

# Whiskey Aging Emissions: Supreme Court of Kentucky Addresses Whether Clean Air Act Preempts Common Law Claims



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The Supreme Court of Kentucky addressed whether common law claims filed related to air emissions were preempted by the Clean Air Act. See *Brown-Forman Corporation and Heaven Hill Distilleries, Inc. v. Miller, 2017*.

The decision involves a lawsuit in which a property owner alleged that warehouses used in the whiskey aging process were damaging a structure.

George Miller owns property in Jefferson County, Kentucky near warehouses owned by Brown-Forman Corporation and Heaven Hill Distilleries, Inc. (collectively “warehouses”). He filed suit complaining fugitive ethanol emissions were causing fungus to cover parts of his property.

The distilled spirit (bourbon) must be aged a minimum of two years in new charred-oak barrels. Therefore, the warehouses store barrels of bourbon as part of the aging process.

Fugitive emissions escape from the whiskey barrels (denoted the “angels’ share”) during this process. The emissions promote the growth of the *Baudoinia compniacensis* fungus, or “whiskey fungus.” Miller alleged that this fungus caused a black film-like substance to cover every outdoor surface of his property.

The trial court granted a motion to dismiss Miller’s claims on the grounds that the federal Clean Air Act preempted state tort claims. The Court of Appeals reversed and remanded the case, holding that the Act did not preempt the state law claims. The Kentucky Supreme Court granted Brown-Forman’s motion for discretionary review and affirmed the Court of Appeals’ holding regarding preemption.

The Supremacy Clause of the Constitution establishes the precedence of lawful federal enactments over contradictory state laws. However, the Clean Air Act includes two savings clauses which explicitly reserve certain rights for the states. One such clause allows states to adopt standards more stringent than those in the Act. The other savings clause contains a subsection entitled “Nonrestriction of other rights” which states:

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. § 7604(e).

The Supreme Court of Kentucky was persuaded that permitting state common law claims furthers the purpose of the Clean Air Act by allowing states to address air pollution at its source. It cited a similar case in which the Sixth Circuit held that the states' rights savings clause in the Act preserved claims brought under state common law. *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685 (6th Cir.2015).

The Court adopted the Sixth Circuit's analysis that the Clean Air Act's legislative history, United States Supreme Court precedent construing the virtually identical provisions of the Clean Water Act, persuasive opinions from state and federal courts, and the strong presumption against preemption of state claims in the field of environmental regulation, all supported rejection of preemption in this case.

The Court further held that the Act does not preempt a trial court from awarding money damages on state tort causes of action nor does it preempt state injunctive relief.

[A copy of the decision can be downloaded here.](#)