Chapter 6

Implications of Cook v. Rockwell: Tenth Circuit Finds Price-Anderson Act Does Not Preempt Nuisance Claim

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On June 23, 2015, the United States Court of Appeals for the Tenth Circuit ruled that defendants Dow Chemical Co. (Dow) and Rockwell International Corp. (Rockwell) had waived any argument that the Price-Anderson Act (PAA) expressly preempted the plaintiffs' related state law nuisance claims, and furthermore, even if the defendants had not waived that argument, that the PAA is not a 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" under the PAA.[1] *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 of *Cook v. Rockwell International Corp.*

The *Cook v. Rockwell International Corp.* case is a class action for property damages allegedly stemming from the handling of radioactive waste at Rocky Flats, a nuclear weapons production facility located near downtown Denver, Colorado. 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

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[1] *Cook v. Rockwell Intern. Corp.*, 790 F.3d 1088 (10th Cir., 2015) (*Cook II*).

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.[2] 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, prompting the plaintiffs to appeal. 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 state law nuisance verdict in favor of the plaintiffs.

Relevant Text of the Price-Anderson Act

Under the PAA, a "public liability action" is "any suit asserting public liability" (42 U.S.C. § 2014(hh)). As defined in that Act, "'public liability' means any legal liability arising out of or resulting from a nuclear incident . . ." (*Id.* § 2014(w)), and "'nuclear incident' means any occurrence, including an extraordinary nuclear occurrence,[3] 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" (*Id.* § 2014(q)). Furthermore, "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section" (*Id.* § 2014(hh)).

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[2] *Cook v. Rockwell Intern. Corp.*, 618 F.3d 1127 (10th Cir., 2010) at pp. 1138-1142, 1153 (*Cook I*).

[3] An extraordinary nuclear occurrence is defined as: "any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial damages to persons offsite or property offsite." (42 U.S.C. § 2014(j)).

Interpreting the above passages from the PAA, the Tenth Circuit concluded the text of the statute fell short of completely preempting the type of state law claims that the court termed "lesser nuclear occurrences", a phrase found nowhere in the statute.

Analysis

The court opened its opinion by concluding "that Dow and Rockwell forfeited any field preemption argument long ago"[4] by failing to properly and timely raise those defenses. 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. The Tenth Circuit identified alleged but unproven "nuclear incidents" as "lesser nuclear occurrences", but the PAA does not separately define "occurrences", "nuclear occurrences", or "lesser nuclear occurrences".

In reaching this conclusion, the court observed that the United States 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 did not address "what happens in the face of a lesser occurrence".[9]

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

5 *Ibid.* 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". *Ibid.* at 1098 (citing *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986 (9th Cir., 2008), at p. 1009). 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 what happens in the face of a lesser occurrence". *Ibid.*

6 *Ibid.* at 1095.

7 *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1 (U.S., 2003) at p. 8.

The Tenth Circuit also opined that *Cotroneo v. Shaw Environment & Infrastructure, Inc.*,[10] a case on which the defendants heavily relied, did not help them. The Tenth Circuit pointed out that the Fifth Circuit "failed to identify any provision of the [PAA] that expressly preempts and precludes state law claims in the absence of a nuclear incident".[11] Rather, "the [Fifth Circuit] reasoned more generally that to allow parties to recover under state law for lesser occurrences would 'circumvent the entire scheme governing public liabilities actions'". According to the Tenth Circuit, this general reasoning "seems a good bit like an implied preemption argument — a suggestion that state suits offend some underlying statutory policy, not any express statutory language" which was "an argument Dow and Rockwell appear to have disclaimed in this appeal". Thus, partly because of the defendants' waiver of their preemption arguments, the Tenth Circuit concluded that *Cotroneo* was insufficient.[12] Interestingly, however, the majority opinion of *Cotroneo* does not even contain the word "preemption"; only the dissent explicitly analyzes the preemption issue.

Other Circuit Decisions

In reaching its decision, the Tenth Circuit's opinion omitted any discussion of several other cases that the defendants relied on in support of their preemption argument.

For instance, the Tenth Circuit did not mention *In re TMI Litig. Cases Consol*, which held that "[a]fter the Amendments Act [of 1988], 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*".[13] In *TMI*, the Third Circuit traced the legislative history of the PAA and noted that "[p]rior to the Amendments Act, the grant of federal jurisdiction and rights of removal were available only in actions resulting from an extraordinary nuclear occurrence".[14] That is, following the 1988 amendments, the PAA covered both extraordinary nuclear occurrences and nuclear incidents. In summary:

> The Amendments Act creates a federal cause of action which did not exist prior to the Act, establishes federal jurisdiction for that cause of action, and channels all legal liability to the federal courts through that cause of action. By

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

9 *Ibid.* at 1098 (referring to *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986 (9th Cir., 2008).

10 *Cotroneo v. Shaw Environment & Infrastructure, Inc.*, 639 F.3d 186 (5th Cir., 2011).

11 *Cook II*, footnote 2, at 1098.

12 The panel then dismissed the defendants' remaining arguments, concluding "the first panel did not specifically preclude the district court from entering a new judgment predicated on an error-free state law nuisance verdict." *Ibid.* at 1103.

13 *In re TMI Litigation Cases Consol. II*, 940 F.2d 832 (3d Cir., 1991) at p. 854. [Emphasis in original.].

14 *Id.* at 853, n.18.

> creating this federal program which requires the application of federal law, Congress sought to effect uniformity, equity, and efficiency in the disposition of public liability claims. With the federal jurisdiction and removal provisions set forth in the Amendments Act, Congress ensured that all claims resulting from a given nuclear incident would be governed by the same law, provided for the coordination of all phases of litigation and the orderly distribution of funds, and assured the preservation of sufficient funds for victims whose injuries may not become manifest until long after the incident. *See* H.R.Rep. No. 104, 100th Cong., 1st Sess., pt. 3, at 18 (1987). Thus, Congress clearly intended to supplant all possible state causes of action when the factual prerequisite of the statute are met.[15]

Thus, "[p]ermitting the states to apply their own nuclear regulatory standards, in the form of the duty owed by nuclear defendants in tort, would ... 'frustrate the objectives of the federal law'".[16] Moreover, the body of existing law up to this point, such as *O'Conner v. Commonwealth Edison Co. and Nieman v. NLO*, has followed the rationale and analysis of *TMI* and likewise found implied preemption of state causes of action by the PAA.[17] Because the Tenth Circuit did not address several opinions from other circuits, one can only speculate how it would have distinguished them from *Cook II*, but should the defendants file a petition for certiorari and the United States Supreme Court grant it, the high court may take it upon itself to determine which circuits have interpreted the preemptive effect of the PAA correctly.

Potential Weaknesses in Tenth Circuit's Opinion

While the Tenth Circuit's singular observation that the *Cotroneo* decision had not identified any express preemption language in the PAA was accurate, because it determined that the defense of implied preemption was foreclosed for the *Cook* defendants, the Tenth Circuit did not address other aspects of *Cotroneo* — which, if addressed, arguably undermine the Tenth Circuit's preemption theories. Most notably, *Cotroneo* also included state law claims that were wholly separate and apart from the PAA claims. After concluding that the plaintiffs had alleged but not proven a nuclear incident and granting summary judgment to the plaintiffs accordingly, the district court had declined to exercise supplemental jurisdiction over the separate state law claims. The Fifth Circuit found this was error, and held:

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15 *Ibid.* at 856-57.

16 *Ibid.* at 859.

17 *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir., 1994) at p. 1105 ("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."); *Nieman v. NLO, Inc.*, 108 F.3d 1546 (6th Cir., 1997) at p. 1553 ("because we agree with the analyses of preemption in *O'Conner and TMI II*, we hold that the Price—Anderson Act preempts Nieman's state law claims; the state law claims cannot stand as separate causes of action. Nieman can sue under the Price—Anderson Act, as amended, or not at all.").

> [t]hose claims are part of this suit, which is a 'public liability action.' The PAA, in section 2014(hh), provides that the entire suit, not just particular claims that are part of the suit, 'shall be deemed to be an action arising under section 2210.' Therefore, the [non-PAA] claims, along with the plaintiffs' other claims, must be treated as arising under federal law. The fact that the plaintiffs have failed to produce sufficient evidence to survive summary judgment as to whether their injuries and illnesses were actually caused by their overexposure to radiation does not change this result. It nonetheless remains true that this action is a 'suit *asserting* public liability.' Id. § 2014(hh) (emphasis added [in italics]). As such, it is a 'public liability action' and therefore the entire suit is deemed to be an action arising under federal law.[18]

Nowhere in its opinion did the Tenth Circuit address this particular language of the PAA, which would appear to support a preemption argument.

Moreover, the Fifth Circuit explained, "[p]ublic liability — the only type of legal liability contemplated by a public liability action — thus presupposes the occurrence of a nuclear incident. Therefore, if the plaintiff cannot show that a nuclear incident occurred, there can be no public liability, and hence no recovery on his public liability action."[19] According to the Fifth Circuit, "Congress had no need to expressly exclude claims not arising out of a nuclear incident [*i.e.*, "lesser nuclear occurrences"], however, because those claims were never included in the definition in the first place", as the definition of "public liability" is limited to that arising from "a nuclear incident".[20] Therefore, "adding an exclusion for claims not arising out of a nuclear incident would be redundant".[21]

Effect of Each Interpretation of the PAA

According to the Tenth Circuit and the dissent in *Cotroneo*, the other circuits' interpretation of the PAA "grants an ordinary preemption defense to any defendant sued under the Act".[22] This, by itself, is not a controversial statement. According to Judge Dennis in the Fifth Circuit, interpreting the PAA in this manner arguably "*overprotects* nuclear licensees and contractors by exempting them from liability for causing the types of injuries for which Congress expected them to provide their own self-insurance or private insurance . . .".[23] Moreover, as the Tenth Circuit reasoned, such an interpretation under-protects plaintiffs who are unable to prove a nuclear incident under the PAA.[24]

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[18] *Supra*, footnote 10 at 194 (emphasis added in underline); *see also O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir., 1994) at p. 1096 ("Any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act.") (citing S. Rep. No. 218, 100th Cong., 1st Sess. 2, at 13 (1987), reprinted in 1988 U.S.C.C.A.N. 1424, 1476, 1477).

[19] *Ibid.* at 195-96.

[20] *Ibid.* at 196, n.10.

[21] *Ibid.*

[22] *Cotroneo*, 639 F.3d at 202 (Dennis, J. dissenting).

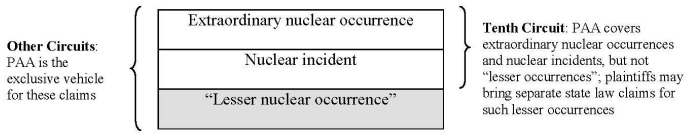
However, the Tenth Circuit's interpretation is not without its flaws. As the *Cotroneo* majority pointed out:

> The problem with [the dissent's] reading is that the statutory text does not contain even a whisper about liability other than "public liability," or a hint that an entire universe of claims — those not arising from a nuclear incident [i.e., lesser nuclear occurrences] — would arise under section 2210, yet be governed by almost none of it. Thus, the dissent's criticism of our reading applies with even greater force to its own: had Congress intended to create two classes of liability in a "public liability action," but subject only the "public liability" to the numerous provisions in section 2210, it most likely would have expressly said so.[25]

Debates on whether the PAA preempts all other state law claims aside, the ultimate question appears to be what balance Congress intended to strike between providing adequate remedies to plaintiffs harmed by exposure to radionuclides on the one hand and protecting private nuclear operators from crippling liabilities on the other. Given that the last significant overhaul of the PAA occurred nearly thirty years ago, it appears Congress has had little objection to the way courts have interpreted the PAA since. If *Cook II* stands, it will be interesting to see whether and how Congress responds.

Current Landscape of Circuit Decisions

Thus, at present, excepting the Tenth Circuit, all other circuits that have addressed the issue have decided that the PAA precludes competing state law claims, although the type of preemption, if any exists, is open to debate.



23 *Ibid.* at 202 (Dennis, J. dissenting) [Emphasis added].

24 *Cook II*, 790 F.3d at 1096 ("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.").

25 *Supra*, footnote 10 , 639 F.3d at 197, n.11.

Impact

The *Cook II* 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). 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.[26]

[26] At the time of this writing, the defendants had not yet filed a petition, which is due on December 17, 2015, after having received an extension of time from the Supreme Court.