

## Sixth Circuit Holds Clean Air Act Does Not Preempt State Common Law Claims

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On November 2, 2015, the *Sixth* Circuit held that the **Clean Air Act** does not preempt state law nuisance, trespass, and negligence claims. ***Little, et al. v. Louisville Gas & Electric Co., PPL Corp.***, Case No. 14-6499 (Nov. 2, 2015); ***Merrick v. Diageo Americas Supply Inc.***, Case No. 14-6198 (Nov. 2, 2015). In a class action lawsuit, the plaintiffs in *Little v. LG&E* alleged that dust from Louisville Gas and Electric Co.'s (LGE) Cane Run power plant contaminated their property and caused health problems. Defendant LGE argued that the Clean Air Act (CAA) preempted the plaintiffs' nuisance, trespass, and negligence claims. LGE argued that the CAA preempts state common law air pollution claims because it gives the EPA the authority to set uniform air quality control standards across the country. LGE further argued that the state common law claims conflict with the CAA's methods for regulating emissions and that allowing those claims to proceed would disturb the balance among federal and state interests. The district court disagreed. LGE petitioned for interlocutory appeal and the district court certified the order for appeal.

The Sixth Circuit held that the CAA does not preempt the state law claims, relying on the circuit's same-day ruling in *Merrick v. Diageo Americas Supply Inc.*, Case No. 14-6198 (Nov. 2, 2015). There, plaintiffs brought nuisance, trespass, and negligence claims alleging that ethanol vapor from aging whiskey damaged their property. In *Merrick*, the Sixth Circuit held that the CAA did not preempt property owners' claims against the whiskey distillery that allegedly caused "whiskey fungus" to grow on their properties. It allowed the *Merrick* claims to proceed citing the CAA's states' rights savings clause (42 U.S.C. § 7416). Specifically, the Sixth Circuit held that, even if the CAA did not set limits on ethanol emissions, it reserved to the states the ability to set "any requirement respecting control or abatement of air pollution." These requirements could include limits on ethanol emissions. According to the Sixth Circuit, the CAA language is broad and demonstrates Congress' intent to leave state common law standards undisturbed. The Sixth Circuit in *Little* determined that the plaintiffs' state common law claims were indistinguishable from those in *Merrick*. Therefore, the CAA did not preempt those claims.

The *Little* and *Merrick* decisions leave utilities and other regulated entities vulnerable to lawsuits alleging state common law air pollution claims in addition to causes of action arising under the CAA.

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