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How To Defend Air Pollution Torts After Bell V. Cheswick

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Law360, New York (September 27, 2013, 12:04 PM ET) -- On Aug. 20, the United States Court of Appeals for the Third Circuit caught many off guard by reversing a district court's dismissal of state law tort claims against a coal-fired generating station in Springdale, Pa.[1] In Bell v. Cheswick Generating Station, the court of appeals held that the federal Clean Air Act does not preempt tort claims filed under the common law of Pennsylvania, the state in which the source is located.

The court's reasoning closely followed the U.S. Supreme Court's longstanding analysis of preemption under the analogous provisions of the Clean Water Act. Although likely to invite more litigation, there is no reason to believe this decision will dramatically open the "floodgates" to a vast number of new state tort claims.

Nevertheless, regulated entities should be prepared to defend themselves against these types of claims. This defense should draw on the lessons learned from other environmental tort cases and should emphasize the significance of Clean Air Act compliance to a favorable merits determination, even if it is not dispositive as a matter of federal preemption.

In Bell, a class of 1,500 individuals living within 1 mile of an emitting facility filed common law nuisance, negligence and trespass claims against the facility's owner, GenOn Power Midwest LP. Class members complained of noxious odors and particulates emanating from the plant.

The United States District Court for the Middle District of Pennsylvania granted a motion to dismiss on the grounds that the plaintiffs' tort claims "impermissibly encroach[ed] on and interfere[d] with [the statutory] regulatory scheme" and were thus preempted by the Clean Air Act.[2] In reversing, the court of appeals relied heavily on the Supreme Court's decision in International Paper Co. v. Ouellette.[3]

In Ouellette, the Supreme Court held that the Clean Water Act's savings clause preserves the right of claimants to file suit under the laws of the "source state" — the state of the emitting facility. In Bell, the Third Circuit compared the Clean Water Act and the Clean Air Act, found no material difference between their savings clauses and preemptive reach and thus held that Ouellette controlled the outcome: The Clean Air Act does not preempt claims brought under the common law of the source state.

GenOn Power and the Utility Air Regulatory Group as amicus argued to the court that allowing the case "to move forward would open the proverbial floodgates to nuisance claims against sources in full compliance with federal and state air pollution control permits and regulations, creating a patchwork of inconsistent standards across the country that would compromise Congress's carefully constructed cooperative federalism framework."[4] But the court of appeals explained that Ouellette rejected these same arguments in the Clean Water Act context.[5]

It also is worth noting that certain tort claims are preempted under the Clean Air Act. Specifically, Title II of the Clean Air Act regulates mobile sources (cars, trucks, engines and the like), and it contains a much broader preemption provision, which blocks state adoption or enforcement of any "standards relating to the control of emissions" from new motor vehicles or engines.[6]

Courts have readily concluded that this express preemption provision bars state common law claims concerning mobile source emissions.[7] Ultimately, the Clean Air Act's express contemplation of higher source-state standards — the act as "a floor, not a ceiling" — and the "relatively predictable" burden of complying with a single state's common law persuaded the Third Circuit that exposing stationary source emitters (as distinct from mobile sources) to tort actions, regulatory compliance notwithstanding, was not an unreasonable burden.[8]

Legal Defenses after Bell

Bell may not "open the floodgates," but it is a reminder that permit compliance may not always be a perfect safe harbor from a tort suit. Fortunately, firms have a variety of other legal defenses to fall back on in this area besides federal preemption.

Although the Clean Air Act may not preempt source state tort claims, analogous state statutes often block such claims. Of course, the clearest cases are those involving statutes that expressly abrogate common law remedies. But such express "preemption" is not always necessary.

For example, a Pennsylvania appeals court held that the state's Solid Waste Management Act prevented a township from filing a nuisance claim to enjoin a power station from transporting fly ash through a residential area "because of the existence of an exclusive statutory remedy."[9] The statute did not expressly abrogate traditional nuisance claims, but the court nonetheless thought it dispositive that the act specifically empowered the secretary of health to file suits in equity, while remaining silent on the rights of other potential claimants.

Admittedly, such cases may be the exception — state courts are often hesitant to deny common law remedies absent a clear statutory directive to that effect.[10] But air pollution is typically the subject of extensive state regulation — in accordance with federal Clean Air Act directives and otherwise — and so, the circumstances and arguments should be evaluated case by case.

Two recent developments may create more room to argue that state environmental statutes have supplanted common law remedies. First, in American Electric Power Co. (AEP) v. Connecticut, the Supreme Court held that the Clean Air Act "displaced" the federal common law of nuisance.[11] The court reasoned that because Congress, through the Clean Air Act, had already provided a way to regulate greenhouse gas emissions through the act, any need for "law-making by federal courts disappears."[12]

Litigants should consider arguing for the existence of a parallel doctrine in the states. If the federal Clean Air Act displaces federal common law nuisance, perhaps a state air pollution law can displace state common law nuisance. State courts have not yet embraced this theory.

AEP's displacement rationale was specific to federal common law, for which the authority has always been more precarious than for state common law.[13] For example, one North Carolina court rejected an attempt to analogize federal displacement theory in this way, explaining that "the presumption as to the abrogation of common law in this state by an enactment of the [state legislature] is substantially different."[14]

The argument may, however, warrant renewed attention given the spread of so-called "no more stringent" laws, which limit, or in some cases, prohibit, the ability of state environmental agencies to adopt standards any tougher than those required by federal law. More than two dozen states now have such statutes in effect.[15]

In light of these laws, the Supreme Court's displacement theories may carry greater force. To be sure, these laws are generally aimed at state agency regulation rather than common law courts. Nevertheless, courts may question why state legislatures would have prohibited state agencies from adopting tougher rules administratively if they thought that the courts were empowered to impose the same "more stringent" obligations.

Of course, it is also conceivable that in the future, legislatures could frame "no more stringent" laws more broadly to encompass common law tort claims imposing any obligations beyond compliance with federal law.

The Role of Compliance after Bell

It is also important to remember, even after Bell, the role that compliance with state and federal regulation plays in defending against tort claims. Even if a court does not accept that regulatory compliance can serve as the basis for dismissal on preemption grounds, it remains powerful evidence of due care.

It is black-letter law that courts may adopt as the standard of due care the requirements of a statutory or administrative regulation when that regulation's purpose is to protect against the kind of injury alleged in tort.[16] Thus, in cases like Bell, where the alleged injuries are the kinds normally associated with air pollution — health impacts resulting from exposure to particulates, etc. — compliance with state and federal air pollution controls will often be enough to prevail on the merits.

Of course, the converse is also a concern: Plaintiffs may argue that noncompliance demonstrates a lack of due care.[17] Therefore, as a practical matter, emitters should always strive to remain in compliance with federal regulations.

Even when compliance with the Clean Air Act is an insufficient defense per se, defendants can still argue that it is particularly strong evidence of due care. The act includes many regulatory programs requiring periodic re-evaluation of state-of-the-art emissions control technology and of ambient standards and emissions standards.[18]

These rereview provisions quickly add up. For example, in 2011, the U.S. Environmental Protection Agency took nearly 200 regulatory actions pursuant to the Clean Air Act.[19] If an emitter tracks and adheres to those regulations, compliance may be a more powerful defensive fact than, for example, evidence that an allegedly negligent driver was adhering to the speed limit.

Further, the EPA and state regulatory analyses of regulatory, health and risk issues are typically part of extensive records for permitting and rulemaking, and a company's familiarity with those discussions as applied to their facilities could further support a demonstration of due care.

Regulated entities should not shy away from engaging in this kind of due care analysis. Some may be tempted to argue instead that emissions may pose some inherent risks, and zero emissions is an impossible goal. Indeed, that is the entire point of the Clean Air Act: to create a workable balance between the economic costs of pollution-control technology and the human health and environmental benefits of reducing facility emissions.

But defendants should approach this point carefully: Plaintiffs have argued that if the harm associated with an activity is both severe and unavoidable, even with due care, the courts should classify it as "abnormally dangerous" and impose strict liability.[20] Emitters should avoid unintentionally lending credence to this argument.

Further tempering the potential for a flood of new lawsuits are recent Supreme Court decisions making mass tort class actions like Bell increasingly difficult to sustain. In a 2011 case, Wal-Mart v. Dukes,[21] and a 2013 case, Comcast Corp. v. Behrend,[22] the court decertified plaintiffs' classes on commonality grounds because questions particular to each individual claimant would "inevitably overwhelm questions common to the class."[23]

Though neither decision occurred in an environmental context, these decisions likely pose an obstacle to certifying classes predicated on air pollution torts. For example, the Louisiana Supreme Court cited Dukes extensively in a decision to decertify a class seeking tort damages against a wood treatment facility for releasing "a significant amount of hazardous and toxic chemicals ... into the environment, including the air, soil, and water, of the communities in which plaintiffs reside."[24]

The court reasoned that the causation issues — including the existence of alternate sources of pollution — needed to be determined with respect to individual plaintiffs because they were too complex to render uniform class wide determinations.[25]

Ironically then, the argument that generally applicable EPA air emissions standards are insufficiently protective in an individual case may tend to support the conclusion that such cases as inappropriate for a class action. These sorts of arguments may become increasingly important to make after Bell.

Conclusion

The Bell decision was significant, and emitters should take note that they may be more vulnerable to state law tort claims than they might previously have anticipated. But it is easy to overstate its importance — there is no reason to believe that it marks the start of a new era of crippling vulnerability to tort suits.

In the future, emitters and their counsel may consider arguments that state legislators have already taken steps to abrogate common law remedies through state law "preemption" or "displacement." Failing that, there are other more established defenses to fall back upon.

This article discusses two examples. Regulatory compliance has long been a powerful defense against allegations of negligence and may be a particularly fertile defense in light of the extent and frequent updating of air pollution control permits and regulations.

And the Supreme Court has recently made it much more difficult to certify classes comprised of plaintiffs suffering the kinds of highly individualized injuries normally associated with mass environmental torts.

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[1] See Bell v. Cheswick Generating Station (3d Cir. Aug. 20, 2013).
[2] Bell v. Cheswick, 903 F. Supp. 2d 314, 322 (W.D. Pa. 2012).
[3] 479 U.S. 481 (1987).
[4] Bell.
[5] See id. (citing Ouellette, 479 U.S. 496-99).
[6] 42 U.S.C. § 7543(a).
[7] "[S]tate common law tort claims are clearly subject to preemption under [42 U.S.C. § 7543(a)]." Jackson v. Gen. Motors Corp., 770 F. Supp. 2d 570, 576 (S.D.N.Y. 2011) aff'd sub nom. Butnick v. Gen. Motors Corp., 472 F. App'x 80 (2d Cir. 2012); see also In re Office of Attorney Gen. of State of New York, 269 A.D.2d 1, 11 (N.Y. App. Div. 2000) ("[W]e find that common law actions seeking damages from the manufacturers of [heavy duty diesel engines] for the production of new engines which fail to comply with Federal standards are foreclosed.").
[8] See Bell.
[9] Elizabeth Twp. v. Power Maint. Corp., 417 A.2d 1285, 1289 (Pa. Commw. Ct. 1980).
[10] See, e.g., Burch v. Nedpower Mount Storm, LLC, 647 S.E.2d 879, 887 (W. Va. 2007) ("In determining the meaning of a statute, it will be presumed, in the absence of words therein, specifically indicating the contrary, that the legislature did not intend to innovate upon, unsettle, disregard, alter or violate . . . the common law[.]").
[11] 131 S. Ct. 2527 (2011).
[12] Id. at 2537.
[13] See Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.").
[14] Biddix v. Henredon Furniture Indus., 331 S.E.2d 717, 723 (N.C. Ct. App. 1985).
[15] See Andrew Hecht, Obstacles to the Devolution of Environmental Protection: States' Self-Imposed Limitations on Rulemaking, 15 Duke Envtl. L. & Pol'y F. 105, 116 n.42 (compiling a list of "no more stringent" laws).
[16] See Restatement (Second) of Torts § 286 (1965) ("The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect

that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.").

[17] See id. § 288B(1) ("The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.").

[18] For example, the Act requires EPA to review and as appropriate revise the National Air Ambient Quality Standards "from time to time." 42 U.S.C. § 7408(c) ; see also Process of Reviewing the National Ambient Air Quality Standards, http://www.epa.gov/ttn/naaqs/review.html (last visited Sept. 18, 2013). Similarly, EPA must review and as appropriate revise the New Source Performance Standards every eight years. See 42 U.S.C. § 7411(b)(1)(B). EPA is also required to review and as necessary revise technology-based hazardous air pollutant standards every eight years and undertake a review of standards to address residual risk for all source categories. See 42 U.S.C. § 7412(d)(6) and (f)(2). Finally, permits for construction and modification of major sources must require best available control technology or the lowest achievable emissions rate, determined on a case-by-case basis at the time of permitting. See 42 U.S.C. §§ 7479(3) and 7501(3).

[19] See Section of Env't, Energy, and Res., Am. Bar Ass'n, Environment, Energy, and Resource Law: The Year in Review 2011 15-31 (2012).

[20] See Restatement (Second) of Torts § 519(1) (1965) ("One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.").

[21] 131 S. Ct. 2541 (2011).

[22] 133 S. Ct. 1426 (2013).

[23] Id. at 1433.

[24] Price v. Martin, 79 So. 3d 960, 965 (La. 2011).

[25] Id. at 975.