

## CLIENT ALERT

### Another Federal Circuit Rejects Clean Air Act Preemption Arguments and Allows State Common Law Tort Suit to Proceed

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Following in the footsteps of the Third Circuit, the Sixth Circuit last week held in *Merrick v. Diageo Americas Supply, Inc.*, 2015 WL 6646818 (6th Cir. Nov. 2, 2015) that the Clean Air Act (CAA) did not preempt the state law tort claims of a putative class of property owners who alleged that a distillery's ethanol emissions intruded onto their property, constituting trespass, nuisance, and negligence. The same day, the Sixth Circuit relied on *Merrick* in rejecting CAA preemption arguments in a similar case, *Little v. Louisville Gas & Electric*, Case No. 14-6499. The decisions open another door to common law suits against industrial air emitters who dutifully comply with the Clean Air Act.

#### Background

The defendant, Diageo Americas Supply, Inc. (Diageo), operates a whiskey distillery that emits tons of ethanol into the air. The plaintiffs, a putative class of property owners near the distillery, complained that these emissions combined with condensation on their property to form "whisky fungus," an unsightly growth that damaged their property and was expensive to remove. *Id.* at \*3. After complaining to the local air pollution control district, the property owners filed a class action complaint in federal district court, alleging claims for negligence, nuisance, and trespass, and seeking an injunction requiring the distillery to curb its ethanol emissions. *Id.* In addition to arguing that it had no duty to curb ethanol emissions, Diageo contended that plaintiffs' state law claims were preempted by the CAA, which is a "comprehensive federal law that regulates air emissions under the auspices of the Environmental Protection Agency (EPA)." *Id.* at \*1 (citing *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190-91 (3d Cir. 2013)).

#### The Parties' Arguments

Diageo argued that the state law claims conflicted with the CAA, which gives the EPA the authority to set uniform air quality control standards across the country. *Id.* at \*1. Diageo contended that it complied with the CAA by obtaining a permit from the Louisville Metro Air Pollution Control District, which "prescribes detailed requirements for data collection, recordkeeping, and reporting. It also expressly incorporates most of the regulations of the air pollution control district[.]" *Id.* at \*2. The permit sets limits for various pollutants from the distillery, but put no limits on fugitive ethanol emissions. *Id.*

Plaintiffs argued that regardless of whether Diageo complied with the CAA, they were not prohibited from seeking state law remedies because the CAA expressly preserves state common law remedies in two sections. First, the "citizen suit provision," which has been construed as a "savings clause," provides that nothing in the CAA "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[.]" 42 U.S.C. § 7604(e). Second, the CAA clause entitled "Retention of State authority" states that the CAA does not preempt state attempts to set standards or limitations respecting air emissions or requirements respecting control or abatement of air pollution. 42 U.S.C. § 7416.

The district court agreed with plaintiffs, finding that their state law claims were not preempted.

### **The Court's Decision**

On interlocutory appeal, the Sixth Circuit agreed with the district court, finding no preemption under the CAA. The Sixth Circuit noted that the CAA itself "expressly preserves the state common law standards on which plaintiffs sue." *Merrick*, 2015 WL 6646818 at \*4. Specifically, the Sixth Circuit held that, even if the CAA did not set limits on ethanol emissions, it reserved to the states the ability to set "any requirement respecting control or abatement of air pollution," which could include limits on ethanol emissions. *Id.* at \*4-5. The "any requirement" language was especially broad, and the Sixth Circuit reasoned that Congress had not made clear an intent to preempt state law. Rather, it was Congress's apparent intent in passing the CAA to set certain minimum requirements, but to otherwise leave existing common law standards undisturbed. *Id.* at \*5. The *Merrick* Court agreed with the Third Circuit in *Bell* that the relevant CAA provisions were similar to the provisions of the Clean Water Act, which the Supreme Court had held did not preempt state law claims. *See Int'l Paper Co. v. Ouellette*, 475 U.S. 481, 497-98 (1987) (holding that the states' rights savings clause of the Clean Water Act preserved state law claims filed in the source state.)

That same day, the Sixth Circuit relied on *Merrick* in deciding a similar case, *Little v. Louisville Gas & Electric*, Case No. 14-6499. The *Little* court pointed to the analysis in *Merrick* and upheld a district court order finding that plaintiffs' state law claims for nuisance, trespass, and negligence were not preempted by the CAA where plaintiffs complained that dust and coal ash had been emitted from defendant's power plant and intruded onto their land.

### **Implications**

The Sixth Circuit's decisions in *Merrick* and *Little* are another blow to regulated parties' efforts to expand to state common law claims the Supreme Court's holding in *American Electric Power Co. v. Connecticut (AEP)*, 131 S.Ct. 2527 (2011), that the CAA displaced claims arising under federal common law. The Sixth Circuit emphasized the distinction between federal common law and state common law claims, holding that only claims arising under the former are displaced by the CAA. The court also summarily dismissed Diageo's arguments that having states create their own regulatory schemes would undermine the goal of the CAA to set uniform standards, and would potentially force regulated parties to face conflicting standards. Given the Supreme Court's denial of certiorari in the *Bell* case, it appears that facilities in both the Third Circuit (Delaware, New Jersey, and Pennsylvania) and Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) should assess their risk and preparedness for similar tort litigation going forward.

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