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# *Bell v. Cheswick* and What the Clean Air Act's Savings Clause Means for Fenceline Communities

## INTRODUCTION

Under the doctrine of conflict preemption, courts disallow common law tort claims that would interfere with federal regulatory schemes.<sup>1</sup> The Clean Air Act preempts a wide range of environmental tort litigation by this doctrine,<sup>2</sup> but the Act's citizen suit savings clause preserves state common law claims related to air pollutants that the court finds do not conflict with the provisions of the Act.<sup>3</sup> This In Brief examines one such case.

On August 20, 2013, in *Bell v. Cheswick Generating Station (Bell II)*, the Third Circuit found that the Clean Air Act's citizen suit savings clause preserved landowners' rights to seek relief under state common law tort claims against a local coal plant for damage to their property caused by fallout of airborne pollutants.<sup>4</sup> This decision opens the door for private citizens to assert their property rights against polluters through citizen suits independent of the Environmental Protection Agency and the standards of the Clean Air Act. By finding that federal emissions regulations did not preempt the common law tort claims asserted by the plaintiff class in *Bell II*, the court preserved the agency of private citizens to assert their own rights against polluters. In evaluating the legacy of *Bell II* moving forward, this In Brief analyzes advantages, shortcomings, and uncertainties future plaintiff classes may encounter in applying *Bell II* as a model for their own litigation.

## I. BACKGROUND

On April 19, 2012, Kristie Bell and Joan Luppe filed a class action lawsuit against coal-fired power plant Cheswick Generating Station (Cheswick) and its

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1. See *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010).

2. See, e.g., *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (federal common law nuisance claims); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981) (federal common law nuisance claims).

3. See Clean Air Act, 42 U.S.C. § 7604(e) (2006).

4. *Bell v. Cheswick Generating Station (Bell II)*, 734 F.3d 188, 198 (3d Cir. 2013), *petition for cert. filed sub nom. GenOn Power Midwest, L.P. v. Bell*, No. 13-1013 (U.S. Feb. 20, 2014), 2014 WL 709667.

owner, GenOn Power Midwest (GenOn), in Pennsylvania state court.<sup>5</sup> On behalf of at least 1500 of their fellow Springdale residents, Bell and Luppe brought common law trespass, nuisance, and negligence claims in response to the accumulation of fly ash and coal dust<sup>6</sup> on class members' properties within a one-mile radius of the plant.<sup>7</sup>

In claiming nuisance, the plaintiffs alleged that particulate discharges from the plant settled on their properties and thereby damaged and interfered with the use and enjoyment of their land.<sup>8</sup> To add insult to injury, many of the residents had to clear the pollutants off their land themselves.<sup>9</sup> Both trespass and nuisance, the plaintiffs alleged, occurred once damaging air contaminants, odors, chemicals, and particulates emitted by the plant entered onto class members' private properties.<sup>10</sup> In support of their negligence claim, the plaintiffs contended that Cheswick knowingly operated without the best available technology and was aware that this resulted in the plant emitting concentrations of waste great enough to accumulate on local properties.<sup>11</sup>

Following removal, the District Court for the Western District of Pennsylvania dismissed the plaintiffs' claims on the grounds that the Clean Air Act (the Act) preempted state law tort claims arising out of emissions governed by the Act.<sup>12</sup> The court reasoned that granting relief for the plaintiffs would require the court to regulate the plant's emissions, interfering with the regulatory scheme devised by the Act.<sup>13</sup>

On appeal, the Third Circuit reversed based on three findings.<sup>14</sup> First, the court reasoned that the savings clause of the Act preserves the rights of individuals and classes to seek redress under certain state common law claims.<sup>15</sup> Second, the court found that the Act contains no language suggesting that Congress intended to preempt such state common law tort claims.<sup>16</sup> Third, the court held that state common law tort claims stemming from pollution to land do not satisfy the requirements of conflict preemption, as they do not, in fact, rival federal government efforts to regulate emissions in the air.<sup>17</sup> In

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5. See *Bell v. Cheswick Generating Station (Bell I)*, 903 F. Supp. 2d 314, 314–16 (W.D. Pa. 2012), *rev'd*, 734 F.3d 188 (3d Cir. 2013).

6. Class Action Complaint in Civil Action ¶ 24, *Bell I*, 903 F. Supp. 2d 314, *rev'd*, 734 F.3d 188 (No. 2:12cv00929). Fly ash and coal dust are byproducts of the coal burning process. See *id.* If not properly equipped, coal-fired plants like Cheswick can emit these waste products into the air. See *id.*

7. *Bell I*, 903 F. Supp. 2d at 314–16.

8. *Id.* at 315.

9. *Id.*

10. *Id.* at 315–16.

11. *Id.* at 320.

12. *Id.* at 322–23.

13. *Id.* at 322.

14. *Bell II*, 734 F.3d at 190–93.

15. *Id.* at 191–92; see 42 U.S.C. § 7604(e) (2006).

16. *Bell II*, 734 F.3d at 198.

17. *Id.*; see also *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010).

accordance with these findings, the circuit court concluded that the Act did not preempt the plaintiffs' claims.<sup>18</sup>

Once the *Bell II* court determined that the savings clause applied to the plaintiffs' claims, GenOn's preemption defense relied on one remaining contention: that while the savings clause does permit a private right of action in general, these particular claims were of a category Congress intended to preempt.<sup>19</sup> In order to discern Congress's intent on this matter, the court scoured the text of the Act for an expression of intent to preempt state tort law claims or any indication that the scope of the regulatory scheme left no room for state law to provide a private right of action.<sup>20</sup> In carrying out this inquiry, the court found no language expressing such intent.<sup>21</sup>

In search of an implicit demonstration of intent to preempt, the court turned to the standard applied by the U.S. Supreme Court in *International Paper Co. v. Ouellette*.<sup>22</sup> In *Ouellette*, the Court did not infer preemption because federal legislation on the matter was not "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation."<sup>23</sup> The circuit court found that this standard was not met, as the Clean Air Act is not sufficiently comprehensive to regulate surface pollution like coal ash, even in instances where these pollutants arrive on the land by raining down from the air.<sup>24</sup> Accordingly, the court concluded that the plaintiff class's state common law tort claims were not preempted and remanded the case for a trial on the merits of the plaintiff class's claims.<sup>25</sup>

## II. ANALYSIS

This In Brief addresses the implications of *Bell II* on two levels. First, it sets forth how this class action suit can serve as a model for communities confronted with similar environmental harms. Second, it identifies circumstances particular to *Bell II* and evaluates difficulties that could arise for future plaintiffs attempting to apply this model in a different situation.

### A. *Bell As a Model for the Next Springdale*

As a result of *Bell II*, local property owners have a new means to hold polluters accountable for the fallout of their emissions.<sup>26</sup> Without the burden of reliance on administrative bureaucracy, common law tort claims can serve as a more immediately enforceable deterrent to uncontained emissions of airborne

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18. *Bell II*, 734 F.3d at 198.

19. *See id.*

20. *See id.* at 194–97.

21. *See id.*

22. *See id.* at 196–97; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987).

23. *Ouellette*, 479 U.S. at 491 (quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)).

24. *See Bell II*, 734 F.3d at 196–97.

25. *Id.* at 198.

26. *See supra* notes 14–25 and accompanying text.

particulates. Furthermore, Cheswick was not facing charges under statutory emissions regulations, and federal common law options are preempted by the Clean Air Act under *American Electric Power Co. v. Connecticut*.<sup>27</sup> Thus, a finding of preemption in *Bell II* would have eliminated the only means by which these property owners could seek compensation for a legitimate injury not covered by the Act.

Additionally, the nature of environmental harms, similar to what transpired in Springdale, lends itself to class action suits like the one brought by Bell and Luppe. Point sources like Cheswick generate geographically concentrated patterns of emissions fallout, making a class action lawsuit less burdensome to organize. In order to identify and reach all affected parties, one needs only to contact landowners within the affected radius of the plant. The tort claims allowed under *Bell* are particularly amenable to potential plaintiffs because if a widely dispersed particulate accumulates on one neighbor's property in an amount sufficient enough to constitute a significant harm, that individual's entire neighborhood, if not her entire town, might have suffered a similar harm that can be traced back to the same source. This sets the stage perfectly for a class action modeled after *Bell*.

### B. Potential Complications for the Next Springdale

The plaintiffs in *Bell* overcame several difficulties, particularly the preemption doctrine. But though the residents of Springdale paved much of the way for similarly situated future litigants, more potential barriers and unresolved questions of law persist.

First, there is the matter of discerning the range of tort claims that fall outside the scope of preemption. Power plants produce a wide variety of particulates substantially more hazardous than coal byproducts. Airborne dioxin discharges settling in and along the Great Lakes, for example, pose a significant threat to health and property values.<sup>28</sup> *Bell II* does not shed light on how a court would handle fallout of such a hazardous contaminant or the conveyance of emissions fallout through interstate and international waterways.<sup>29</sup> Though a court likely would treat many variations of the facts in *Bell II* similarly, each new substance and means of accumulation presents a new question for litigation.

Second, potential plaintiffs may have trouble proving which of multiple point sources is responsible for the accumulation. In *Bell II*, Cheswick was the only nearby polluter large enough to have emitted the discharges at issue. For communities with multiple point sources, proving which facility is responsible

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27. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

28. *See generally* BARRY COMMONER ET AL., *DIOXIN FALLOUT IN THE GREAT LAKES: WHERE IT COMES FROM; HOW TO PREVENT IT; AT WHAT COST* (1996) (examining the potential for dioxin fallout to settle in and along the Great Lakes).

29. *See Bell II*, 734 F.3d at 192–93. Nowhere in the statement of facts are dioxins or waterways mentioned as relevant to the court's decision.

for which accumulations could prove problematic. The complications of proving causation and apportioning liability among multiple tortfeasors are too numerous and complex for adequate summary here. For the present purposes, it suffices to say that a study of *Bell II* offers no answers to these questions.

Third, industry and regulators alike have a policy interest in holding point sources to clear, uniform standards, and some argue that preserving a private right of action in cases like *Bell II* undermines this objective.<sup>30</sup> The *Bell II* court's decision was rooted heavily in positive doctrinal reasoning rather than normative public policy considerations.<sup>31</sup> Nonetheless, the court acknowledged the policy implications of preserving state tort law claims in addressing GenOn's concern that preserving common law claims would force plant operators to account for the conflicting and uncertain standards of several states.<sup>32</sup>

In *Bell*, Pennsylvania residents sued the operators of a Pennsylvania power plant under Pennsylvania common law.<sup>33</sup> However, if a future case arose in which a point source like Cheswick were to damage properties in neighboring states, a court would have to resolve a conflict of law between states. Fortunately for courts and litigants who may find themselves in this situation, the relevant case law is clear.

In *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, the State of North Carolina asserted claims under North Carolina common law against plants located in Alabama and Tennessee.<sup>34</sup> The *Cooper* court sought to maintain a coherent federal regulatory scheme while still respecting states' authority to protect their citizens through state common law.<sup>35</sup> In order to strike a balance between these objectives, the *Cooper* court adopted a rule under which the common law of the state where the source is situated, but not those of other affected states, controls.<sup>36</sup> Accordingly, the court found that it could not apply North Carolina common law to out-of-state sources, but "[t]here is no question that the law of the states where emissions sources are located . . . applies in a nuisance dispute."<sup>37</sup>

As the court acknowledged in *Bell II*, the cooperative federalism structure of the Clean Air Act preserves states' authority to impose standards on in-state polluters beyond those imposed by the Act in the interest of affording their citizens greater protection.<sup>38</sup> The court in *Bell II* distinguished its facts from

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30. *See id.* at 197.

31. *See* Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 238 (2000) ("Generally, courts do not engage in policy analysis when applying preemption; instead, they rely on doctrines of statutory construction and statutory interpretation.").

32. *See Bell II*, 734 F.3d at 197–98.

33. *Id.* at 197.

34. *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010).

35. *See id.* at 298.

36. *See id.* at 305; *see also Bell II*, 734 F.3d at 197–98.

37. *See Cooper*, 615 F.3d at 306–07.

38. *See Bell II*, 734 F.3d at 197–98.

those before the court in *Cooper* in that *Bell II* involved claims limited to the law of the source state. Although the *Bell II* court quoted the *Cooper* court's finding that the law of a non-source state is inapplicable,<sup>39</sup> the *Bell II* court found that property owners may recover under tort claims against a point source under the common law of the source state.<sup>40</sup>

This rule is not without its flaws, the most apparent of which being that it gives industry decision makers an incentive to minimize liability by locating plants where state tort law is more amenable, rather than the socially efficient solution: minimizing potential harm by selecting sites that minimize risks to environmental health. Nonetheless, the *Bell II* court did not mention efficiency concerns or the rule's potential impacts on source location decisions; instead, the court emphasized the pragmatic complications of subjecting a source to the laws of multiple states.<sup>41</sup> Given the multitude of factors that influence distribution of plants regardless of this rule, maintaining regulatory coherency certainly is a defensible position on the matter.

### III. PENDING CERTIORARI PETITION

In February of 2014, GenOn filed a petition for a writ of certiorari with the U.S. Supreme Court, characterizing the circuit court's decision in *Bell II* as at odds with the reasoning of the Fourth Circuit in *Cooper*.<sup>42</sup> In its petition, GenOn quoted the *Cooper* court in alleging that preserving the claims asserted in *Bell II* would contribute to "the balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike."<sup>43</sup> This concern is irrelevant to *Bell II*, as the *Cooper* court was expressing how ill-advised it would be for courts to apply the common law of non-source states.<sup>44</sup> In contrast, the *Cooper* court found that the common law of the source state would, in fact, apply.<sup>45</sup>

Courts hesitate to enjoin activities authorized by federal legislation,<sup>46</sup> but Cheswick's permit under the Act authorized the plant to pollute the atmosphere, not to deposit thick layers of contaminants on private property. The court in *Cooper* applied the standard from *Ouellette* that the Act preempts a state common law tort claim only if recognition of the claim would "[interfere] with the methods by which the federal statute was designed to reach [its] goal."<sup>47</sup> The goals of the Act all relate specifically to air quality.<sup>48</sup> In

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39. *Id.* at 196; *see Cooper*, 615 F.3d at 308.

40. *Bell II*, 734 F.3d at 197; *Cooper*, 615 F.3d at 308.

41. *Bell II*, 734 F.3d at 197.

42. Petition for Writ of Certiorari, GenOn Power Midwest, L.P. v. Bell, No. 13-1013 (U.S. Feb. 20, 2014), 2014 WL 709667, at \*21-22.

43. *Id.* at \*3.

44. *Cooper*, 615 F.3d at 296.

45. *See id.* at 306-07 ("There is no question that the law of the states where emissions sources are located . . . applies in a nuisance dispute.")

46. *See id.* at 309.

47. *Id.* at 303 (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)).

48. *See* 42 U.S.C. § 7401(b) (2006).

*Cooper*, the court could not grant injunctive relief capping air emissions without so interfering,<sup>49</sup> but allowing tort recovery when discharges coat plaintiffs' properties would not interfere with efforts to regulate air quality. Thus, the court in *Bell II* decided correctly that the Act did not preempt plaintiffs' state common law claims, and this decision did not contradict *Cooper*. There is no error by the *Bell II* court, nor any dispute between the circuit courts for the Supreme Court to settle.

#### CONCLUSION

As illustrated by the court in *Bell II*, a finding that the Clean Air Act preempted the claims brought against GenOn by the citizens of Springdale would have been improper under the law.<sup>50</sup> Of greater import to those affected, however, is that a finding of preemption here would have deprived citizens of their only available means of redress. Unlike North Carolina in *Cooper*, which retained an alternative means of redress regarding upwind emissions,<sup>51</sup> the plaintiffs in *Bell II* would not have any other remedy for their injuries had the court found that the Act preempted their claims. This demonstrates that a finding of preemption here would have created a gap in the protection of citizens from pollution rather than interfered with an existing body of law, and underscores just how much was at stake in *Bell II* for the residents of Springdale and other communities alike.

The right to sue under state common law when a polluting facility's emissions accumulate on one's property is not a cure-all by any stretch of the imagination. But even for all of its inadequacies, qualifications, and uncertainties destined to be the subjects of legal battles to come, the victory of Kristie Bell, Joan Luppe, and their Springdale neighbors in defending the right of landowners to take polluters to court themselves is a victory for the larger environmental justice movement. While several obstacles remain for the next Springdale, the *Bell II* court's finding of no preemption lessens barriers to bringing litigation, making class actions like *Bell* an attractive tool for private enforcement of environmental justice for local citizens, by local citizens. For the residents of Springdale and fence-line communities like it, *Bell v. Cheswick* calls for celebration.

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49. See *Cooper*, 615 F.3d at 309–10.

50. See *supra* notes 12–25 and accompanying text.

51. See *Cooper*, 615 F.3d at 310–11 (finding that “North Carolina is by no means without remedy” and explaining the alternative means of redress that remain available to North Carolina despite preemption of its nuisance claim).

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