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The Reemergence of Nuisance Law in Environmental Litigation

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By Alan Weinstein*

In the summer of 1980, Chicago's beaches were fouled by raw and inadequately treated sewage, allegedly discharged into Lake Michigan by the Hammond (Indiana) Sanitary District. Clearly, Illinois and Chicago officials wanted to stop pollution of the lake. Surprisingly, they turned to the common law of nuisance, rather than to a regulatory agency or a statutory citizens' suit to obtain relief, charging the city of Hammond and the sanitary district with violations of the Illinois common law of nuisance.

While planners are generally familiar with the application of common law nuisance doctrines to resolve disputes between conflicting uses of land, there is less familiarity with nuisance actions to abate environmental pollution. Yet prior to the enactment of comprehensive environmental regulations in the early 1970s, nuisance actions were used to challenge pollution of the air, water, and land by both industrial and municipal activity.[1] Further, legislators and judges looked to nuisance law as a guide to the formulation and interpretation of new environmental regulations, in much the same way that nuisance doctrines provided the framework for zoning.[2] In fact, in the early years of the environmental movement that emerged in the 1960s, nuisance law, along with a number of other legal doctrines, was touted as an effective way to deal with pollution problems.[3]

The advocates of nuisance pointed out that economists' definition of pollution as a negative externality fits well with nuisance doctrines concerning unreasonable interference with property rights; that nuisance, because of its historical association with equity jurisdiction, made injunctions readily available to halt polluting activities; and that the case-by-case approach of the common law, which judges each individual lawsuit on its own merits, would allow courts in nuisance actions to tailor remedies to the particular circumstances of each pollution episode. But nuisance also had serious shortcomings that limited its effectiveness to combat pollution, particularly when compared with the comprehensive pollution control regulations provided by federal law.

Unlike regulatory programs, which typically require permits and periodic reporting to ensure compliance *prospectively*, nuisance can only cure pollution *retrospectively;* there can be no nuisance action until a pollution episode has occurred. In contrast with regulatory agencies, which have a technical staff of scientists, engineers, and planners to fashion pollution control strategies, nuisance actions are heard in courts of general jurisdiction where few, if any, of the judges and lawyers have technical training. The case-by-case approach of nuisance law is also prohibitively expensive when compared with regulatory programs that can address all like-situated cases with a single set of regulations.

The hallmark of the environmental legislation of the 1970s was a system of uniform national standards to control pollution. While this approach has been criticized by economists who favor various tax- or fee-based pollution control strategies, it has remained in place because of two distinct advantages: relative ease of administration and certainty. Under a uniform standard approach, both regulators and potential polluters know how much pollution must be abated, and compliance may readily be monitored. If a polluter does not meet the standards specified in his permit, the regulatory remedy is an "enforcement action," usually prosecuted in state court, that will prescribe the steps the violator must take to achieve compliance. To avoid problems, the polluter need only meet the requirements of his permit.

The availability of nuisance actions potentially conflicts with these legislative goals of uniformity, ease of administration, and certainty. A polluter sued on a nuisance claim, which is independent of the regulatory program, has no guarantee that his record of compliance with permit standards will earn a favorable ruling. This is not only unfair to the permit holder who complied in good faith with his permit only to find a nuisance action filed against him, but also can deter speedy compliance with permit standards, as polluters may delay meeting their permit obligations to see whether someone might initiate a nuisance lawsuit.

On the other hand, nuisance law historically has served to "fill in the gaps" left by more comprehensive legislative schemes and, arguably, could still be used to remedy pollution problems overlooked by legislators and regulators. In 1980, Illinois could sue Hammond on federal and state common law nuisance grounds as well as federal and state statutory grounds. Today, that is no longer the case. In the past three years, a number of court decisions have redefined the relationship among state and federal statutory and common law nuisance remedies for environmental pollution. In this article, we explore these developments and their implications for the future availability of common law nuisance as a remedy for pollution.

Ironically, our exploration begins with an earlier Illinois allegation of out-of-state pollution of Lake Michigan. In 1972, Illinois charged that Milwaukee was polluting Lake Michigan

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1. W. RODGERS, ENVIRONMENTAL LAW 100 (1977).

2. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the landmark Supreme Court case upholding the constitutionality of zoning regulations, Justice Sutherland's opinion explicitly noted the role nuisance law should play in shaping the new law of zoning: "In solving doubts, the maxim *sic utere tuo ut alienum non laedes*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the [zoning] power."

3. See, e.g., Klipsch, *Aspects of Constitutional Rights to a Habitable Environment: Towards an Environmental Due Process*, 49 IND.L.J. 203 (1974); Howard, *State Constitutions and the Environment*, 58 VA.L.REV. 193 (1972); Sax, *The Public Trust Doctrine in Natural Law: Effective Judicial Intervention*, 68 MICH.L.REV. 471 (1970); Bryson & Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241 (1971); McLaren, *The Common Law Nuisance Actions and the Environmental Battle: Well-Tempered Swords or Broken Reeds?* 10 OSGOODE HALL L.J. 505 (1972).

through the discharge of vast quantities of raw and inadequately treated sewage.[4] Illinois initially brought suit against Milwaukee in the U.S. Supreme Court, charging Milwaukee with violating the federal common law of interstate water pollution. The motivation behind the Illinois nuisance action was undoubtedly the shortcomings of the then existing federal water pollution legislation.

The Federal Water Pollution Control Act (FWPCA), first enacted in 1948 and substantially amended in 1956 and 1965, approached water pollution problems through ambient water quality standards tailored to particular bodies of water. Responsibility for developing and enforcing these standards rested with the states. Interstate water pollution became subject to FWPCA under the 1965 amendments, but the enforcement process—a series of conferences that sought amicable settlements of pollution problems—was cumbersome and inefficient. The failure of this statutory interstate pollution abatement procedure led Illinois to invoke nuisance doctrines against Milwaukee.

The Supreme Court, in *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91 (1972), declined to hear Illinois's suit, holding that Illinois could sue Milwaukee in federal district court under the federal common law of interstate water pollution. The Court's decision in *Milwaukee I* was a landmark because, for the first time, the Court expressly held that the federal common law of nuisance could govern an action concerning interstate water pollution. At the same time, the Court also recognized the potential for confict between such nuisance actions and statutory programs. Justice Douglas's opinion noted that: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of suits alleging creation of a public nuisance by water pollution."[5]

As Justice Douglas noted, a major issue in the conflict between common law and statutory remedies is the preemption doctrine. Preemption refers to the power a legislature has to exclude other remedies, such as common law nuisance, from an area of law that it has undertaken to regulate comprehensively. Preemption may occur at the federal or state levels. There may be federal preemption of federal common law, federal preemption of state statutory law, or state preemption of local regulation or state common law. In *Milwaukee I*, the preemption issue had been whether the then existing FWPCA would preempt Illinois's federal common law claims against Milwaukee, and the Court ruled against preemption, allowing Illinois to sue Milwaukee under the federal common law of nuisance. Accordingly, on May 19, 1972, Illinois filed its complaint in the United States District Court for the Northern District of Illinois, seeking abatement of the Milwaukee sewage discharges under the federal common law of nuisance.

Five months later, Congress, recognizing that "the Federal water pollution control program . . . has been inadequate in every vital aspect,"[6] enacted a comprehensive reform of the FWPCA that made it illegal for anyone to discharge pollutants into navigable waterways without a permit. Milwaukee, complying with the new requirement, received permits from the Wisconsin Department of Natural Resources (DNR), which had qualified as a permit-granting agency under FWPCA. The question posed in Douglas's opinion was now squarely at issue. Would this new comprehensive statutory program preempt the newly created federal common law of nuisance?

Milwaukee raised the preemption issue on a motion to dismiss the Illinois complaint but the motion was denied in *Illinois v. Milwaukee*, 366 F.Supp. 298 (N.D. Ill. 1973), allowing the Illinois nuisance lawsuit to remain before the court. After three years of discovery, trial commenced in January 1977. While this trial on the nuisance claim was proceeding in federal district court, the Wisconsin DNR initiated an enforcement action against Milwaukee in state court—as provided for in the FWPCA—alleging that the city was not fully complying with its permit requirements. In May 1977, the state court entered a judgment requiring that Milwaukee's sewage discharges meet the effluent limitations stated in the DNR permits and establishing a detailed timetable for the construction of a system to control overflows of raw sewage into Lake Michigan.[7] Less than six months later, the federal district court issued its own judgment order. The federal court found that Milwaukee's sewage discharges constituted a nuisance under federal common law and ordered Milwaukee to meet effluent limitations well beyond those specified by the DNR permits and to adhere to an even more stringent timetable to correct the overflow problem.[8]

The potential conflict between statute and nuisance was now fully realized. Milwaukee in late 1977 faced two separate court-imposed mandates, one based on the statutory guidelines under FWPCA, the other founded on the novel claims of the federal common law of nuisance. Two years later, the Seventh Circuit U.S. Court of Appeals, ruling on Milwaukee's appeal of the district court's judgment, closed the distance between the statutory and common law remedies somewhat, but upheld the lower court's finding that the 1972 amendments to the FWPCA had not preempted the federal common law of nuisance.[9] Other federal courts faced with the preemption issue also held that the FWPCA left intact the federal common law of nuisance enunciated in *Milwaukee I*.[10]

Milwaukee continued its fight, however, and was granted a second hearing by the U.S. Supreme Court in 1980. In April

4. Illinois, in fact, named as defendants not only the City of Milwaukee, but the cities of Kenosha, Racine, and South Milwaukee, Wisconsin; the Sewerage Commission of the City of Milwaukee; and the Metropolitan Sewerage Commission of Milwaukee County. Kenosha, Racine, and South Milwaukee subsequently settled out of court.

5. 406 U.S. at 107.

6. City of Milwaukee v. Illinois (Milwaukee II), 451 U.S. 304 at 310 (1981).

7. Sewerage Commission v. State (Dane Cty. Cir. Ct. of Wis. No. 152-1342, May 25, 1977). The overflows of raw sewage were caused by the limited hydraulic capacity of a combined system of storm and sanitary sewers in older sections of Milwaukee. In wet weather, the increased flows of stormwater overloaded the combined sewers, which also carried human waste. To prevent sewage from backing up into homes, the combined sewer system contained a number of overflow outlets that relieved the pressure by discharging flows of stormwater and raw sewage directly into streams and Lake Michigan, bypassing the treatment facilities entirely.

8. Illinois v. Milwaukee, N.D. Ill. No. 72-C-1253, ("Findings of Fact and Conclusions of Law," July 29, 1977) (Judgment Order, November 15, 1977).

9. Illinois v. Milwaukee, 599 F.2d 151 (7th Cir. 1979). The court ruled that Milwaukee did not have to go beyond the effluent limits specified in the DNR permits, stating that "[i]n applying the federal common law of nuisance in a water pollution case, a court should not ignore the Act but should look at its policies and principles for guidance." *Id.* at 164. The lower court's stringent timetable for correction of overflows was left in place, however.

10. See Milwaukee II, 451 U.S. at 340 n.9.

1981, nine years after *Milwaukee I* created the federal common law of nuisance for interstate water pollution, the Supreme Court, in *Milwaukee II*, held that the 1972 amendments to the FWPCA preempted the federal common law of nuisance. The case has received substantial comment[11] and we will not attempt here to provide a critical analysis of the majority and dissenting opinions. Our focus is rather on the effect this decision is having—and is likely to have—on pollution abatement actions based on federal and state common law nuisance theories.

Will the Common Law of Nuisance Survive Milwaukee II?
The Supreme Court's decision in *Milwaukee II* raised a number of important issues about the future of environmental common law nuisance actions. Three of the more significant issues are: What is the scope of *Milwaukee II* as it applies to the FWPCA? What is the impact of *Milwaukee II* on federal common law of nuisance actions brought in areas governed by environmental legislation other than the FWPCA? Have state as well as federal common law of nuisance remedies been preempted by environmental legislation? The remainder of this article exmaines how the courts are resolving these questions.

The Scope of Milwaukee II as Applied to the FWPCA
The decision in *Milwaukee II* left unclear whether the FWPCA completely preempted the federal common law of nuisance in the field of water pollution. However, this confusion was short-lived. Just two months after *Milwaukee II*, the Supreme Court decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), 33 ZD 255, answered the question. In *Sea Clammers*, a group of commercial fishermen, suing under the federal common law of nuisance and other theories, alleged that the defendant was polluting fishing grounds in the Atlantic Ocean and thereby causing them economic harm. The Court rejected the fishermen's federal common law of nuisance claim, holding that *Milwaukee II* was to be read as "entirely" preempting the federal common law of nuisance in the area of water pollution.

Lower federal court decisions have further defined the reach of *Milwaukee II* in nuisance actions that conflict with the FWPCA. In *United States v. Olin*, 11 ENVTL. L. REP. 21026 (D.C. Ala. 1981), the United States brought a federal common law nuisance action seeking to abate discharges of DDT. At issue was whether *Milwaukee II* and *Sea Clammers* were applicable to nonpoint- as well as point-source discharges. The court, after extensively quoting from *Milwaukee II*, effectively held that the FWPCA was comprehensive enough to preempt federal common law nuisance actions against nonpoint-source polluters.

In *People of Illinois v. Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982), the retroactivity of *Milwaukee II* was at issue. The court examined the FWPCA's legislative history and concluded that Congress, in enacting the 1972 amendments, had considered the residual effects of pre-1972 discharges. Thus, the federal common law of nuisance could not survive as a cause of action for water pollution incidents prior to 1972, since Congress expressly intended the FWPCA to govern past as well as future pollution episodes.

The Impact of Milwaukee II on the Relationship of Federal Common Law to Other Pollution Statutes.
Although *Milwaukee II* and *Sea Clammers* clearly established that the FWPCA preempts a federal common law of nuisance action brought against a water polluter, they did not address the status of federal common law nuisance actions brought against an air polluter or landfill operator. Are these actions also preempted by the relevant federal statutes, the Clean Air Act (CAA) and the Resource Conservation and Recovery Act (RCRA)? The courts have begun to address these questions and are beginning to determine what remains of the federal common law of nuisance after *Milwaukee II*.

The Clean Air Act
In *New England Legal Foundation v. Costle*, 666 F.2d 30 (2d Cir. 1981), 34 ZD 140, the plaintiffs sought declaratory and injunctive relief against the Long Island Lighting Co. based on violations of the CAA and the federal common law of nuisance. Although the Second Circuit's holding did not address whether the CAA totally preempted federal nuisance actions, the court in dictum intimated that federal common law nuisance actions involving air pollution might be looked at differently from actions to abate water pollution. Specifically, the court noted that the CAA differs substantially from the FWPCA since under the FWPCA the EPA regulates *every* point source of water pollution but under the CAA, the states and the EPA are only required to control those sources of air pollution that threaten ambient air quality standards. By noting these differences, the court implied that the CAA is not as "all comprehensive" as the FWPCA and for that reason might not "entirely" preclude a federal common law of nuisance action to abate an air polluter.

In contrast to *New England Legal Foundation*, the court in *United States v. Kin-Buc, Inc.*, 532 F.Supp. 699 (D.N.J. 1982), 34 ZD 266, held that the CAA does totally preclude a federal common law of nuisance action. In this case, the United States sought damages under the federal common law of nuisance for air and water pollution emanating from a landfill. Defendants moved for summary judgment with respect to the air pollution claim, arguing that the FWPCA and CAA were "sister statutes," and that in light of *Milwaukee II* the CAA must therefore logically preclude a federal common law of nuisance action. The court rejected this argument by stressing the differences between the two acts. However, the court also rejected the idea that the absence of a direct conflict between the CAA and the federal common law means that a federal common law action can be maintained. Citing *Milwaukee II*, the court said that the proper test to apply "is whether the scope of the legislative scheme established by Congress is such that it addresses the problems formerly governed by federal common law." The court then examined the legislative history of the CAA and concluded that it establishes a *complete* regulatory procedure that, when administered by an expert agency, obviates the need for federal common law. Thus, "since Congress addressed the problem of air pollution in the CAA that statute preempts a federal common law claim for nuisance."

11. See, e.g., *City of Milwaukee v. Illinois (Illinois II)*, 10 ECOLOGY L.Q. 51 (1982); *City of Milwaukee v. Illinois: The Demise of Federal Common Law Nuisance Actions in Interstate Water Pollution Disputes*, 35 S.W. L.J. 1097 (1982); *Environmental Law: States May No Longer Bring a Federal Common Law Nuisance Action to Abate Interstate Water Pollution*, 7 U.DAYTON L. REV. 511 (1982); *City of Milwaukee v. Illinois: The Demise of the Federal Common Law of Water Pollution*, 1982 WIS. L. REV. 627.

RCRA

The effect of RCRA on the federal common law of nuisance has also been at issue in recent cases. In *U.S. v. Price*, 523 F.Supp. 1055 (D.N.J. 1981), the United States sought an injunction to remedy hazards posed by chemical dumping, bringing the action under the federal common law of nuisance as well as other theories. The court, relying on *Milwaukee I*, held that the chemical dumping was intrastate in all respects and therefore there was no proper basis for development of federal common law in this area. The court nevertheless elected to address the preemption issue and stated that:

> . . . even if this was an appropriate area for federal common law, any such common law has been preempted by the enactment of RCRA and more recently the Comprehensive Response, Compensation and Liability Act of 1980 (CRCLA) . . . The comprehensive nature of the schemes established by RCRA and CRCLA require us to conclude that if federal common law ever governed this type of activity it has since been preempted by those statutes.

Is There Still a State Common Law of Nuisance for Pollution Episodes Governed by Federal Environmental Legislation?

We now can see that the federal courts will no longer allow lawsuits based on the federal common law of nuisance where there is a comprehensive federal pollution control statute. But what about lawsuits based on state common law of nuisance? The constitutional test for showing preemption of state law differs significantly from that for preemption of federal common laws. Thus, the fact that *Milwaukee II* and subsequent cases found that comprehensive statutory programs to abate pollution preempt the *federal* common law of nuisance does not necessarily mean that *state* common law actions are also preempted. The federal courts that have considered state common law of nuisance laws since *Milwaukee II* are split on the issue.

The litigation between Illinois and Hammond illustrates the differing views the federal courts have taken. Three separate lawsuits charged Hammond with violating the Illinois common law of nuisance. The first two lawsuits, filed by the state of Illinois and Illinois's former Attorney General, William Scott, were decided together in *Scott v. City of Hammond*, 519 F.Supp. 292 (N.D. Ill. 1981), 34 ZD 11. In *Scott*, the court ruled that state common law of nuisance claims were not preempted by the FWPCA. In reaching this decision, the court stated that "where there is no separate common law but only federal statutory law, the statute must be examined to determine whether Congress intended to make these pollution control matters solely a federal question."

Since the FWPCA expressly allows states to adopt and enforce standards more stringent than the statutory requirements, and also provides for "citizen suits" that expressly reserve "any right which any person (or class of persons) may have under any statute or common law," the court argued that Congress could not have intended to make interstate pollution control solely a federal matter. The court dismissed Hammond's argument that the FWPCA preempted *both* federal and state common law by noting the differing standards for preemption: "Hammond's arguments concerning preemption do not withstand analysis. When the *Milwaukee II* Court described the scope of federal legislation it did so in the context of determining whether federal legislation replaced federal common law. The Court expressly recognized that the test for that displacement was less demanding than the clear intent test for preemption of state law."

But in the third lawsuit in the Hammond litigation, brought by the Chicago Park District, the court held that the FWPCA *did* preempt both federal and state common law of nuisance. *Chicago Park District v. Sanitary District of Hammond*, 530 F.Supp. 291 (N.D. Ill. 1981). This court argued that: "It would be bizarre to hold that state law claims against out-of-state dischargers were preempted by federal common law but not by the comprehensive federal statute that has in turn preempted that federal common law. Uniformity in the interstate regulation of pollution is a concern of the same magnitude whatever form the federal response may take." In this decision, the court clearly relied on the reasoning of *Milwaukee I* that "Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." Although these conflicting decisions have been appealed to the Seventh Circuit Court of Appeals, that court still has not rendered a decision, leaving Illinois's common law claims against Hammond still in dispute.

Where Are We?

In the three years since the Supreme Court's ruling in *Milwaukee II*, some trends have emerged. First, it is clear that the federal common law of nuisance may no longer be the basis for a lawsuit to abate interstate water pollution. Second, although relatively few cases have considered whether the federal common law of nuisance may be used to challenge air pollution or solid and hazardous waste problems, the courts are generally barring nuisance lawsuits for alleged RCRA or Clean Air violations.

When we consider the availability of *state* common law of nuisance lawsuits, there is no clear trend to be discerned. The litigation between Illinois and Hammond has gone both ways on the issue, and the Seventh Circuit has not yet decided whether state law has been preempted. It is quite possible that the courts will adopt a "middle ground," neither wholly preempting nor wholly permitting state common law of nuisance lawsuits, but rather restricting nuisance lawsuits to damage claims. Under this "middle ground" theory, a court would hold that comprehensive pollution control legislation would preempt state common law of nuisance actions that sought to enforce stricter standards than those mandated by environmental regulations, but would allow nuisance lawsuits that sought damages for alleged pollution episodes.

This "middle ground" has already been suggested by one federal court. In *Chappel v. SCA Services*, 540 F.Supp. 1087 (C.D. Ill. 1982) residents of Wilsonville, Illinois, were seeking to recover damages for property losses and personal injuries that resulted from the operation of a hazardous waste landfill. The federal court, although remanding the case to the Illinois state courts for lack of federal jurisdiction, noted that the citizen suit provisions of federal pollution control statutes apparently did not provide any right to damages for private citizens injured by pollutant discharges. Since the federal common law of nuisance was clearly preempted by federal statutory law, a state common law nuisance action may thus be the only way that plaintiffs can recover for any damages

they have suffered. In this situation, the court reasoned that state common law nuisance actions for damages were not preempted by federal pollution control statutes.

Conclusion

In the past decade, we have witnessed the birth, growth, and now, apparently, the demise of the common law of nuisance as an alternative to federal statutory remedies for pollution. While nuisance was a potentially useful approach to particular pollution problems, its costs, the uncertainty of outcomes in nuisance litigation, and most critically, the potential for conflict between standards mandated by statute and standards derived from nuisance lawsuits are powerful policy arguments for the preemption of the common law of nuisance by comprehensive federal environmental legislation.

These policy arguments are far less compelling when we consider common law nuisance as a means for recovering damages for private plaintiffs harmed by polluters. A nuisance action for damages alone does not conflict with statutory policy where the alleged harm was caused by a polluter's violation of federally mandated standards. The courts may find it more difficult to weigh the equities where damages are sought for harms caused by discharges or emissions expressly permitted under those same standards, but allowing such actions could further the aims of environmental policy. Since the plaintiffs in such actions—challenging a legislatively permitted activity—would face a very high burden of proof, we should not expect a flood of such litigation. The few cases that were brought might then prove very useful by increasing our sophistication regarding pollution costs. In this way, nuisance law could continue to serve its historical equity function without causing undue conflict in our environmental policy, but at the same time it could slowly influence that policy by developing a body of knowledge regarding pollution costs derived from the resolution of individual cases.