claims, and which are preempted under the CAA.[14] The CAA reserves only for states (and by extension state courts) the ability to implement more stringent emissions requirements than those established by the CAA; the law does not give federal courts any such authority.[15]

Additionally, according to the Sixth Circuit, the strong presumption against federal preemption of state law means that "even if the express language of the states' rights savings clause here did not preserve state common law claims, principles of federalism and respect for states' rights would likely do so in the absence of a clear expression of such preemption."[16] The court punted to Congress the responsibility for determining whether requiring compliance with state common law, as well as with the comprehensive CAA regulatory regime, would impose too substantial a compliance burden on industry.[17]

11. In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liability Litigation, 725 F.3d 65, 96-104 (2d Cir. 2013).
12. 42 U.S.C. §7416.
13. *Merrick*, 2015 U.S. App. LEXIS 19096, at *15.
14. *Id.* at **16-18.
15. *Id.* at **20-21.
16. *Id.* at *22.
17. *Id.* at *26.

C. Claims Allowed by These Cases Require Commonality of Injury and Causation

While state common-law claims may be asserted against in-state sources where plaintiffs allege that the CAA does not adequately protect individual rights, if plaintiffs file a class action suit, the court may refuse to certify the class if the plaintiffs do not share the requisite commonality of law and fact required under Rule 23 of the Federal Rules of Civil Procedure. The common-law claims at issue in these cases—such as nuisance and trespass—require highly individualized judicial determinations. For example, the environmental damage to each plaintiff in the class could depend on the size of the plaintiff's property and its proximity to the emitting source, among other factors.

In fact, after the Third Circuit held in *Bell* that the plaintiffs' common-law claims could proceed, the district court subsequently granted the defendant's motion to strike the class allegations. By defining the class as "residents or homeowners who live or own real estate within one (1) mile of the Cheswick Facility who have suffered similar damages to their property by the invasion of particulates, chemicals, and gases from Defendant's facility which thereby caused damages to their real property," the plaintiffs had defined an impermissible "fail-safe" class.[18] In other words, because the plaintiffs linked the class definition with the "ultimate issue of liability," the court could not certify the class without "conduct[ing] mini-hearings in order to determine who belongs within the class and who does not, rendering the process administratively infeasible and therefore unascertainable."[19] So, while courts may be opening the door to common-law claims, class-action plaintiffs will have a difficult time establishing the necessary commonality of law and fact needed to certify a class.

D. Supreme Court Review Is Unlikely

The decisions in *Merrick* and *Little* align with the consistent recent trend of courts finding no CAA preemption of state common-law claims against intrastate sources.[20] The Supreme Court has already denied certiorari in *Bell* and *Freeman*.[21] It is therefore unlikely that the Supreme Court will grant cert in *Merrick* or *Little*, as the cases are essentially identical.[22] If the Sixth Circuit had reversed the

18. Bell v. Cheswick Generating Station, GenOn Midwest Power, L.P., No. 12-929 (W.D. Pa. Jan. 28, 2015); *see* Bell v. Cheswick Generating Station, No. 12-929, 2015 U.S. Dist. LEXIS 56219, n.1 (W.D. Pa. Apr. 29, 2015) (referring to court's prior rejection of class certification).
19. *Bell*, No. 12-929, slip op. at 7.
20. *See* In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liability Litigation, 725 F.3d 65, 97 (2d Cir. 2013) ("[T]he Clean Air Act and its 1990 Amendments contain no explicit preemption directive expressing a Congressional intent to override state tort law.").
21. Bell v. Cheswick Generating Station, 734 F.3d 188, 43 ELR 20195 (3d Cir. 2013), *reh'g en banc denied*, No. 12-4216 (3d Cir. Sept. 23, 2013), *cert. denied sub nom.* GenOn Power Midwest, L.P. v. Bell, 134 S. Ct. 2696 (2014); Freeman v. Grain Processing Corp., 848 N.W.2d 58 (Iowa 2014), *cert. denied*, No. 14-307, 2014 WL 4542764, at *1 (U.S. Dec. 1, 2014).
22. A similar case arose in the U.S. Court of Appeals for the Fifth Circuit, but due to recusals and insufficient quorum, there is no Fifth Circuit en banc

district court and held that the claims were preempted, the resulting split between the Second and Third Circuits and the Sixth Circuit might have increased the chances that the Supreme Court would grant certiorari to an appeal.

It is also worth noting that the Sixth Circuit did not even see a circuit split resulting from its decision; it distinguished,[23] rather than disagreed with, *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, in which the U.S. Court of Appeals for the Fourth Circuit held that the CAA preempted common-law nuisance claims brought by North Carolina against sources in Alabama and Tennessee.[24] While not ruling directly on the issue, the Fourth Circuit in *Cooper* left open the door to allowing state-law claims to proceed against sources within the same state because they do not have the same interstate commerce implications.[25] Because *Cooper* dealt with claims brought under state common law against sources in other states, rather than intrastate sources, that distinction for the Sixth Circuit in *Merrick* "was dispositive on the preemption issue."[26]

III. Conclusion

With Supreme Court review unlikely, and with the body of precedent growing, sources may want to factor in potential exposure to state common-law claims in reevaluating their compliance strategies. Even sources in compliance with their facility operating permits may want to monitor fugitive emissions to better evaluate potential exposure to intrastate common-law claims.

In this regard, the Sixth Circuit's holding also coincides with EPA's promotion of advanced monitoring, including monitoring of airborne emissions at facility fence lines, as part of the Agency's Next Generation Compliance Initiative. Indeed, investments in such systems are now mandated by recently finalized EPA regulations in the refinery sector.[27] Facilities should confer with counsel, however, before embarking on such advanced monitoring and before finalizing compliance strategies to address state common-law claims.

ruling, and the court determined it had no authority to reinstate the previously vacated panel opinion. Comer v. Murphy Oil USA, 607 F.3d 1049, 1055, 40 ELR 20147 (5th Cir. 2010).

23. *Merrick*, 2015 U.S. App. LEXIS 19096, at *18 ("*Cooper*, however, did not involve claims under the common law of the source state, rather *Cooper* involved claims against Alabama and Tennessee sources brought under North Carolina law.").
24. 615 F.3d 291, 40 ELR 20194 (4th Cir. 2010).
25. *Id.* at 303 ("We need not hold flatly that Congress has entirely preempted the field of emissions regulation. . . . [W]e cannot state categorically that the *Ouellette* Court intended a flat-out preemption of each and every conceivable suit under nuisance law.").
26. *Merrick*, 2015 U.S. App. LEXIS 19096, at *18.
27. Final Rule, Petroleum Refinery Sector Risk and Technology Review and New Source Performance Standards, 80 Fed. Reg. 75178 (Dec. 1, 2015).