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10th Circ. Pushes Back On Preemption In Plutonium Case

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In a pointed opinion, on June 23, 2015, the Tenth Circuit ruled that defendants Dow Chemical Co. and Rockwell International Corp. had waived any argument that the Price-Anderson Act expressly preempted the plaintiffs' related state law nuisance claims, and, even if the defendants had not waived that argument, that the PAA is not a complete federal preemption statute that would bar the plaintiffs from asserting a state law nuisance claim in the event that they could not prove a "nuclear incident"[1] under the PAA.[2]

This decision constitutes a marked departure from all other federal circuits that have addressed the issue and, if adopted by other courts, would represent a significant expansion of potential liability for operators in the nuclear energy industry.

Background

Cook v. Rockwell International Corp. stems from the handling of radioactive waste at Rocky Flats, a nuclear weapons production facility located near downtown Denver. During the Cold War, the plant had been operated by Dow and, later, by Rockwell, both under contracts with the federal government. Evidence presented in the litigation revealed that plant workers had disposed of radioactive waste onto the ground, where the waste eventually leached into nearby bodies of water, and that they had also released waste into the air, which then migrated onto the soil around the plant. The contamination allegedly caused nearby residential property values to decline, prompting the property owners to file a civil lawsuit under both the PAA and state nuisance law.

At trial, the jury awarded the plaintiffs a verdict of $177 million in compensatory damages, $200 million in punitive damages and $549 million in prejudgment interest, totaling nearly $1 billion. On appeal, the defendants successfully argued that the trial court had erred in its instructions to the jury regarding the plaintiffs' burden of proof under the PAA with respect to a "nuclear incident" and the Tenth Circuit vacated the district court's judgment and remanded the case for further proceedings.[3] On remand, the plaintiffs abandoned their PAA claim (essentially conceding that they could not prove a "nuclear incident") and argued that the judgment on their state law claim nevertheless remained intact. The district court disagreed, finding that the PAA preempted their state law nuisance claim and that the Tenth Circuit's mandate barred the plaintiffs from securing judgment on their nuisance verdict, and the plaintiffs appealed. The Tenth Circuit again vacated the district court's judgment, ruling that the PAA did not preempt the plaintiffs' state law nuisance claim, and remanded for reinstatement of the jury's nuisance verdict in favor of the plaintiffs.

Analysis

The court began by concluding "that Dow and Rockwell forfeited any field preemption argument long ago."[4] The court then went a step further and determined that even if the defendants had preserved their preemption argument, the PAA is not a complete preemption statute. Therefore, if plaintiffs allege and prove a "nuclear incident," they are entitled to relief under the PAA, subject to certain limitations of liability and indemnity provisions built into the PAA "to ensure that liabilities arising from large nuclear incidents don't shutter the nuclear industry."[5] However, if the plaintiffs cannot prove a "nuclear incident" under the PAA but *can* prove some sort of "lesser occurrence" or "lesser state law nuisance," they may proceed on their state law claims.

In reaching this conclusion, the court observed that the U.S. Supreme Court disfavors preemption, and the text of the PAA "merely affords a federal forum when a nuclear incident is 'assert[ed].'" However, "[n]othing in this language speaks to what happens when a nuclear incident is alleged but unproven. And certainly nothing in it dictates that injured parties in such circumstances are forbidden from seeking or securing traditional state law remedies."[6] The panel then determined that the PAA was "not a true complete preemption statute," citing a Supreme Court decision that purportedly excluded the PAA from a list of a select few complete preemption statutes,[7] and noted that "[o]ften Congress entrusts before-the-fact regulation to a federal agency while leaving at least some room for after-the-fact state law tort suits."[8] Finally, the court distinguished some of the cases that the defendants relied on by concluding that they either did not address "what happens in the face of a lesser occurrence" or that their rationale "seems a good bit like an implied preemption argument ...[,] an argument Dow and Rockwell appear to have disclaimed in this appeal."[9] Curiously, in deciding that the PAA is not a complete preemption statute, the opinion omitted any discussion of several other cases that the defendants relied on in support of their preemption argument.

The panel then dismissed the defendants' remaining arguments, concluding that "the first panel did not specifically preclude the district court from entering a new judgment predicated on an error-free state law nuisance verdict."[10]

It is also important to note what the Tenth Circuit did *not* address. While the opinion in *Cook II* discusses whether the PAA preempts state law claims if a "nuclear incident" is alleged but unproven, it does not address the appropriate pleading standard for a public liability action brought under the PAA, a related but distinct issue. All circuit courts to have addressed the issue still agree that breach of the federal dose limit is the appropriate pleading standard for public liability actions under the PAA.[11]

Impact

The *Cook* decision represents a significant departure from existing case law (which generally had found that allegations even potentially falling under the PAA preempted all state law claims based on harm allegedly caused by exposure to or contamination from radioactive materials).[12] If the decision is left in place, it greatly expands the scope of potential liability for nuclear power defendants in "failed" PAA cases that leave room for plaintiffs to assert state law claims. Although Dow and Rockwell petitioned the Tenth Circuit for rehearing en banc on July 6, the court denied the petition on July 20. On July 24, the defendants filed a motion to stay execution of the mandate pending their petition for certiorari, which the Tenth Circuit denied the same day because "the motion does not establish that there is a substantial possibility that a petition for writ of certiorari would be granted." It then issued its mandate on July 28. Because of this newly created circuit split, the size of the verdict, and future interpretations of the PAA's preemptive effect (or lack thereof) on state law claims, it is likely that Dow and Rockwell will petition the Supreme Court for certiorari.

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[1] 42 U.S.C. § 2014(q) defines a "nuclear incident" as "any occurrence, including an extraordinary nuclear occurrence, within the United States causing ... bodily injury, sickness, disease or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive or other hazardous properties of source, special nuclear, or byproduct material ...."

[2] *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088 (10th Cir. 2015) (*Cook II*).

[3] *Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1138-42, 1153 (10th Cir. 2010) (*Cook I*).

[4] *Cook II*, 790 F.3d at 1094.

[5] *Id*. at 1096. The panel appeared to agree with the Ninth Circuit, which held that "[t]he PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents." *Id*. at 1098 (citing *In re Hanford Nuclear Reservation Litig*., 534 F.3d 986, 1009 (9th Cir. 2007)). However, it went on to say "no one disputes this beside-the-point point. The issue before us isn't what happens in the event of a nuclear incident, but (again) what happens in the face of a lesser occurrence." *Id*.

[6] *Id*. at 1095. The Tenth Circuit identified alleged but unproven "nuclear incidents" as "lesser nuclear occurrences" and opined, "it's hard to conjure a reason why Congress would allow plaintiffs to recover for a full panoply of injuries in the event of a large nuclear incident but insist they get nothing for a lesser nuclear occurrence." The PAA does not separately define "occurrences," "nuclear occurrences" or "lesser nuclear occurrences."

[7] *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003).

[8] *Cook II*, 790 F.3d at 1097-98.

[9] *Id*. at 1098 (referring to *In re Hanford Nuclear Reservation Litig*., 534 F.3d 986 (9th Cir. 2007) and *Cotroneo v. Shaw Environment & Infrastructure Inc.*, 639 F.3d 186 (5th Cir. 2011)).

[10] *Id*. at 1103.

[11] *See, e.g.*, *In re TMI Litig. Cases Consol*, 67 F.3d 1103, 1113 (3d Cir. 1995) (holding that the federal dose limit regulations "constitute the federal standard of care" in a public liability action under the Price-Anderson Act and rejecting an argument that [as low as reasonably achievable] is part of the duty of care); *O'Conner v.Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994) (concluding "federal regulations must provide the sole measure of the defendants' duty in a public liability cause of action," and that imposing a nonfederal duty would conflict with federal law.); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1003 (9th Cir. 2007) ("Every federal circuit that has considered the appropriate standard of care under the PAA has concluded that nuclear operators are not liable unless they breach federally imposed dose limits.").

[12] *In re TMI Litig. Cases Consol.*, 940 F.2d 832, 854 (3d Cir. 1991) ("After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all."); *Cotroneo v. Shaw Environment & Infrastructure Inc.*, 639 F.3d 186, 193, 197 (5th Cir. 2011) ("[A] plaintiff who asserts any claim arising out of a 'nuclear incident' as defined in the PAA, 42 U.S.C. § 2014(q), can sue under the PAA or not at all," and to allow parties to recover under state law for lesser occurrences would "circumvent the entire scheme governing public liability actions."); *Nieman v. NLO*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("the state law causes of action cannot stand as separate causes of action ..."); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994) ("a new federal cause of action supplants the prior state cause of action. ... [S]tate regulation of nuclear safety, through either legislation or negligence actions, is preempted by federal law."); *In re Hanford Nuclear Reservation Litig*., 534 F.3d 986 (9th Cir. 2007) ("[t]he PAA is the exclusive means of compensating victims for any and all claims arising out of nuclear incidents."); *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1306 (11th Cir. 1998) ("Congress passed the Price-Anderson Amendments Act of 1988 ... creating an exclusive federal cause of action for radiation injury").
