BELL V. CHESWICK GENERATING STATION: A BLOW TO THE CLEAN AIR ACT "PERMIT SHIELD"

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The Supreme Court, in *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), held that the Clean Air Act (CAA) preempts *federal* common law claims relating to a CAA permittee's air emissions. *American Electric* expressly left open the question of whether the CAA also preempts state common law claims. District courts relied on the Court's reasoning in *American Electric* to hold that the CAA also preempts all *state* common law claims. Recently, however, the Third Circuit, in *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir. 2013), reversed one of these district court decisions and held that the CAA does not "shield" permittees from state common law claims.

Clean Air Act Preemption Before *American Electric*

Before the Supreme Court's decision in *American Electric*, courts were split as to whether the CAA preempted state common law claims.

In *Gutierrez v. Mobil Oil Corp.*, 798 F. Supp. 1280 (W.D. Tex. 1992), a class of property owners alleged that an oil company negligently allowed toxic gases to escape from its facility and contaminate the plaintiffs and their property. *Id.* at 1281. The court held that the CAA did *not* preempt state law causes of action. *Id.* at 1285.

The court articulated that the CAA expressly allows the state to enact and enforce more stringent limitations than those specified in the CAA. *Id.* at 1284 (citing 42 U.S.C. § 7412(r)(11)). The state may enact and enforce these more stringent limitations through common law. *Id*. In addition to citing the CAA's reserved role for the states, the court focused on the Act's "citizen suit savings clause," which states that "[n]othing in this section shall restrict *any right* which any person (or class of persons) shall have under any statute or common law to seek enforcement of *any* emission standard or limitation or *to seek any other relief* (including relief against the Administrator or a State agency)." *Id.* at 1283 (citing 42 U.S.C. § 7604(e)) (emphasis in original).

Thus, while the court expressed concern with "the manageability and efficiency of this dual system that Congress has created," it deferred to the clear language of the CAA. *Id.* at 1285. Further, the court reasoned that Congress could not have intended for the CAA to preempt state common law claims because such preemption would "preclude relief for any person who can prove the elements of the common law claims." *Id.* at 1284. The Sixth Circuit held similarly in *Her Majesty the Queen v. City of New York*, 874 F.2d 332 (6th Cir. 1989).

On the other hand, the Fourth Circuit held in *North Carolina v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010), that the CAA preempts some state common law claims. North Carolina brought a public nuisance claim against the Tennessee Valley Authority (TVA), alleging that emissions from TVA's plants violated North Carolina's air pollution laws. *Id*. at 296. The Fourth Circuit reversed the district court, holding that the CAA preempted the state nuisance claim. *Id.* at 301–06.

First, the court acknowledged the dangers of authorizing courts to adopt emissions standards to govern nuisance claims. *Id.* at 301–02. Different courts would undoubtedly adopt different standards and could even subject a single emitter to multiple emissions standards. *Id.* at 302.

Next, the court recognized the "considerable potential mischief" in nuisance actions that seek to establish emissions standards that vary from federal and state regulatory laws. *Id.* at 303. Although the court acknowledged the CAA's citizen suit savings clause, it recognized that plaintiffs should not be allowed to use the savings clause to undermine the statute. *Id.* at 304. The court accused the plaintiffs of doing just that—attempting "to replace

comprehensive federal emissions regulations with a contrasting state perspective about the emission levels necessary to achieve those same public ends." *Id.*

Finally, the court articulated a number of reasons why Congress entrusted EPA with setting emissions standards, rather than allowing courts to do so. *Id.* at 304–06. Setting air emissions standards requires scientific expertise. *Id.* at 304–05. Further, if the responsibility was left to the courts, inconsistent emissions standards would encourage forum shopping. *Id.* at 306.

American Electric and District Court Decisions Following *American Electric*

The Supreme Court, in *American Electric*, held that *federal* common law claims for alleged increased risk of harm to public health and welfare stemming from an emitter's greenhouse gas emissions were preempted by the CAA. 131 S. Ct. at 2537. The Court, however, explicitly left open the question of whether the CAA preempts *state* common law claims, noting that the issue would turn "on the preemptive effect of the federal Act." *Id.* at 2540.

Following this decision, district courts faced with the question relied on the reasoning in *American Electric* and *TVA* to hold that the CAA broadly preempts *all* state common law claims.

In *United States v. EME Homer City Generation L.P.*, 823 F. Supp. 2d 274 (W.D. Pa. 2011), Pennsylvania and New Jersey brought public nuisance claims against the owners and operators of a coal-fired plant. *Id*. at 266–67. Citing *TVA* and *American Electric*, the court stated that the CAA represents a "comprehensive statutory and regulatory scheme[]" and held that state common law public nuisance claims were preempted. *Id.* at 297.

Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013), involved a suit by plaintiffs damaged by Hurricane Katrina who alleged that their damages were the result of defendants' greenhouse gas (GHG) emissions. *Id.* at 852. Plaintiffs' state law claims included negligence, public and private nuisance, and trespass. *Id*. The court determined that the CAA preempts a judicial determination that GHG emissions levels were unreasonable because "those determinations had been entrusted by Congress to the EPA" through the CAA. *Id.* at 865.

Bell v. Cheswick Generating Station

In *Bell v. Cheswick Generating Station*, 903 F. Supp. 2d 314, 315 (W.D. Pa. 2012) *rev'd*, 734 F.3d 188 (3d Cir. 2013), a class of more than 1500 people who resided within one mile of a coal-fired plant brought state common law claims for negligence, private nuisance, strict liability, and trespass. *Id.* at 315–16. The plaintiffs alleged that emissions from the plant settled on their property, causing damage and forcing them to constantly clean their property. *Id*. at 315.

Like other district courts after *American Electric*, the district court cited to *TVA* in holding that the CAA established a comprehensive regulatory scheme. *Id.* at 321. The plaintiffs' claims would require the court to establish emission standards in order to provide a remedy to the plaintiffs, thereby encroaching on that regulatory scheme. *Id.* at 322.

Further, the district court found the CAA's savings clause "unpersuasive" because it was "ambiguous as to which state actions were preserved" and could "undermine [the] carefully drawn statute. . . ." *Id.* (citing *TVA*, 615 F.3d at 304). Thus, the district court held that the CAA preempted the plaintiffs' claims. *Id.* at 323.

The Third Circuit, however, reversed. 734 F.3d at 188. The court recognized that the citizen's suit savings clause in the CAA is virtually identical to the one in the Clean Water Act. *Id.* at *195–96. Therefore, the Supreme Court's rationale in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), in which the Court held that the Clean Water Act did *not* preempt state common law claims based on the law of the state where the

source of the pollution is located, extended to the CAA. *Id.* at 198.

Examining the argument that allowing state common law claims would undermine the regulatory framework established by the CAA, the Third Circuit stated that the CAA merely creates a "regulatory floor" and states are free to impose higher standards. *Id.* at 198 (citing *Ouellette*, 479 U.S. at 497–98). One way for a state to impose higher standards on sources of pollution is through its judicial branch. *Id.* In other words, a state's courts could adopt such standards when ruling on source-state common law tort actions. *Id.*

On September 3, 2013, a *Bell* defendant filed a petition for rehearing en banc, arguing that the Third Circuit focused solely on express preemption and failed to examine implied preemption—whether the state common law claims conflicted with the CAA's regulatory scheme. The Third Circuit denied the petition on September 23, 2013. More recently, on February 20, 2014, a petition for a writ of certiorari was filed with the Supreme Court.

CAA Preemption After *Bell*

Bell's holding governs the Third Circuit, and the CAA preemption defense should still be available in other circuits. The *Bell* decision is noteworthy, however, and it should remind permittees that their CAA permits may not serve as a "shield" against state common law claims. District courts outside of the Third Circuit are already relying on *Bell* to hold that the CAA does not preempt state common law claims. *See, e.g.*, *Cerny v. Marathon Oil Corp.*, Civ. A. SA-13-CA-562-XR, 2013 WL 5560483, at *8 (W.D. Tex. Oct. 7, 2013).

Permittees should remember, however, that compliance with CAA regulations may still serve as a defense to negligence claims by, for example, showing that (1) the plaintiffs suffered no injury, or (2) the defendants did not breach their duty of due care. *See, e.g.*, *Iberville Parish Waterworks Dist. No. 3 v. Novartis Crop Prot., Inc.*, 45 F. Supp. 2d 934 (S.D. Ala.), *aff'd*, 204 F.3d 1122 (11th Cir. 1999) (because there was no evidence that the plaintiffs' systems exceeded the MCL for the herbicide Atrazine, it "cannot be said that either has suffered any actual invasion of a legally protected interest"); *Taco Cabana, Inc. v. Exxon Corp.*, 5 S.W.3d 773 (Tex. App. 1999) (state water code established standard for whether contamination levels were unreasonable).

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