Clean Air Act Preemption of State Law Tort Claims

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Federal Law Preemption

• Under Supremacy of Clause of the US Constitution federal laws preempt conflicting state laws (“any state law that ‘interferes with or is contrary to federal law’. “Bell v Cheswick Generating Station, 734 F.3d 188 (3rd Cir. 2013), quoting Free v Bland, 369 U.S. 663, 666 (1962)).

• Express preemption

• Implied preemption
  • Field preemption
  • Conflict pre-emption

Displacement of Federal Common Law

• A product of the limits of federal common law
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*International Paper Co. v Ouellette, 479 U.S. 481 (1987)*

- Clean Water Act (CWA) preempts claims based on the common law of a state other than the state where the discharger is located.

- CWA creates an all-encompassing program of water pollution regulation:
  - Permit program administered by EPA and states
  - Technology based standards
  - Balances competing public and industrial uses
  - Water pollution elimination not immediately achievable

- Contrasts this with regulation by nuisance law:
  - Vague and indeterminate standards
  - Undermines goals of efficiency and predictability in permit systems

- Congress could not have intended to tolerate common law suits with a potential to undermine an elaborate permit system that sets clear standards.

- Because CWA allows states to impose stricter standards, a claim based on common law of the source state may not create the same conflict.
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North Carolina ex rel. Cooper v Tennessee Valley Authority, 615 F.3d 291 (4th Cir. 2010)

- Clean Air Act (CAA) preempts state common law claims

- While Ouellette did not hold all nuisance claims preempted, “it recognized the considerable mischief in those nuisance actions seeking to establish emission standards different from federal and state regulatory law…”

- Found in the CAA a Congressional decision to have emission standards set by expert regulatory bodies rather than courts
  - Directs EPA to develop scientific expertise
  - Provides for notice and comment rulemaking
  - Facilitates a uniform application of standards
  - Provides certainty for entities faced with large investments required to reduce emissions
  - Avoids practical effects of having multiple and conflicting standards guide emissions, including the likelihood that would result in higher emissions

- Contrasted this with courts applying vague indeterminate standards of public nuisance law, relying on information received through bench trials
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- In holding that the CAA displaces federal common law rights to seek abatement of carbon dioxide emissions, the Court found emission standards developed by courts from common law principles cannot be reconciled with the decision-making scheme Congress prescribed in Act.
  - “The [CAA] entrusts … complex balancing (of competing interests, achievable environmental benefits, energy needs, economic disruptions) to EPA in the first instance, in combination with state regulators.”
  - EPA is better equipped to do the job than judges issuing ad hoc injunctions
  - Federal judges lack scientific, economic and technological resources an agency can utilize, are confined to evidence parties present and lack authority to render decisions binding on facilities not before them
  - Congress designated an expert agency to serve as primary regulator of greenhouse gas emissions
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*Bell v Cheswick Generating Station*, 734 F.3d 188 (3rd Cir. 2013), *cert. denied*, 134 S. Ct. 2696 (2014)

- Reversing a Pennsylvania District Court, the Third Circuit Court of Appeals held the CAA does not preempt claims based on common law of the state where the facility is located.

- To reach its conclusion the Third Circuit:
  - Found the savings clauses in the CWA and CAA to be, for all practical purposes, identical, and that both preserve a right for states to impose stricter standards
  - Read the Supreme Court’s decision in *Ouellette* to say that stricter standards preserved by the CWA’s savings clause include both statutory and common law standards
  - Rejected arguments that subjecting facilities to standards developed by courts in accordance with common law of the state in which the facility is located, interferes with the goals of the CAA.

- Earlier this year the U.S. Supreme denied a petition seeking review of this decision
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Freeman v Grain Processing Corporation, 848 N.W.2d 58 (Iowa 2014)

- Reversing a state trial court, the Iowa Supreme Court held that the CAA does not preempt claims based on common law of the state where the facility is located.

- In reaching this decision the Court followed the reasoning in Bell v Cheswick Generating Station and its reliance on:
  - Language in the U.S. Supreme Court’s decision in Ouellette stating that the CWA savings clause preserves claims based on the common law of the state where the discharger is located
  - Similarities in the savings clauses found in the CWA and the CAA
  - The Court also rejected arguments that amendments to the CAA in 1990 give rise to conflict preemption
Comer v Murphy Oil USA, Inc., 839 F. Supp.2d 849 (S.D. Miss. 2012), aff’d on other grounds, 718 F.3d 469 (5th Cir. 2013)

- State common law claims alleging defendants’ emissions contribute to global warming and Hurricane Katrina held displaced by CAA

- Requires the court to determine “what amount of emissions is unreasonable and what level of reduction is practical, feasible, and economically viable, a task entrusted by Congress to the EPA.”
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- CAA preempts Kentucky common law claims
- On appeal to the Kentucky Court of Appeals
- Amicus Brief filed by Kentucky Association of Manufacturers and Kentucky Chamber of Commerce


- CAA does not preempt Kentucky common law claims
- Before the U.S. Court of Appeals for the Sixth Circuit on Interlocutory Appeal
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- Rejects CAA preemption defense


- Rejects CAA preemption defense
Decisions to watch:

- US Supreme Court decision whether to review the *Grain Processors Corp.* decision, and any decision on the merits

- Kentucky Court of Appeals decision *Merrick v Brown-Forman Corp.*

- Sixth Circuit Court of Appeals decision in *Merrick v Diageo Americas Supply, Inc.*