The Reemergence of Nuisance Law in Environmental Litigation

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The Reemergence of Nuisance Law in Environmental Litigation

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 associa-

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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 laedas, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clue. 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."

through the discharge of vast quantities of raw and inade-
quately treated sewage. 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 enforce-
ment process—a series of conferences that sought amicable
settlements of pollution problems—was cumbersome and in-
efficient. 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 land-
mark 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 conflict 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."

As Justice Douglas noted, a major issue in the conflict be-
tween common law and statutory remedies is the preemption
dctrine. 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 comprehen-
sively. 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," enacted a comprehensive reform of the
FWPCA that made it illegal for anyone to discharge pollutants
into navigable waterways without a permit. Milwaukee, com-
plying 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 Il-
linois v. Milwaukee, 366 F. Supp. 298 (N.D. Ill. 1973), allow-
ing 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 enforce-
ment action against Milwaukee in state court—as provided for
in the FWPCA—alleging that the city was not fully comply-
ing 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. 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.

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. Other federal courts faced with
the preemption issue also held that the FWPCA left in-
tact the federal common law of nuisance enunciated in
Milwaukee I.

Milwaukee continued its fight, however, and was granted
a second hearing by the U.S. Supreme Court in 1980. In April
1984, the Court, in Illinois v. Milwaukee, N.D. Ill. No. 72-C-1253

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 storm-
water overloaded the combined sewers, which also carried human waste. To
prevent sewage from backing up into homes, the combined sewer system con-
tained a number of overflow outlets that relieved the pressure by discharg-
ing flows of stormwater and raw sewage directly into streams and Lake
Michigan, bypassing the treatment facilities entirely.


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 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 explains 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.
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:

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\ldots \text{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) \ldots} \]

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 actions 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.