What's Old Is New Again: State Common-Law Tort Actions Elude Clean Air Act Preemption

by Matthew Morrison and Bryan Stockton

Matthew Morrison is a Partner, and Bryan Stockton is an Associate, with Pillsbury Winthrop Shaw Pittman LLP, where they work in the firm's Environment, Land Use, and Natural Resources practice in Washington, D.C. Mr. Morrison was formerly a Deputy Director in EPA's enforcement program and a Senior Counsel in the Environmental Enforcement Section of the Justice Department.

I. Introduction

It usually takes at least three to start a trend, but two recent appellate-level decisions suggest a new air pollution enforcement trend is in the making: Environmental plaintiffs may be able to avoid Clean Air Act (CAA)[1] preemption by bringing state common-law tort claims against an intrastate emitting source. The plaintiffs in both *Bell v. Cheswick*[2] and *Freeman v. Grain Processing Corp.*[3] successfully convinced the U.S. Court of Appeals for the Third Circuit and the Iowa Supreme Court, respectively, that the CAA did not preempt their tort claims based on state common law. The result—as well as the U.S. Supreme Court's denial of certiorari in both cases—surprised observers because the Supreme Court has held previously that the CAA preempts similar tort claims based on federal common law.[4]

If other courts follow the precedent set by these two decisions, an emissions source that is otherwise in compliance with all state and federal air permits and regulations may still be found liable for state common-law nuisance, negligence, or trespass claims. Two pending appeals[5] in the U.S. Court of Appeals for the Sixth Circuit could make the trend complete; or, if the Sixth Circuit decides differently than the Third Circuit, the resulting circuit split could position the issue for Supreme Court review.

It is too early to ascertain the full impact of these decisions, however, and recent rulings in other class action cases suggests that courts may be hesitant to certify classes of plaintiffs with injuries that vary significantly from one plaintiff to another. Nevertheless, by resorting to torts that date back over 400 years, plaintiffs may open the door to litigation against facilities that are otherwise meeting their regulatory obligations. The common-law exposure is particularly daunting where the regulatory landscape remains unsettled, such as greenhouse gas (GHG) emissions and hydraulic fracturing, making risk management for emitting sources a very complicated endeavor.

II. A Developing Trend in Air Pollution Enforcement

A. *Traditional Enforcement Role of Common Law Narrows as Environmental Regulation Expands*

Until the 1970s, individuals and states frequently used state common-law torts such as nuisance to protect the environment and individual property rights. According to commentators, "the deepest doctrinal roots of modern environmental law are found in principles of nuisance. . . . [N]uisance theory and case law is the common law backbone of environmental and energy law."[6]

The CAA established a complex regime of cooperative federalism, with states and the federal government regulating certain air pollutants. Two saving clauses in the CAA preserved certain causes of action for states and individuals, respectively. The states-rights saving clause allows states to set more stringent air quality levels: "[E]xcept as

1. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
2. 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).
3. 848 N.W.2d 58 (Iowa 2014), *cert. denied*, No. 14-307, 2014 WL 4542764, at *1 (U.S. Dec. 1, 2014).
4. American Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 41 ELR 20210 (2011).
5. Little v. Louisville Gas & Elec. Co., No. 3:13-CV-01214-JHM, 44 ELR 20171, 2014 WL 3547331 (W.D. Ky. July 7, 2014), *appeal docketed*, No. 14-0508 (6th Cir. Dec. 12, 2015); Merrick v. Diageo Americas Supply, Inc., No. 3:12-CV-334-C, 44 ELR 20078 (W.D. Ky. Mar. 19, 2014), *appeal docketed*, No. 14-0505 (6th Cir. Oct. 1, 2014). Defendants petitioned the court to assign both appeals to the same merits panel. *See* Defendant-Appellant Diageo Americas Supply, Inc.'s Motion to Coordinate for Purposes of Merits Panel Assignment and Oral Argument, No. 14-6198 (Feb. 20, 2015).
6. William H. Rodgers Jr., Handbook on Environmental Law §2.1, at 100 (2d ed. 1977).

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."[7] The citizen suit saving clause reads, "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or seek any other relief . . . ."[8]

With the advent of comprehensive environmental enforcement regimes and new federal agencies staffed with technical experts, courts increasingly recognized that technical interstate pollution issues were better handled under prospective federal regulations than under retrospective tort law. Courts often have been reluctant to allow common-law suits that could interfere with a federal regulatory regime to proceed.[9] The U.S. Court of Appeals for the Fourth Circuit in *North Carolina v. TVA* held that the CAA preempted a nuisance claim by North Carolina against sources in two adjoining states, because allowing the interstate nuisance suit to proceed would upset "the cooperative federal-state framework that [the U.S.] Congress through the [U.S. Environmental Protection Agency (EPA)] has refined over many years."[10]

The Supreme Court has never ruled on whether the CAA preempts *state* common-law tort claims, but in *American Electric Power v. Connecticut*, it held that the CAA preempts *federal* common-law tort claims.[11] In *United States v. EME Homer City Generation* and *Comer v. Murphy Oil*, federal district courts extended the preemption reasoning in *American Electric Power* to state-law claims, finding that the reasonableness of emissions is a determination that Congress entrusted to EPA and not to the courts.[12]

B. Bell *and* Freeman *Confirm Enforcement Role for State Common-Law Torts*

It is against this background that the decisions in *Bell* and *Freeman* surprised many observers. In *Bell*, the plaintiffs—a putative class of individuals living near the Cheswick Generating Station—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.[13] The district court dismissed the case, reasoning that to allow a state common-law suit would interfere with the CAA's "extensive and comprehensive" regulatory scheme governing air emissions, the Act's saving clauses notwithstanding. On appeal, the Third Circuit reversed and remanded, holding that the CAA did not preempt state common-law claims.[14]

The Third Circuit leaned heavily on the Supreme Court's 1987 decision in *International Paper Co. v. Ouellette*.[15] In that case, the Supreme Court held that the Clean Water Act (CWA)[16] preempted state common-law claims against a source in another state, reasoning that "[i]t would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure."[17] The Court in *Ouellette* implied that the CWA would not preempt a common-law tort suit, however, if it were brought under the law of the state where the source was located.[18]

The Third Circuit found "no meaningful difference" between the CWA and the CAA for purposes of preemption.[19] It thus applied to the CAA the Supreme Court's CWA decision in *Ouellette* and concluded that there is no preemption for a state common-law claim based on the law of the state where the source of the pollution is locat-

7. CAA §116, 42 U.S.C. §7416.
8. CAA §304, 42 U.S.C. §7604(e).
9. Extinguishing the common-law cause of action can arise from either "field preemption"—when the regulatory scheme is so pervasive that Congress could not have left room for states to supplement it—or from "conflict preemption"—when state law interferes with complying with the federal statute. *See* North Carolina ex rel. Cooper v. Tennessee Valley Auth., 615 F.3d 291, 303 (4th Cir. 2010). *See also* United States v. EME Homer City Generation L.P., 823 F. Supp. 2d 274, 297, 41 ELR 20326 (W.D. Pa. 2011) (holding that the CAA's comprehensive regulatory regime preempts a common-law nuisance claim), *aff'd*, 727 F.3d 274, 43 ELR 20194 (3d Cir. 2013); Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 477 (1984) (preempting state law that "interferes with the methods by which the federal statute was designed to reach [its] goal"); Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 869 (2000) (holding that a saving clause in the National Traffic and Motor Vehicle Safety Act did "not bar the ordinary working of conflict preemption principles").
10. *North Carolina ex rel. Cooper*, 615 F.3d at 298.
11. American Elec. Power Corp. v. Connecticut, 131 S. Ct. 2527, 2540, 41 ELR 20210 (2011) ("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."). *See also* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853, 42 ELR 20195 (9th Cir. 2012), *cert. denied sub nom*. Native Vill. of Kivalina v. Exxon Mobil Corp., 133 S. Ct. 2390 (2013) (finding that CAA displaced federal common-law claims against greenhouse gas (GHG) emitters for climate change).
12. *Homer City*, 823 F. Supp. 2d at 296-97; Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849, 865, 42 ELR 20067 (S.D. Miss. 2012). The procedural history of *Comer* is unusual. A panel decision of the U.S. Court of Appeals for 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; however, due to recusals, the Fifth Circuit lost its quorum and was unable to issue a decision in the case or to reinstate the panel decision. *Comer*, 839 F. Supp. 2d at 853.
13. For a thorough discussion of *Bell*, see Samantha Caravello, Bell v. Cheswick Generating Station, 38 Harv. Envtl. L. Rev. 465 (2014).
14. Bell v. Cheswick Generating Station, 734 F.3d 188, 198, 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).
15. 479 U.S. 481, 500, 17 ELR 20327 (1987).
16. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
17. *Ouellette*, 479 U.S. at 500.
18. *Id.* at 497.
19. *Bell*, 734 F.3d at 195.

ed.[20] The Third Circuit further concluded that Congress had not intended "to abolish state control"[21] by creating its regulatory scheme, and distinguished the Court's ruling in *American Electric Power* by explaining: "Legislative displacement of federal common law does not require the same sort of evidence of clear and manifest [congressional] purpose demanded for preemption of state law."[22] The Supreme Court denied certiorari for *Bell* in June 2014.

In *Freeman*, the case took a similar trajectory. A putative class of Iowa residents sued a nearby corn wet-milling facility for nuisance under state common law and statutory authority, as well as for trespass and negligence under state common law. The plaintiffs alleged the corn mill emitted harmful pollutants and noxious odors onto their land. The trial court dismissed the claim on the basis that: (1) the CAA and the state statutory companion to the CAA preempted the lawsuit; and (2) adjudicating the dispute would involve political and economic questions best addressed by the political branches of government. The Iowa Supreme Court reversed, in a lengthy decision released days after the U.S. Supreme Court denied certiorari in *Bell*.

The Iowa Supreme Court explained the long history of pollution-based tort claims as well as the growth of environmental regulations, which can provide for a more efficient and comprehensive management of air pollution compared to case-by-case litigation. The court distinguished the role of environmental statutes from that of common law, which focused on remedying specific harms to rights holders caused by pollution at a specific property.[23] The court concluded that the environmental regulatory regime does not completely preempt tort-law claims because common-law causes of action are part of states' historic police powers,[24] and because a property owner seeking a full remedy for the loss of use or enjoyment of a specific property has no other remedy but common law or state law.[25] According to the court, citizen suits under environmental statutes ordinarily do not provide the same types of relief as common law does.

The Iowa court also analogized *Ouellette*'s CWA reasoning to the CAA issue before it. In rejecting the defendant's preemption arguments and reliance on *American Electric Power* and similar cases, the court cited the recent *Bell* decision. It found that Congress, through the saving 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 state common law.[26] The court concluded that the standard for preempting state common law is higher than for preempting federal common law, and that the standard was not met in that case.[27] The U.S. Supreme Court denied certiorari in *Freeman* in December 2014.

C. Door Opens to New Litigation, But Just a Crack

Stationary sources should therefore be aware that they are now more vulnerable to state-law tort claims than they may have previously thought. Considered together, *Bell* and *Freeman* offer plaintiffs a new means to seek remedies (including compensatory damages) that the CAA does not provide. Indeed, these cases have already spurred favorable results for plaintiffs in federal district and state courts in Kentucky when their claims were challenged on preemption grounds.[28] The Sixth Circuit granted appeals in two of these cases in late 2014,[29] and the parties briefed the court in early 2015 as this publication was going to press. If the Sixth Circuit were to hold that the CAA preempts the state-law claims, the resulting split between the Third and Sixth Circuits would increase the likelihood the Supreme Court would grant certiorari.

Without knowing how the Sixth Circuit will decide, these post-*Bell* decisions continue the trend against CAA preemption of state common-law claims. Consequently, emitting sources should reevaluate their compliance strategies to consider not only regulatory conformity, but also local human health and environmental impacts.

III. Brakes on the Developing Trend

Despite the potential for new litigation, however, there are several reasons why it is unlikely that this trend will result in a deluge of new lawsuits. First, an additional defense, irrespective of the potential for preemption, is that future courts may limit the litigation opening that *Bell* and *Freeman* provide by restricting its applicability in certain types of class actions. Second, courts could constrain the remedies available under common law so that they do not conflict with the aims of the CAA. Third, *Bell* and *Freeman* can be considered classic private nuisance cases, and courts may be unwilling to extend their preemption analysis

20. Bell v. Cheswick Generating Station, 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).
21. *Bell*, 734 F.3d at 196 (*quoting* Her Majesty the Queen in Right of the Province of Ontario v. Detroit, 874 F.2d 332, 19 ELR 20888 (6th Cir. 1989)).
22. *Id.* at 197, n.7.
23. Freeman v. Grain Processing Corp., 848 N.W.2d 58, 69 (Iowa 2014), *cert. denied*, No. 14-307, 2014 WL 4542764, at *1 (U.S. Dec. 1, 2014).
24. *Id.* at 75.
25. *See id.* at 70.
26. *Id.* at 82-83.
27. *Id.* at 83.
28. *See* Little v. Louisville Gas & Elec. Co., No. 3:13-CV-01214-JHM, 44 ELR 20171, 2014 WL 3547331, at *23 (W.D. Ky. July 17, 2014) (holding that the CAA did not preempt the plaintiffs' state common-law claims against an intrastate power plant releasing dust and coal ash that coated the 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."); Merrick v. Brown-Forman Corp., 2014 Ky. App. LEXIS 178, at *7 (Ky. Ct. App. Nov. 7, 2014) ("[W]e conclude that *Bell* rather than *Cooper* is more persuasive" on the issue of CAA preemption of state common-law claims); Mills v. Buffalo Trace Distillery, Inc., Civ. Action No. 12-CI-743 (Franklin Cir. Ct. (Ky.) Div. II Aug. 28, 2013) (rejecting CAA preemption of common-law claims against distillery) (three of these cases dealt with the unusual issue of ethanol emissions and whiskey fungus from distilleries).
29. Little v. Louisville Gas & Elec. Co., No. 3:13-CV-01214-JHM, 44 ELR 20171, 2014 WL 3547331 (W.D. Ky. July 7, 2014), *appeal docketed*, No. 14-0508 (6th Cir. Dec. 12, 2015); Merrick v. Diageo Americas Supply, Inc., No. 3:12-CV-334-C, 44 ELR 20078 (W.D. Ky. Mar. 19, 2014), *appeal docketed*, No. 14-0505 (6th Cir. Oct. 1, 2014).

to disputes over things considered public nuisances, like GHG emissions. Lastly, courts have yet to consider whether state-passed "no more stringent" laws, which restrict state administrative rules and regulations from exceeding federal standards, also apply to the state common law, preventing state common law from being stricter than federal law. If courts decide that these "no more stringent" laws do apply, then state common law could be preempted as federal common law is.

A. *Class Action Plaintiffs Risk Decertification for Lack of Commonality in Nuisance Cases*

To successfully plead the state common-law torts, plaintiffs must show specific harm and causation. This is a highly individualized determination because the environmental damage to each plaintiff in the class depends on the size of the plaintiff's property and its proximity to the emitting source, among other factors. The individual nature of alleged damages may, in turn, make it difficult for putative class action plaintiffs to establish the requisite commonality of law and fact required for a court to certify their class under Rule 23 of the Federal Rules of Civil Procedure. Indeed, Supreme Court decisions in 2011 and 2013 decertified plaintiffs' classes because they lacked such commonality,[30] and wherever questions of fact or law for each plaintiff would "inevitably overwhelm questions common to the class," plaintiffs will have a difficult time obtaining certification as a class.[31]

Other courts have followed suit. The Louisiana Supreme Court cited this Supreme Court precedent to decertify a class of plaintiffs suing a wood treatment facility for releasing hazardous and toxic chemicals into the environment, because the causation with respect to each individual plaintiff was too complex for a classwide determination.[32] Similarly, a federal district court decertified a class of 23 persons suing a local hog farm for foul odors because, under state statute, the determination of permanent nuisance "requires an individualized inquiry and is not capable of determination on a classwide basis."[33] In short, state common-law claims may be asserted against in-state sources where plaintiffs assert that the CAA does not adequately protect individual rights, but if the rights being protected are not common enough among all plaintiffs, then the court may not certify the class.

B. *Courts May Limit Remedies to Avoid Conflicts With the CAA*

Plaintiffs may also find their claims preempted if they seek remedies that infringe too closely on the regulatory scheme of the CAA. The plaintiffs in *Bell* conceded that the injunctive relief they sought would be limited to requiring the power plant to refrain from depositing particulate matter on their property. The Third Circuit did not describe their effort as one to shutter the plant completely[34]; such an attempt arguably would undermine the complex federal regulatory system and perhaps prompt a finding of preemption. Indeed, if a court determined that plaintiffs were using state common law to "achieve a general regulatory purpose"—such as by seeking to shut down a statewide fleet of coal plants—rather than to "protect the use and enjoyment of specific property," a court may find that the CAA preempts such claims.[35]

C. *Private Nuisance Claims Fare Better Than Public Nuisance Claims*

Whether the state common-law claims infringe on the regulatory scheme of the CAA becomes particularly difficult to ascertain where that regulatory scheme remains in flux. This is particularly true of potential state common-law claims relating to GHG emissions. The Supreme Court in *American Electric Power* allowed for the possibility that a state common-law claim could survive federal preemption where the federal law claim did not.[36] The outcome could depend in large part on the distinction between public nuisances (an unreasonable interference with a public right) and private nuisances (an unreasonable invasion of another's private use and enjoyment of property).[37] Both *Bell* and *Freeman*, where the plaintiffs were successful, are classic private nuisance cases. They concerned a limited number of plaintiffs living in immediate proximity to a facility in the same state whose dust and particulate matter were physically invading their property.

By contrast, Pennsylvania unsuccessfully brought a public nuisance claim for a power plant's air permit violations in *United States v. EME Homer City Generation*.[38] A federal district court found that a public nuisance claim (albeit "not thoroughly developed," in the words of the court) was preempted because both the CAA and a state air pollution law represented a pervasive and comprehensive scheme to regulate air pollutants, leaving no room for a common-law

30. *See* Wal-Mart v. Dukes, 131 S. Ct. 2542 (2011); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).
31. *Comcast*, 133 S. Ct. at 1433.
32. Price v. Martin, 79 So. 3d 960, 975 (La. 2011).
33. Powell v. Tosh, No. CIV.A. 5:09-CV-00121, 2013 WL 4418531, at *7, 43 ELR 20186 (W.D. Ky. Aug. 2, 2013).
34. *See* Bell v. Cheswick Generating Station, 734 F.3d 188, 192-93, 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).
35. Freeman v. Grain Processing Corp., 848 N.W.2d 58, 84 (Iowa 2014), *cert. denied*, No. 14-307, 2014 WL 4542764, at *1 (U.S. Dec. 1, 2014).
36. American Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2540, 41 ELR 20210 (2011) ("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.").
37. *Freeman*, 848 N.W.2d at 66, n.3 (*citing* Restatement (Second) of Torts §821D, at 100 (1979)).
38. United States v. EME Homer City Generation L.P., 823 F. Supp. 2d 274, 297, 41 ELR 20326 (W.D. Pa. 2011), *aff'd*, 727 F.3d 274, 43 ELR 20194 (3d Cir. 2013). One way to distinguish *Homer City* from *Bell* and *Freeman* is that the plaintiffs in *Homer City* sought a "general regulatory purpose"—enforcing air permit violations—while the plaintiffs in *Bell* and *Freeman* sought remedies specific to the defendant's alleged interference with their property interests.

claim.[39] A GHG emission tort would likely closely resemble a public nuisance, where plaintiffs' claims assert that GHG emissions interfered with the public's right to things such as a stable future climate or consistent sea level and, like in *Homer City*, were not tied to interference with one's specific property. Common-law claims become far more difficult when dealing with a ubiquitous pollutant like carbon dioxide from innumerable intrastate, interstate, and international sources. Plaintiffs in such cases would have to portray what is essentially a public nuisance as a private nuisance in order to best take advantage of the precedent in *Bell* and *Freeman* and avoid CAA preemption.

The distinctions between public and private nuisances could also have implications for potential state common-law claims in cases involving hydraulic fracturing. Unlike nuisance claims related to GHGs, claims relating to hydraulic fracturing often involve a host of more traditional, identifiable private nuisances such as loud noises, truck traffic, pollution, and odors.[40] A Dallas jury's $3 million award to a family in a private nuisance case concerning drilling operations—an outlier so far for its size—could prompt additional lawsuits.[41] To the extent that plaintiffs allege that air emissions from hydraulic fracturing operations pose a private nuisance under state law, a driller's compliance with air permits may not suffice to avoid liability under state common law for any air emissions-related claims.

D. State "No More Stringent" Laws Add Complexity

Finally, depending on how courts interpret them, state "no more stringent" laws, which purport to prohibit laws that are more stringent than federal laws, could support preemption of state-law claims.[42] A number of states have already passed these laws to encompass things such as air pollution,[43] water pollution,[44] underground storage tanks,[45] and administrative regulations.[46] It remains uncertain, however, whether such laws might block state common-law torts.

The Supreme Court in *Ouellette* ruled that, through the CWA's saving clauses, states retain the ability to "impose higher standards" than federal law, and that this "authority may include the right to impose higher common-law as well as higher statutory restrictions."[47] If a state then passes a law prohibiting any state regulator from promulgating state environmental regulations that are more stringent than federal environmental rules, defendants may argue that the prohibition includes the state's common law. Defendants in such states may further argue that, because the CAA preempts federal common law, and state common law in those states cannot exceed federal standards, the CAA effectively preempts state common law as well. Until courts rule on the issue or legislatures explicitly include the common law in these provisions, it remains unclear whether such laws would provide a viable defense to state common-law claims.

IV. Conclusion

Bell and *Freeman* closely hew to the classic private nuisance cases that rose to prominence during the Industrial Revolution, and signal the potential for a new host of litigation against emissions sources. If the Sixth Circuit adopts the precedent established by these cases, confirming the trend, owners of stationary sources could be sued for unanticipated state tort claims even if they are in compliance with the CAA. Class action plaintiffs still face formidable challenges, however, in establishing commonality of their private injuries and in crafting prayers for relief that steer clear of the CAA's regulatory framework.

Conversely, while the unusual procedural history of *Comer* prevented a true circuit split between the Third Circuit and the U.S. Court of Appeals for the Fifth Circuit, if a split were to arise between the Sixth and Third Circuits, the Supreme Court certainly could accept certiorari in the near future and resolve the state-law preemption question. Until that time, it would be prudent for emitting sources to factor in potential exposure to state common-law claims in reevaluating their compliance strategies.

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39. *Homer City*, 823 F. Supp. 2d at 296-97. On appeal, the Third Circuit did not consider the dismissal of the state-law claims because plaintiffs' undeveloped arguments are forfeited on appeal. *Homer City*, 727 F.3d at 300. Because plaintiffs in *Bell* developed their state-law arguments, that decision best reflects the Third Circuit's current view of CAA preemption with regard to intrastate common-law claims.
40. *See* Crowder v. Chesapeake Operating, Inc., No. 2011-008256-1 (Tarrant Cnty. Ct. at Law May 23, 2014) (jury found temporary nuisance). *But see* Anglim v. Chesapeake Operating, Inc., No. 2011-008256-1 (Tarrant Cnty. Ct. at Law April 2014) (jury did not find nuisance).
41. Parr v. Aruba Petroleum Inc., No. CC-11-01650-E (Dallas Cnty. Ct. at Law June 19, 2014).
42. National Conference of State Legislatures, State Agency Authority to Adopt More Stringent Environmental Standards (2014), *available at* http://www.ncsl.org/research/environment-and-natural-resources/state-agency-authority-to-adopt-more-stringent-environmental-standards.aspx. For a full treatment of "no more stringent" laws, see Andrew Hecht, *Obstacles to the Devolution of Environmental Protection: States' Self-Imposed Limitations on Rulemaking*, 15 Duke Envtl. L. & Pol'y F. 105 (2004).
43. *See, e.g.*, Colo. Rev. Stat. §25-7-114.2 (West 2014); Mo. Rev. Stat. §643.055 (West 2014).
44. *See, e.g.*, Colo. Rev. Stat. §25-8-202(8)(a) (West 2014).
45. *See, e.g.*, Ark. Code Ann. §8-7-803 (West 2014).
46. Ky. Rev. Stat. Ann. §13A.120 (West 2014).
47. International Paper Co. v. Ouellette, 479 U.S. 481, 497, 17 ELR 20327 (1987). *See* Bell v. Cheswick Generating Station, 734 F.3d 188, 196, 43 ELR 20195 (3d Cir. 2013) ("[T]he CAA displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute.") (*quoting* Her Majesty the Queen in Right of the Province of Ontario v. Detroit, 874 F.2d 332, 19 ELR 20888 (6th Cir. 1989).