Price Anderson Act/Damage Claims: Federal Court Addresses Preemption Scope

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The United States District Court for the Southern District of Illinois ("Court") addressed in a June 29th Memorandum and Order ("Order") certain issues arising out of a class action alleging a plant operating in Metropolis, Illinois, caused property damage and bodily injury. See *Steward v. Honeywell Int'l, Inc.*, 2020 WL 3507689 (S.D. Ill. 2020).

The issues addressed included one involving the Price Anderson Act ("PAA").

Plaintiffs allege that from 1963 to 2017, the plant manufactured uranium hexafluoride ("UF6"). The plant process allegedly emitted air contaminants with toxic materials. The contaminants are alleged to have settled into the soil and buildings causing property loss and damages.

Plaintiffs filed a lawsuit against the current owner of the plant, Honeywell International, Inc. ("Honeywell"). The Complaint alleged property damage, personal injuries, and remediation. In the Amended Complaint, Plaintiffs assert state law claims of the following:

- negligence,
- trespass,
- nuisance,
- property damage,
- failure to warn,
- ultra-hazardous activity,
- gross negligence, and
- negligent infliction of emotional distress.

They further assert federal law claims pursuant to the Resource Conservation and Recovery Act ("RCRA"), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and the Clean Air Act ("CAA").

The motions addressed in the Order include a motion to dismiss for failure to state a claim.

Honeywell argues that the Plaintiffs' state law claims should be dismissed because they are preempted by the PAA. Plaintiffs respond that Honewell does not have a license for the disposal of plutonium. Therefore, they argue the company is not a party to any indemnification agreement under the PAA.

The Court notes that the PAA was enacted to encourage private investment in nuclear energy by ensuring that public funds are available to assist affected parties if there is a nuclear incident and to limit liability. It provides for the licensing of privately constructed nuclear power plants.

Facilities are required to purchase private liability insurance in exchange for indemnification by the federal government for damages in excess of the amount covered by private insurance. The PAA provides that any public liability action arising out of a nuclear incident is provided a federal cause of action through the federal courts. Consequently, if Plaintiffs' state law claims fall under the public liability action, then the claims must be brought pursuant to the PAA.

Plaintiffs argue that the contamination does not fall under the PAA because it is not a nuclear incident. They describe such an incident as a discrete and catastrophic event originating in a licensed facility.

Honeywell responds that the definition of a nuclear incident should include any claim for property damage resulting from exposure to nuclear radiation. Under 42 U.S.C. § 2014(q), a nuclear incident is defined as "any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, 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."

The Court holds that the material in question is "source, special nuclear, or byproduct material." Further, it explained that the meaning of "occurrence" used in the statute refers to discrete events and those that take place over time.

Plaintiffs cite *Cook v. Rockwell Intern. Corp.,* 790 F.3d 1088, 1096 (10th Cir. 2015), to further their argument that the PAA governs larger nuclear incidents and state tort law can govern lesser. In *Cook*, the court held that "the Price-Anderson Act does not preempt and preclude a freestanding state law nuisance claim when a nuclear incident is alleged but unproven." Id. at 1103. However, this opinion is deemed an outlier.

The Court cites *El Paso National Gas Co. v. Neztsosie*, 526 U.S. 473, 486-487 (1999), for the proposition that the United States Supreme Court noted the PAA was enacted to avoid duplicative determinations that occur when claims within the act are tried in jurisdictions other than a district court. Therefore, the Court held that Plaintiffs' state law claims are preempted by the PAA and the state law claims are dismissed with prejudice.

Honeywell also argues that Plaintiffs' federal claim under RCRA should be dismissed for failure to state a claim. Plaintiffs allege that Honeywell violated the standards under RCRA and its use of radionuclides presents a substantial endangerment to the environment. It premises this claim on the basis that the materials are "solid waste" and "mixed waste" as defined by the RCRA.

Honeywell responds arguing:

- the radioactive materials are outside the scope of the RCRA,
- the claims are too vague,
- air emissions are not encompassed, and
- failure to fit within the state a citizen suit provision under RCRA.

The Plaintiffs' inability to identify the exact chemicals that caused damage or the specific damages attributable to each material is deemed not fatal at this stage. Further, the Court clarified that Plaintiffs' allegations are sufficient to put Honeywell on notice of the claim.

The Court explained that RCRA applies to solid waste. Solid waste includes "hazardous waste." However, RCRA excludes byproduct as defined by the Atomic Energy Act of 1954.

Plaintiffs allege that the plant material includes material defined by the Atomic Energy Act and heavy metals and chemical compounds containing fluorine. Therefore, the Court held that Plaintiffs' inclusion of

material outside the scope of the RCRA is not fatal to their claim because they included material within the definition of solid waste.

Honeywell also argues that the RCRA does not apply to air emissions alleged in the Amended Complaint. Plaintiffs respond that the solid waste material converted to airborne matter, settled on the land, and are the type of discarded material defined by solid waste.

The Plaintiffs cite the holding in *Ctr. For Comty. Action & Environ. Justice v. BNSF Ry. Co.,* 764 F.3d 1019 (9th Cir. 2014) to further their argument that "particulate matter contained in exhaust gases" is solid waste under RCRA. The Court disagrees. The Ninth Circuit court did not address the solid waste debate. Therefore, the Court did not find the Plaintiffs' argument to be strong and dismissed Plaintiffs' claim with prejudice.

Honeywell also argues that Plaintiffs CERCLA action should be dismissed because Plaintiffs have not alleged sufficient facts to state a claim and categories of damages are unavailable under CERCLA. CERCLA is noted to have been created to promote the cleanup of hazardous waste sites and to ensure the responsible party is liable for the allocated costs.

Plaintiffs alleged that Honeywell's plant released radionuclides and is liable for certain costs associated with the CERCLA National Contingency Plan. The Court stated that in order to succeed in an action for recovery of costs under CERCLA, Plaintiff must prove:

1. The site is a facility as defined by CERCLA;
2. Honeywell is a responsible party as defined by CERCLA;
3. There was a release of hazardous substances; and
4. The release caused the Plaintiff to incur response costs.

See *Emergency Servs. Billing Corp. v. Allstate Ins. Co.,* 668 F.3d 459, 463 (7th Cir. 2012).

The Court held that Plaintiffs alleged sufficient facts to state a claim under CERCLA. This was the case even without identifying the exact relevant part of the National Contingency Plan. It held that Plaintiffs may only pursue costs associated with the investigation and remediation of the effects of a hazardous substance. However, the Court held it is unnecessary to strike certain damage requests at the pleading stage.

Finally, Honeywell claims that Plaintiffs' federal claim under the CAA should fail as a matter of law. Plaintiffs alleged that Honeywell is in violation of the CAA for releasing radionuclides that expose people to radiation and contamination. 40 C.F.R. § 61.102 is cited.

The Court concluded that this standard only applies to facilities owned or operated by a federal agency. Honeywell is not a federal agency subject to the regulation. The Court dismissed Plaintiffs' claim under 40 C.F.R. § 61.102.

Plaintiffs further alleged that Honeywell is in violation of 42 U.S.C. § 7412. They argued that a CAA citizens suit action could be pursued.

Title V was added to the CAA in 1990. This provision provides for permits that include enforceable emission limitations and standards. Also, if a facility complies with a Title V permit, it is deemed compliant with the CAA and the national hazardous air pollutant standards.

Honeywell argued that its 104-page Title V permit attached to its Motion requires dismissal of the CAA claim. Plaintiffs responded that the emissions from the plant are outside the national hazardous air pollutant standards set forth in the Title V permit.

The Court held that the claim under Title V survives because it is unable to conclude that Honeywell is in compliance with the permit such that Plaintiffs' CAA claim would fail as a matter of law.

The Court therefore grants in part and denies in part Honeywell's Second Motion to dismiss for failure to state a claim. Plaintiffs' state law claims and federal claim under RCRA are dismissed with prejudice. Plaintiffs' federal claim under CERCLA is not dismissed. Plaintiffs' federal claim under CAA is dismissed in part with prejudice.

A copy of the decision can be downloaded here.