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Recent Cases on Clean Air Act Preemption of Common Law Torts Upend Conventional Wisdom

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Two recent appellate-level decisions allowing state common law tort claims against an intrastate emitting source to avoid Clean Air Act (CAA) preemption have surprised many CAA litigators. The outcome in both Bell v. Cheswick[1] *and* Freeman v. Grain Processing Corporation[2]*—as well as the Supreme Court's recent denial of* certiorari *in both cases—was unexpected to many because the Supreme Court has held previously that the CAA preempts similar tort claims based on* federal *common law.*[3] *Stationary sources should be aware that some plaintiffs may be more inclined to attempt to raise state law tort claims, regardless of ultimate merit.*

In *Bell*, individuals living near a coal plant sued under state common law nuisance, negligence and recklessness, and trespass law. Plaintiffs alleged that the plant emitted odors, ash and contaminants on their property. The district court dismissed the case because the plaintiffs' suit interfered with the CAA's "extensive and comprehensive" regulatory scheme governing air emissions, the CAA's savings clauses notwithstanding. Reversing on appeal, the Third Circuit held that the CAA did not preempt state common law claims.[4] The Third Circuit leaned heavily on the Supreme Court's decision in *International Paper v. Ouellette*[5]. In that case, the Supreme Court held that the Clean Water Act (CWA) preempted federal

[1] 734 F.3d 188 (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).

[2] 848 N.W.2d 58 (Iowa 2014), *cert. denied*, No. 14-307, 2014 WL 4542764, at *1 (U.S. Dec. 1, 2014).

[3] American Electric Power Co. v. Connecticut, 131 S. Ct. 2526 (2011).

[4] 734 F.3d 188, 198 (3d Cir. 2013)

[5] 479 U.S. 481 (1987).

common laws claims against interstate sources,[6] but the court also implied the CWA would not preempt a state common law tort suit against intrastate sources.[7] The Third Circuit found "no meaningful difference" between the CWA and the CAA for purposes of preemption.[8] The Supreme Court denied certiorari in *Bell* in June of 2014.

In *Freeman*, a putative class of Iowa residents sued a nearby corn wet-milling facility for nuisance under both the state common law and statute as well as for trespass and negligence under the state common law. The plaintiffs alleged the corn mill emitted harmful pollutants and noxious odors onto their land. The Iowa Supreme Court reversed in a lengthy decision released days after the Supreme Court denied cert in *Bell*. The court distinguished the role of the environmental statutes from that of the common law, which the court said focuses on remedying special harms to rights holders caused by pollution at a specific property.[9] The court concluded that the CAA enforcement regime does not completely preempt state tort law claims because common law causes of action are part of the historic police powers of states,[10] and because property owner seeking a full remedy for the loss of use or enjoyment of a specific property have no other remedy but the common law or state law.[11]

The court also analogized the reasoning in *Ouellette* to the CAA. In distinguishing *American Electric Power*, where the Supreme Court held CAA preempted federal common law,[12] the Iowa court concluded that the standard for preempting state common law is higher than for preempting federal common law, and the standard was not met in this case.[13] The court also found that Congress, through the savings clauses, sought to preserve state law claims; and that by promoting a system of cooperative federalism, Congress authorized states to impose stricter requirements, which include those in state common law.[14] The Supreme Court denied certiorari in *Freeman* in December of 2014.

Considered together, *Bell* and *Freeman* offer plaintiffs a new means to seek remedies (including compensatory damages) that the CAA does not provide. Consequently, if other courts follow the precedent set by these two decisions—and one federal district court in Kentucky already has done so[15]—plaintiffs may attempt to bring state tort claims against owners of stationary sources even if they are in compliance with the CAA. However, it is too early to ascertain the full impact of these decisions. Prior to *Bell* and *Freeman*, at least two federal district courts extended the reasoning in *American Electric Power* to preempt state common law claims.[16] Given this conflict, the Supreme Court of course may accept cert in a future

[6] *Id.* at 500.

[7] *Id.* at 497.

[8] 734 F.3d at 195.

[9] 848 N.W.2d at 69.

[10] *Id.* at 75.

[11] See *id.* at 70.

[12] 131 S. Ct. at 2537.

[13] 848 N.W.2d at 83.

[14] *Id.* at 82-3.

[15] See *Little v. Louisville Gas & Elec. Co.*, No. 3:13-CV-01214-JHM, 2014 WL 3547331, at *23 (W.D. Ky. July 17, 2014) (holding that CAA did not preempt plaintiffs' state common law claims against power plant releasing dust and coal ash that coated plaintiffs' homes and properties); *Merrick v. Diageo Americas Supply, Inc.*, 5 F.Supp.3d 865, 876 (W.D. Ky. Mar. 19, 2014) ("[C]ourts have increasingly interpreted the CAA's savings clause to permit individuals to bring state common-law tort claims against polluting entities.")

[16] *United States v. EME Homer City Generation*, 823 F. Supp. 2d 274, 296-97 (W.D. Pa. 2011) *aff'd*, 727 F.3d 274 (3d Cir. 2013); Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012). The procedural history of *Comer* is unusual. A panel decision of the Fifth Circuit reversed an earlier district court decision, distinguished *American Electric Power*, and declined to preempt state common law nuisance, trespass and negligence claims. This decision was vacated by the Fifth Circuit sitting *en banc*; due to recusals, the Fifth Circuit lost its quorum, and it was unable to issue a decision in the case or to reinstate the panel decision. 839 F. Supp. 2d at 853.

case to clarify the issue. In the meanwhile, the decisions could encourage additional litigation from environmental plaintiffs against facilities that are otherwise complying with environmental laws.

Despite the potential for some new litigation, however, it is unlikely that *Bell* and *Freeman* will result in a flood of new lawsuits. For example, given the fact-specific nature of an alleged nuisance injury, recent Supreme Court decisions decertifying plaintiff classes that lack commonality of fact could restrict the *Bell* and *Freeman's* applicability in mass actions. Future courts could also constrain the remedies available under common law so that they do not conflict with the aims of the CAA. One additional potential defense is whether state "no more stringent" laws, which purport to prohibit state regulations that are more stringent than federal laws, could allow CAA preemption in those states. Since the CAA preempts federal common law, and state common law in jurisdictions that have enacted "no more stringent" laws cannot exceed federal standards, the CAA arguably could preempt those states' common law as well.

Thus, environmental plaintiffs still face formidable challenges in establishing commonality of their private injuries and in crafting prayers for relief that steer clear of the CAA's regulatory framework. Nevertheless, until courts resolve the uncertainty about CAA preemption of state common law, it would be prudent for emitting sources to factor in potential exposure to state common law claims in reevaluating their compliance strategies.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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