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Defending Environmental Common Law Claims After Bell v. Cheswick: Is Federal Permit Compliance Enough?

Assessing the Future of Preemption, Leveraging Potential Analogous State Law Arguments, and Demonstrating Due Care

THURSDAY, OCTOBER 24, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Jonathan Martel, Partner, **Arnold & Porter**, Washington, D.C.

Mark W. DeLaquil, Partner, **BakerHostetler**, Washington, D.C.

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ARNOLD & PORTER LLP

Defending Environmental Common Law Claims After Bell v. Cheswick:

Is Federal Permit Compliance Enough?

Jonathan S. Martel
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October 24, 2013

Agenda

- Introduction (Jonathan Martel)
  - Bell v. Cheswick Background (5 min)
  - Summary of Bell v. Cheswick Holding (5 min)
- Was Bell Correctly Decided?
  - Why not (Mark DeLaquil) (12 min)
  - Why yes (Stacey Myers) (12 min)
- Defenses if Bell Stands (Jonathan Martel) (12 min)
- Moderated Panel Discussion (30 min)
- Questions and Answers (15 min)

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Defending Environmental Common Law Claims After *Bell v. Cheswick*: Is Federal Permit Compliance Enough?

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The Clean Air Act Savings Clause

- Section 116
- "Except as otherwise provided [certain inapplicable sections] . . . . , 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; . . . ."

The Savings Clause Is Not The End Of The Issue

- Three Forms Of Preemption
  - Express Preemption
  - Field Preemption
  - Conflict Preemption
- Savings Clause Precludes Express and Field Preemption, But . . .

The Savings Clause Is Not The End Of The Issue

- A Savings Clause Does Not Decide The Issue Of Conflict Preemption
  - *Michigan Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 477 (1984) (State Law That "Interferes With The Methods By Which The Federal Statute Was Designed To Reach [Its] Goal" Preempted)
  - *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000) (Holding That Savings Clause Did "*Not* Bar The Ordinary Working Of Conflict Pre-emption Principles")
  - *See also Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002)

The Problems With *Bell v. Cheswick*

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- The Lawsuit Seeks A Common Law Remedy That Would Alter The Legal Standards Applicable To The Facility Under The Clean Air Act And Its Operating Permit
- Allows For The Application Of Vague And Indeterminate Legal Criteria Determined By Judges Instead Of Expert Agencies Weighing All Evidence
- Could Lead To Inconsistentcy Through Multiple Lawsuits
- Allows For The "Litigation" Of Emission Standards And Other Controls By Unsuccessful Parties In Clean Air Act Administrative Proceedings

Interference From State Common Law Tort Lawsuits

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- The Clean Air Act's Cooperative Federalism Regime For Regulating Large Stationary Sources
- Comprehensive Title V Permits Including All Applicable Legal Requirements
- Compliance With Requirements Designed To Ensure Attainment Of Health- And Welfare-Based Standards
- Often Additional Federal Technology-Based Standards
- Often Additional State Law Standards By Statute Or Regulation

Interference From State Common Law Tort Lawsuits

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- Remedies
  - Rulemaking And Permit Proceedings
  - Citizen Suits
  - Petition For Agency Action
  - Interstate Action Petitions Under Clean Air Act Section 126
  - Section 303 Emergency Powers

International Paper v. Ouellette

- In *International Paper v. Ouellette*, The Supreme Court Suggested That Source State Nuisance Law Could Apply To Out-Of-State Effluent Discharges
- But *Ouellette* Was Decided Based On A Clean Water Act Savings Clause Concerning "Boundary Waters" That Is Not Present In The Clean Air Act
- *Ouellette* Also Recognized That "It Would Be Extraordinary For Congress, After Devising An Elaborate Permit System That Sets Clear Standards, To Tolerate Common-Law Suits That Have The Potential To Undermine This Regulatory Structure."

The Vagaries Of Nuisance Law

- The Critical Question Is Whether The Activity Is *Reasonable*, Which Occurs If:
  - The Gravity Of The Harm Outweighs The Utility Of The Actor's Conduct, Or
  - The Harm Caused By The Conduct Is Serious And The Financial Burden Of Compensating For This And Similar Harm To Others Would Not Make The Continuation Of The Conduct Not Feasible.

Is A Line Longer Than A Rock Is Heavy?

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- Requires Court To Balance Factors Such As:
  - The Extent Of The Harm Involved
  - The Character Of The Harm Involved
  - The Social Value That The Law Attaches To The Type Of Use Or Enjoyment Invaded
  - The Suitability Of The Particular Use Or Enjoyment Invaded To The Character Of The Locality
  - The Burden On The Person Harmed Of Avoiding The Harm
  - The Social Value That The Law Attaches To The Primary Purpose Of The Conduct
  - The Suitability Of The Conduct To The Character Of The Locality; And
  - The Impracticability Of Preventing Or Avoiding The Invasion

North Carolina v. TVA, 615 F.3d 291 (4th Cir. 2010)

- The Legally Correct And Common Sense Answer: Nuisance Suit By State Of North Carolina Against TVA Sources In Alabama And Tennessee Would Supplant "The Cooperative Federal-State Framework That Congress Through The EPA Has Refined Over Many Years."
- Emphasized The Comprehensive Coverage Of CAA, The Vagueness Of Nuisance Law, And The Extensive Cost That TVA Had Incurred For CAA Compliance Already

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Defending Environmental Common Law Claims After Bell v. Cheswick: Is Federal Permit Compliance Enough?

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Nuisance Law Is the Indispensable Backstop of Environmental Law

"The deepest doctrinal roots of modern environmental law are found in principles of nuisance. . . . Nuisance actions have involved pollution of all physical media - air, water, land - by a wide variety of means.... Nuisance theory and case law is the common law backbone of modern environmental and energy law."

WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW § 2.1, at 100 (2d ed.1977)

The (briefest) history of common law nuisance

Private Nuisance:

- **The action for private nuisance dates back to the twelfth century.**
- **A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land.**

Public Nuisance:

- **By the time of Edward III (1327-1377) nuisance principles had been extended to the invasion of the rights of the public, represented by the Crown, by such things as smoke from a lime-pit that inconvenienced a whole town.**
- **A public nuisance is an unreasonable interference with a right common to the general public (i.e. interference with the public health, the public safety, the public peace, the public comfort or the public convenience) and may be brought by private citizens.**

Restatement (Second) of Torts § 821B & 821D (1979)

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The right to pure air is part of the common law

- **Since at least 1899, the State of Alabama has recognized that "every man has a right, by the common law, to . . . pure air."**

  Hundley v. Harrison, 26 So. 294, 294 (Ala. 1899).

- **Under Tennessee common law "[i]t is generally recognized that whatever is injurious to human life or detrimental to health, or whatever deprives the inhabitants of pure, uncontaminated and inoffensive air, constitutes a public nuisance."**

  Penn-Dixie Cement Corp. v. Kingsport, 225 S.W.2d 270, 273 (Tenn. 1949).

- **Relying on *William Aldred's Case,* 77 Eng. Rep. 816 (1610), the Tennessee Supreme Court has recognized that the right to wholesome air dates back to "before time of memory."**

  Lane v. W.J. Curry & Sons, 92 S.W.3d 355, 365 n. 11 (Tenn. 2002)

And this specifically includes smoke from burning coal

Smoke from coal burning "may constitute a nuisance so imperiling the comfort or health of those on the premises invaded by it as to call for injunctive relief at the hands of a court of equity."

Martin Bldg. Co. v. Imperial Laundry Co., 220 Ala. 90, 91 (1929).

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The CAA Savings Clause expressly preserves common law

- "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.A. § 7604(e) (West).
- "[N]othing 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.A. § 7416 (West.)

"Requirements" language means common law

"[T]he plain meaning of 'requirement' and the Supreme Court's broad interpretation of the term foreclose the TVA's argument that the CAA does not mandate compliance with state 'requirements' enforced through a common-law tort suit."

North Carolina ex rel. Cooper v. Tennessee Valley Authority, 515 F.3d 344, 352-53 (4th Cir. 2008) (discussing Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) and Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).)

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The CAA legislative history shows Congressional intent

- The Senate Report regarding enactment of the CAA explains that the savings clause "**specifically preserve[s] any rights to remedies under any other law**," which includes common law actions, and that compliance with the Act is not a defense in such actions. S. Rep. No. 91-1196, at 38 (1970).

- The 1990 Amendments stated it again:

"**To assure that . . . preemption of State or local law, whether statutory or common, does not occur**, environmental legislation enacted by the Congress has consistently evidenced great care to preserve State and local authority and the consequent remedies available to the citizens injured by the release of harmful substances to the environment." S.Rep. 101-228, 101st Cong., 1st Session 1989, 1990 U.S.C.C.A.N. 3385, 3582.

No "complete occupation" of the field by the CAA

- "When the federal government completely occupies a given field or an identifiable portion of it . . . the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'"

  Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212-13 (1983), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947).

- Under the Clean Air Act, the federal government does not occupy the field; the CAA recognizes "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C.A. § 7401(a)(3) (West).

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State Air Pollution Prevention Laws Preserve Common Law

- The Alabama Air Pollution Control Act, Ala. Code §22-28-23(a), expressly states:

  Nothing in this section shall be construed to limit or abrogate any private remedies now available to any person for the alleviation, abatement, control, correction or prevention of air pollution or restitution for damage resulting therefrom.

- Through this code section, Alabama law "clearly provides an appropriate remedy for [p]laintiffs who have been directly injured by the deleterious effects of pollutants created by another party's acts." Borland v. Sanders Lead Co., 369 So.2d 523, 526 (Ala. 1979).

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State Air Pollution Prevention Laws Preserve Common Law

- The Tennessee Air Quality Act recognizes the continuing role that common law claims play in abating and controlling air pollution:

  The remedies provided for in this part are intended to provide additional and cumulative remedies to prevent, abate and control air pollution in this state. **Nothing in this part shall be construed to abridge or alter any rights of action, civil or criminal, arising from statute, common law or equity.**

Tenn. Code Ann. § 68-201-114 (2008) (emphasis added).

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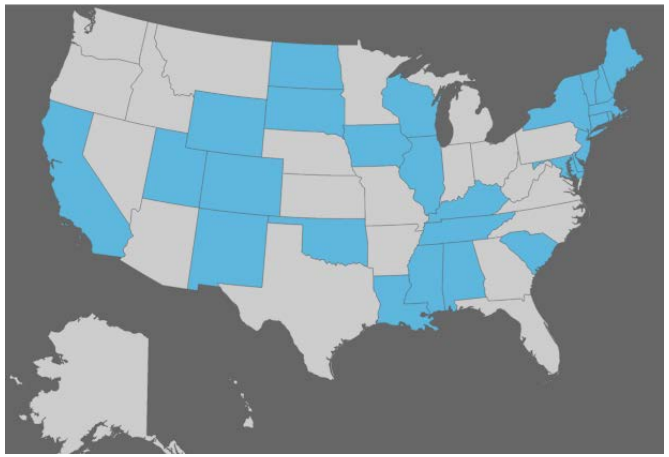
States Do Not View the CAA as Preempting Common Law



Kentucky; Louisiana; North Dakota; South Dakota; Utah; Wyoming; Alabama; Tennessee; New York; Maryland; South Carolina; California; Colorado; Connecticut; Delaware; Illinois; Iowa; Maine; Massachusetts; Mississippi; New Hampshire; New Jersey; Ohio; Oklahoma; Rhode Island; Vermont; Wisconsin; and Washington, D.C.

None of the States argued that the CAA preempted source-state nuisance law

Common-Law Nuisance Fills in Gaps where Congress Hasn't Acted

There can be no preemption where the field is not occupied:

- Clean Air Act does not regulate on the local, neighborhood level
- Clean Air Act "grandfathered" numerous sources, exempting them from requirements to install pollution controls
- Clean Air Act does not address all emissions, noise, odor or other harms

No Conflict Preemption of Common Law by CAA

"Actual conflict with state law" means compliance with both the federal law and the state law is impossible *or* when state law stands as an obstacle to the execution of the full purposes and objectives of Congress.

Michigan Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984).

Common law nuisance claims (specifically preserved by state law) are not at odds with the CAA, and clearly complement, rather than conflict with, Congress' purposes and objectives.

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The entire point of the CAA is to prevent pollution

- "The Congress finds . . . that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in **mounting dangers to the public health and welfare**, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;"
- The purpose of the CAA includes "**to protect and enhance the quality of the Nation's air resources so as to promote the public health** and welfare and the productive capacity of its population;
- Congress expressly stated that "**a primary goal** [of the CAA] is to encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for **pollution prevention**."

42 U.S.C.A. § 7401 (West).

International Paper Co. v. Ouellette, 479 U.S. 481 (1987)

- The question was whether the Clean Water Act preempted a common law nuisance suit filed in Vermont under Vermont law, when the source of the alleged pollution was located in New York.
- The Supreme Court noted that federal legislation may be "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." Id. at 491.
- Also recognized that the Clean Water Act contained "'the most comprehensive and far reaching' provisions that Congress ever had passed in this area." Id. at 489.

International Paper Co. v. Ouellette, 479 U.S. 481 (1987)

- In light of the pervasive regulations, the Supreme Court held that "the only state suits that remain available are those specifically preserved by the Act." Id. at 492.
- In evaluating the CWA, the Court concluded that "[a]lthough Congress intended to dominate the field of pollution regulation, **the saving clause negates the inference that Congress 'left no room' for state causes of action**." Id.
- "The saving clause specifically preserves other state actions, and therefore **nothing in the Act** bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the ***source*** State." Id. at 497.

Courts agree that Ouellette applies equally to the CAA

"The Supreme Court in Ouellette carefully reviewed the effect of the FWPCA on state nuisance claims for interstate pollution and found such suits compatible with the FWPCA's standards and procedures so long as the nuisance claim is brought pursuant to the law of the source state. 107 S.Ct. at 811–14. This approach in effect affords injured private citizens in the non-source state the same rights against the polluter enjoyed by injured private citizens in the source state. We feel that the same concerns that led the Ouellette Court to require application of the source state's law in interstate water disputes are equally applicable to plaintiffs' air claims. Therefore, while we find that plaintiffs' state law nuisance claim is not preempted by the CAA, under Ouellette we will apply New York law in hearing that claim."

Ouellette v. Int'l Paper Co., 666 F. Supp. 58, 62 (D. Vt. 1987)

Courts agree that Ouellette applies equally to the CAA

Citing Ouellette, the Sixth Circuit held that the savings clause of the Clean Air Act "which defendants concede is identical to the savings clause" in the Clean Water Act "allows state law actions . . . notwithstanding the existence of federal law and standards."

Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 343 (6th Cir. 1989); see also Gutierrez v. Mobil Oil Corp., 798 F. Supp. 1280, 1285 (W.D. Tex. 1992); Cerny v. Marathon Oil Corp., CIV.A. SA-13-CA-562, 2013 WL 5560483 (W.D. Tex. Oct. 7, 2013).

The Bell v. Cheswick Decision Correctly Followed Ouellette

In Bell v. Cheswick the Third Circuit conducted "a side-by-side comparison of the text" and correctly held:

> Given that we find no meaningful difference between the Clean Water Act and the Clean Air Act for the purposes of our preemption analysis, we conclude that **the Supreme Court's decision in Ouellette controls this case**, and thus, the Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located.

Bell v. Cheswick Generating Station, 2013 WL 4418637 at *7.

Even North Carolina v. TVA recognized Ouellette controlled

- In North Carolina, the Fourth Circuit observed that the Clean Water Act is "similarly comprehensive" to the Clean Air Act, and that "[w]hile Ouellette involved a nuisance suit against a source regulated under the Clean Water Act, all parties agree its holding is equally applicable to the Clean Air Act."
- "[W]e cannot state categorically that the Ouellette Court intended a flat-out preemption of each and every conceivable suit under nuisance law."

North Carolina, ex rel. Cooper v. Tennessee Valley Authority, 615 F.3d 291, 303, 306 (4th Cir. 2010).

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Response to Preemption "Policy" Arguments

Arguments Against Common Law

- Use of Common Law Remedies Disturbs "Cooperative Federalism"

Rulings From Relevant Authorities

- "application of the source State's law does not disturb the balance among federal, source-state and affected-state interests." Ouellette, 479 U.S. at 498-99.

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Response to Preemption "Policy" Arguments

Arguments Against Common Law

- Common Law Remedy Would be at odds with Regulatory Requirements

Rulings From Relevant Authorities

- Common law "may impose separate standards and thus create some tension with the permit system," but that "does not disrupt the regulatory partnership established by a permit system." Ouellette, 479 U.S. at 499, 507.

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Response to Preemption "Policy" Arguments

Arguments Against Common Law

- Nuisance Standards Are "Vague"; Judges should not replace "expert agencies"

Rulings From Relevant Authorities

- "The federal courts have long resolved nuisance claims, including public nuisance claims, through state-law equity actions, and they have used this power to regulate pollution and other noxious emissions." NC v. TVA, 515 F.3d at 350.

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Response to Preemption "Policy" Arguments

Arguments Against Common Law

- Could lead to "Inconsistency" through multiple lawsuits

Rulings From Relevant Authorities

- Although "nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable." Ouellette, 479 U.S. at 499.

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Response to Preemption "Policy" Arguments

Arguments Against Common Law

- Allows for "litigation" of emissions standards after the administrative process

Rulings From Relevant Authorities

- Additional source control through injunctive relief "will not in any way alter or modify the validity of the federal permit previously issued [and] . . . That permit will be in existence, and will still be of full legal effect." Her Majesty, 874 F.2d at 344.

Compliance with a permit does not foreclose a nuisance claim

The United States Supreme Court has recognized that compliance with a federally authorized permit does not confer "immunity from liability for damage or injury thereby caused to others."

New Jersey v. New York, 283 U.S. 473, 482-83 (1931).

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Compliance with a permit does not foreclose a nuisance claim

- The Alabama Supreme Court has rejected the "mistaken impression that compliance with the Alabama Air Pollution Control Act shielded the Defendant from liability for damages caused by pollutants emitting from its smelter. This is not the law in this State." Borland v. Sanders Lead Co., 369 So.2d 523, 526 (Ala. 1979) (citing Ala. Code §22-28-23); see also Poffenbarger v. Merit Energy Co., 972 So.2d 792, 798 (Ala. 2007).

- Even where defendants "argue that their actions were in accordance with state and federal regulations and that they were permissible under various permits, the plaintiffs may still maintain an action . . . if they can prove the elements of nuisance." Russell Corp. v. Sullivan, 790 So.2d 940, 951; see also Morgan County Concrete Co. v. Tanner, 374 So.2d 1344, 1346, 1347-48 (Ala. 1979).

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Compliance with a permit does not foreclose a nuisance claim

Under Tennessee law "it is no defense to this action to prove . . . that the business is a lawful business and one useful to the public, or that the best and most approved appliances and methods are used in the conduct and management of the business. Where a trade or business is carried on in such manner as to interfere with the reasonable and comfortable enjoyment of another of his property, or which occasions material injury to the property itself, it amounts to a wrong to the neighbor, and one for which an action will lie."

Signal Mountain Portland Cement Co. v. Brown, 141 F.2d 471, 475 (6th Cir. 1944).

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Compliance with a permit does not foreclose a nuisance claim

- Penland v. Redwood Sanitary Sewer Serv. Dist., 965 P.2d 433, 438 (Or. Ct. App. 1998) (rejecting argument that "as a matter of law, there can be no nuisance because [the permittee] has complied with all applicable regulations and permits");
- Woodlake Estates, Inc. v. Sternberger, 173 P.3d 98, 102 (Okla. Ct. App. 2006) (same);
- Galaxy Carpet Mills, Inc. v. Massengill, 338 S.E.2d 428, 429 (Ga. 1986) (same);
- Simpson v. Kollasch, 749 N.W.2d 671, 674 (Iowa 2008) ("compliance with regulations is not a defense to a nuisance claim");
- Louisville and Jefferson County Air Bd. v. Porter, 397 S.W.2d 146, 151 (Ky. 1965) ("We have departed from the notion that the non-negligent operation of a lawful business cannot be a nuisance.")

Defense of Tort Claims After Bell: Potential for Statutory/Regulatory Exclusive Remedy?

- State Exclusive Remedy Doctrine
- New Developments
  - "No more stringent" laws
  - Federal displacement (cases and rationale)
    - North Carolina v. TVA
    - AEP v. Connecticut
    - Comer v. Murphy Oil
- Potential Legislative Solutions?

Defense of Tort Claims After Bell: The Role of Compliance

- Evidence of Due Care
  - State-of-the-art controls
  - Health-based standards
  - Regulatory balance of multiple factors
- Record of Regulatory Actions
  - Rulemaking
  - Permits
- Class Action Obstacles
  - Wal-Mart v. Dukes and Comcast v. Behrend
  - Commonality regarding causation

Moderated Discussion

- Preemption: Legislative Objectives
  - Harms and conflict
  - Torts in Bell: Nuisance, trespass, negligence and recklessness, strict liability
  - Remedies sought in Bell: Injunctive relief, cleanup, compensatory and punitive damages
  - Savings Clause: Do common law claims impose a "standard or limitation respecting emissions" or "any requirement respecting control" of emissions?
- State Law Solutions: What Makes Sense Under State Law
  - What residual role of common law?
  - North Carolina v. TVA: Judges should not be second-guessing agencies
  - Motive for "no more stringent" laws?
- Duty of Care: What is Reasonable?
  - Why isn't compliance dispositive?
  - What more do permittees need to do?