In Environmental Cases, Petition Immunity Can Complement Pre-Emption

By James M. Sabovich

There is in certain legal and business circles a growing unease over the vitality of pre-emption defenses in tort cases where the defendant is ostensibly sued for doing what the government required it to do. The recent U.S. Supreme Court decision in *Wyeth v. Levine*, 2009 DJDAR 3199, finding no pre-emption in a pharmaceutical failure to warn case caused some. The subsequent White House memorandum to federal agencies that has been perceived by advocates and critics of pre-emption as scaling it back caused more.

Because of the expansive federal environmental regime dictating everything from how waste rags must be stored and labeled to the approval of site sampling plans, pre-emption is a significant issue in environmental law. When operating under state or local law pre-emption is always at least in the background. The non-federal laws, which are often modeled on federal law, are operative only because they do not conflict with the federal regime. Live pre-emption disputes, which can generally be placed into two categories, are common too. First, specific state or local environmental regulations are challenged as being pre-empted by federal law. In banning the sale of emissions allowances for sulfur dioxide to "upwind" states, for example, New York found its statute pre-empted by conflict with the Clean Air Act. State and local environmental laws may be pre-empted by non-environmental federal laws, as with the pre-emption of bans on cell towers by the Federal Communications Act of 1996.

The second form of pre-emption is the barring of a particular legal claim brought by a plaintiff, that, while not based on a law that is per se pre-empted, is based on a legal theory that is pre-empted. In the environmental context, this form of pre-emption can be further divided. In cases like *New Mexico v. GE*, 467 F.3d 1223 (10th Cir. 2006), where New Mexico's attempt to recover natural resource damages under state nuisance law was barred by the Natural Resource Damages provisions of the Comprehensive Environmental Response, Compensation and Liability Act the theory can be paraphrased as that the plaintiff is frustrating federal law by seeking what that law provides without doing what federal law requires to obtain it. The second form, most often seen in pre-emption of tort claims, is that the legal theory being advanced imposes liability on a defendant for complying with a federal directive are pre-empted.

Given the highly regulated and legislated nature of environmental responsibilities, and the anxiety over pre-emption as protection against liability for having done what those laws require, it is worth considering supplements. One that is often overlooked and under-utilized is the *Noerr-Pennington* doctrine. Under *Noerr-Pennington*, also called petition immunity, the governed cannot be held civilly liable for attempting to influence their government's decisions. Particularly significant for environmental practitioners is that the doctrine also protects the petitioner from liability for later acting pursuant the government decision. While it began as an antitrust rule, the "doctrine has been extended to preclude virtually all civil liability for a defendant's petitioning activities before not just courts, but also before administrative and other governmental agencies." In general, it applies in the scenario where the governed attempts to influence government action and a third party alleges that that effort, the resulting government decision, or actions pursuant to the government decision, caused them harm. In the recent case of *People ex rel. Gallegos v. The Pacific Lumber Co.*, 158 Cal. App. 4th 950 (2008), for example, petition immunity barred a claim that defendant lumber company had to plaintiff's detriment tricked the Department of Forestry into issuing defendant a permit that allowed what plaintiff alleged to be excessive logging without proper environmental protections.

> **Because of the expansive federal environmental regime dictating everything from how waste rags must be stored and labeled to the approval of site sampling plans, pre-emption is a significant issue in environmental law.**

It is a rule of civil rights based on the First Amendment's prohibition against infringements on the people's "right to petition for redress of grievance." Whereas pre-emption is a rule of relationship between governments, federal versus state, or state versus municipality, with the governed having an interest in the rule's application, the *Noerr-Pennington* is a rule of relationship between the government and the governed, with the tort claimant having an interest in the application of the rule.

Consequently, petition immunity fits naturally in the role of tort defense in circumstances where the conduct is heavily regulated and requires close government involvement, as are many environmental actions. If government legal control over a company's allegedly tortious environmental act is sufficient to give rise to a pre-emption argument, then there is a good chance petition immunity is also present. After all, if in an area where the law requires government approval of conduct, it can be said that the claim conflicts with the law, then the defendant is probably being sued in some measure for seeking government approval or acting pursuant to it. But if pre-emption fails for extraneous reasons, such as evidence of an intent by the legislature or agency not to pre-empt, petition immunity is probably still present.

The value of petition immunity as a companion and backstop to pre-emption in environmental tort cases can be seen by considering the not uncommon scenario of a company being sued under common law tort theories over a site it is remediating under the Comprehensive Environmental Response, Compensation and Liability Act or its state equivalent. Those tort plaintiffs allege the remediation to be inadequate, too slow, deceptive, etc. and that they have been harmed thereby. In the case of *Village of DePue v. Viacom International, Inc.*, 2009 U.S. Dist. LEXIS 58047 (C.D. Ill. July 8, 2009), where a small, 1,842 resident village "[d]issatisfied with Defendants' rate of progress in cleaning up" a National Priority List site pursuant to a state consent order, issued nuisance notices that "directed Defendants to perform an immediate cleanup of the Site," then assessed fines for every day the offending contamination remained at the site. More typical are claims in community exposure suits that the defendant defrauded the supervising agency during the remediation, resulting in alleged harm to plaintiffs.

In such cases, the availability of pre-emption can depend on the division of authority among federal, state, or local governments on a particular issue. *Village of DePue* is illustrative. In that case, the 7th Circuit had previously held that because "the Consent Order was instituted by the Illinois EPA," and "not by the federal government," federal pre-emption did not apply, thus leading to an inquiry of pre-emption under Illinois's state equivalent act. That, in turn, depended on the effect of the village being a "non-home rule unit" under the Illinois Constitution. When that inquiry found pre-emption, the village just made itself a "home rule unit," passed a new nuisance ordinance exponentially increasing the daily fines for "pollution," added common law nuisance and trespass claims and sued the defendants for the same contamination again. This led to another state specific issue, namely the "three-part inquiry to determine whether a purported exercise of home-rule power by a municipality, like the one here, is valid under the state's constitution." After all that the district court found the state equivalent of the act pre-empted of the new nuisance ordinance, but not of the common law claims.

Petition immunity, by contrast, is more likely to apply in such cases and unlikely to devolve into state or locality specific governance issues. It is clear that under *Noerr-Pennington* the remediating defendants would be immune from civil liability for attempting to influence the operative consent order or actions under it. Doing so is First Amendment-protected activity and that protection is not dependant on which government has what authority. Thus, in *People ex rel. Gallegos v. The Pacific Lumber Co.*, where the plaintiff county faulted the defendant lumber company for obtaining too lenient a logging permit from the Department of Forestry, and in *Lynn v. Amoco Oil Co.*, 459 F. Supp. 2d 1175 (N.D. Ala. 2006), where the plaintiff property owners alleged the defendant oil companies obtained too lenient of remediation standards for their leaking underground storage tank properties, the claims were barred by *Noerr-Pennington*.

> **If government legal control over a company's allegedly tortious environmental act is sufficient to give rise to a pre-emption argument, then there is a good chance petition immunity is also present.**

The only clear exception to this immunity is for "sham petitions." That requires a showing "that no reasonable person could have expected the action taken to lead to governmental results."

Obviously, when a plaintiff alleges that a defendant "achieved the very outcome it petitioned for," i.e., a remediation schedule under the consent order allowing to slow a "rate of progress in cleaning up," it is an uphill battle to show "no reasonable person" could have expected to succeed.

Nor under *Noerr-Pennington* could the defendant be held liable for acting pursuant to the resulting consent order. In *Sanders v. Lockyer,* 365 F. Supp. 2d 1093 (N.D. Cal. 2005), the plaintiff smokers sued cigarette manufacturers for entering a master settlement agreement, which created a "cartel" that allegedly allowed them to "dramatically increase the price of cigarettes." The manufacturers moved to dismiss, contending that all efforts to influence the agreement or its implementing legislation were immunized under the *Noerr-Pennington* doctrine.

The plaintiffs agreed that *Noerr-Pennington* covered negotiation of the settlement, but challenged that there was no immunity for later acting in accordance with it. The court disagreed, holding that *Noerr-Pennington* immunity would mean nothing if a petitioner "were then subjected to … liability for his success [in petitioning]." Thus, "the manufacturer defendants are immune from suit for their operation under the settlement agreement and implanting legislation." Applying this to *Village of DePue*, holding the defendants liable to the village for the act of following the schedule set out in the consent order would have violated *Noerr-Pennington*.

This is not to say that all or a sizable minority of environmental tort claims implicate petition immunity. Only that where such a claim sparks a thought of pre-emption, consideration of petition immunity should follow.

James M. Sabovich is a senior associate in the Orange County office of Gibson, Dunn & Crutcher. He is a member of the firm's environmental litigation and mass tort practice group.