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Despite Bell, State Law CO2 Liability Claims Are Doomed

Law360, New York (November 07, 2013, 4:00 PM ET) -- "Therefore, the court declines to assert supplemental jurisdiction over the remaining state law claims which are dismissed without prejudice to their presentation in a state court action." So ends the last analytical paragraph in Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009).

Thus, while plaintiffs' federal common law carbon dioxide liability claims were extinguished on standing and political question grounds, state law claims could go forward should the plaintiffs choose to refile.

Then, the U.S. Supreme Court decided American Electric Power Co. Inc. v. Connecticut, 564 U.S. __ (2011), and held a set of different plaintiffs' federal common law claims were displaced by the Clean Air Act. The court specifically declined to rule on state law claims of the type at issue in Kivalina: "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."

Last fall, we relied on Bell v. Cheswick Generating Station, 903 F. Supp. 2d 314 (W.D. Pa. 2012), out of the Western District of Pennsylvania as support for the proposition that state law nuisance claims were futile — preemption by the Clean Air Act doomed such claims. The Third Circuit's recent review, while reversing the trial court, has not upended our conclusion.

In Bell, 1,500 neighbors of the 570 megawatt coal-fired Cheswick Generating Station operated by GenOn Power Midwest LP became annoyed by ash and other contaminants allegedly settling on their property. And so they brought a class action under Pennsylvania state tort law. GenOn defended based on the comprehensive regulation of the Clean Air Act, which, it was asserted, preempted state law tort claims; the trial court agreed.

On appeal, however, broad preemption by the Clean Air Act was not accepted. The appeals court acknowledged the comprehensive program established by the act. But it also recognized that Congress had specifically provided for a citizens suit provision, 42 U.S.C. § 7604, and that the act contained two "savings" clauses.

The first, the "citizen suit savings clause," provided: "Nothing 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 to seek any other relief (including relief against the administrator or a state agency)." 42 U.S.C. § 7604(e).

The second, the "states' rights savings clause," stated: "Except as 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 ...." 42 U.S.C. § 7416. Read together, a more restrictive state law could be enforced in a citizen suit.

This idea was consistent with the Cheswick Generating Station's permit: "Nothing in this permit shall be construed as impairing any right or remedy now existing or hereafter created in equity, common law or statutory law with respect to air pollution, nor shall any court be deprived of such jurisdiction for the reason that such air pollution constitutes a violation of this permit."

Could a citizen suit successfully address the ill-placed ash and contaminants? The trial court said "no": “Based on the extensive and comprehensive regulations promulgated by the administrative bodies which govern air emissions from electrical generation facilities, the court finds and rules that to permit the common law claims would be inconsistent with the dictates of the Clean Air Act.” But the Third Circuit said "yes."

Its primary authority was the U.S. Supreme Court's 1987 decision in International Paper Co. v. Ouellette, 479 U.S. 481 (1987), a Clean Water Act case where Vermont plaintiffs asserted a (Vermont) common law nuisance suit in Vermont state court, where the pollution originated from a New York facility. To quote:

The Ouellette Court found that the Clean Water Act's savings clauses clearly preserved some state law tort actions, but that the text of the clauses did not provide a definitive answer to the question of whether suits based on the law of the affected state were preempted. 479 U.S. at 492, 497. However, it found definitively that "nothing in the [Clean Water Act] bars aggrieved individuals from bringing a nuisance claim pursuant to the laws of the source state." Id. at 497 (emphasis in original). The court reasoned that, "[b]y its terms the Clean Water Act allows states ... to impose higher standards on their own point sources," and "this authority may include the right to impose higher common-law as well as higher statutory restrictions." Id. (internal citation omitted). The court acknowledged that a source state's "nuisance law may impose separate standards and thus create some tension with the permit system," but explained that this "would not frustrate the goals of the Clean Water Act," because "a source only is required to look to a single additional authority, whose rules should be relatively predictable." Id. at 498-99. Thus, a suit by Vermont citizens would not be preempted if brought under the law of New York, the source state.

But, GenOn argued, the Clean Water Act and its savings clauses are distinguishable from the Clean Air Act and its savings clauses. Not so, said the court; "a textual comparison of the two savings clauses at issue demonstrates there is no meaningful difference between them." Accordingly, the Bell plaintiffs, who brought suit as “Pennsylvania residents under Pennsylvania law against a source of pollution located in Pennsylvania,” were not preempted.

Now let’s return again to Kivalina. The concurring opinion laid out the rule: “Kivalina may pursue whatever remedies it may have under state law to the extent their claims are not preempted.” Bell limits those claims.

Where Alaska natives sue in California a collection of greenhouse gas emitters from around the country, they would appear not to satisfy the requirement of emission source state law application unless they are arguing that the nuisance rules of a score of jurisdictions must be considered. In which case, their case falls apart for improper joinder.

And if they attempt to sue in multiple jurisdictions, they only amplify a fundamental flaw in their approach. Whomever they sue has only contributed a tiny fraction of global greenhouse gases in either volume or over time and thus could not be the proximate cause of the Kivalina plaintiffs' loss. See Comer v Murphy Oil USA Inc., 839 F. Supp. 2d 84 (S.D. Miss. 2012) ("[t]he assertion that the defendants' emissions combined over a period of decades or centuries with other natural and man-made gases to cause or strengthen a hurricane and damage personal property is precisely the type of remote, improbable and extraordinary occurrence that is excluded from liability.")

Carbon dioxide liability plaintiffs may attempt to rely on the Third Circuit's decision in Bell to attempt to revive their litigation fortunes. From our perspective, such attempts still won't ring the bell.

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