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Choosing Which State's Law Governs Interstate Water Pollution

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Choosing Which State's Law Governs Interstate Water Pollution

by Robert H. Abrams

International Paper Company
v.
Harmel Ouellette
(Docket No. 85-1233)

Argued November 4, 1986

ISSUES

This case is a sequel to the long-playing saga of *Illinois v. City of Milwaukee* in which the United States Supreme Court twice grappled with questions regarding what body of law governs interstate water pollution. Here, the Second Circuit Court of Appeals has ruled that victims of interstate water pollution may sue in the courts of their home state and may seek any and all remedies afforded by the law of that state in water pollution nuisance cases. This position is in direct conflict with the ruling of the Seventh Circuit when it previously considered those issues in the denouement of the *City of Milwaukee* litigation.

Vital questions of water pollution law are open for decision—the foremost being whether a downstream victim state can adjudicate and apply its own state law in a traditional common law nuisance suit seeking compensatory damages, punitive damages and an injunction.

FACTS

Owing to the procedural posture of the case, the facts for the purposes of review by the United States Supreme Court are generally not in dispute. The plaintiff is a class of 162 landowners and the state of Vermont, all of whom own riparian property on the east shore of Lake Champlain. International Paper Company (IPCo) operates a kraft paper mill in New York state across the lake from these properties.

To comply with its state-issued, federally-approved, National Pollution Discharge Elimination System (NPDES) discharge permit, IPCo among other things discharges its liquid wastes through a diffusion pipe that extends out into Lake Champlain. As a result of the offshore discharge, prevailing winds and lake currents, the landowners alleged that the "foul, unhealthy, smelly and aesthetically unpleasing" contaminants polluted the waters adjacent to their Vermont properties, interfering with their use and enjoyment of those properties and decreasing their market and rental values. Put differently, the landowners stated a classic water pollution nuisance case against IPCo. Other claims were raised, but only issues relating to the nuisance claim are under review by the Supreme Court at this time.

The nuisance action seeks an array of remedies. The landowners demand $20 million in compensatory damages, $100 million in punitive damages and injunctive relief to abate the continuing nuisance that would require IPCo to restructure its wastewater treatment system.

The procedural posture of the case is a bit complex. The landowners originally filed suit in 1978 in the Superior Court for Addison County Vermont, a Vermont state trial court with jurisdiction over the claim. The common law nuisance suit was brought both individually and as a class action. International Paper Company, a New York corporation operating its offending plant in New York, removed the case to the federal court in Vermont, exercising its right to do so based on diversity of citizenship from the Vermont plaintiffs. Once in federal court, the class was certified and the state of Vermont was added as a class member in respect of its ownership of riparian land affected by defendant's pollution.

IPCo moved in 1981 for summary judgment dismissing the case. The United States District Court reserved decision until after the remand of the second *City of Milwaukee* case had resulted in a holding by the Seventh Circuit that only the law of the source state could be applied in interstate water pollution nuisance cases. Notwithstanding that Seventh Circuit ruling, Chief Judge Coffrin held that the federal legislative scheme authorized nuisance suits to be brought in any court and under the law of any state where the alleged effects of a discharge occur. Under a special statute permitting expedited appellate review in advance of trial, the case went directly to the Second Circuit Court of Appeals to consider the rectitude of Judge Coffrin's ruling. Judge Coffrin was affirmed in a *per curiam* decision, setting the stage for IPCo's successful petition for *certiorari*.

BACKGROUND AND SIGNIFICANCE

In the seminal *City of Milwaukee* litigation, the Su-

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preme Court first held, in 1972, that in the absence of comprehensive federal legislation, federal common law existed to govern interstate water pollution suits (*Milwaukee I*, 406 U.S. 91 (1972)). That very year saw the enactment of the first effective federal water pollution control legislation and led eventually to a second United States Supreme Court ruling in 1981 holding that the 1972 federal legislation, as amended, had preempted federal common law in interstate water pollution suits (*Milwaukee II*, 451 U.S. 304 (1981)). The state of Illinois was free to seek state common law remedies. The United States Circuit Court of Appeals for the Seventh Circuit in 1984 added restrictions that forced Illinois to seek common law remedies only in Wisconsin courts applying Wisconsin common law (*Milwaukee III.*, 731 F. 2d 403 (7th Cir. 1984)). Certiorari was sought by Illinois and denied.

As mentioned above, *Ouellette* raises the precise issue for which *certiorari* was sought and denied in *Milwaukee III*. This is an issue of lingering importance because of its vast practical significance; the scenario of *Ouellette* is likely to be repeated many, many times.

Large numbers of major industrial facilities are located adjacent to major water bodies, at least in part, to take advantage of the waste assimilation capacity of the receiving body. Lake Champlain and innumerable other lakes and rivers are either interstate waters or tributary to interstate waters. As a result, the effects of discharges of numerous industrial and municipal facilities threaten adverse consequences beyond the borders of the state in which the facility is located. At this point, the serious question of what body of law should govern discharger conduct and liability arises.

Two themes dominate the discussion. Facility operators note that this is an era of universal mandatory state water pollution regulation. All states must prescribe water pollution controls that are at least as stringent as federally-set minimum standards. Facility operators further argue that their actions should be subject to regulation only by the state in which they are operating. They assert that to open them up to suits based on the law of other states inexorably leads to inefficient dual regulation—they build their plant to meet their home state's regulatory requirements only to be told by some out-of-state judge that their plant must be redesigned and that they must pay whopping compensatory and punitive damages awards.

Using IPCo as a typical interstate polluter, they claim to be operating within the bounds of their New York-granted NPDES permit and that they have invested significantly in meeting its terms. To be ordered by a Vermont court to alter their mode of operating creates precisely the double regulation that a comprehensive federal regulatory program eschews. Even to allow damages based on another state's laws exposes them to liabilities that are likewise inconsistent with their need to have a single body of law governing their conduct.

The other theme can be set forth with equal clarity. Injured victims of pollution are not barred from seeking common law remedies by the federal water pollution statutes. In fact, the governing federal law has a savings clause that expressly reserves to citizens their common law right to sue (33 U.S.C. section 1365(e)). The claim that permit compliance sets the proper standard of conduct is unavailing. Compliance with a permit has never been accepted as a complete defense in common law tort suits based on nuisance or any other theory. Permits are consistently viewed as setting a minimum socially accepted level of permittee conduct.

Since common law suits survive and the permit is no defense, the only questions are whether the victim state's courts are an available forum and whether the victim state's law can apply. Ordinary choice of law principles, if applicable in this situation, allow downstream victim states to adjudicate these cases and apply their own law. Those states have an interest in providing a forum and a remedy to injured citizens. The facility operators' claims of unpredictable dual regulation simply ignore the fact that they are operating in a federal system having many sovereigns that are concurrently authorized to enforce remedial common law systems governing torts.

When the arguments are characterized in this way, it should be plain that this case is as much about the authority of states in a federal system as it is about remedies for interstate water pollution. This escalates the importance of the decision handed down. The specific legal arena may, however, limit the impact of the result. One avenue available to the Supreme Court in deciding this case is to look at the specific federal statute lurking in the background and find that its proper interpretation compels a particular result. Even then, an authoritative determination could have profound consequences on future interstate water pollution cases and serve as a model for resolving all kinds of interstate pollution cases.

ARGUMENTS

***For International Paper Company** (Counsel of Record, Roy L. Raerdon, One Battery Place, New York, NY 10004; telephone (212) 483-9000)*

1. Under the scheme of regulation embodied in federal water pollution laws, only the source state courts and law are expected to govern suits arising from the pollution.
2. Federal law preempts non-source state common law claims for interstate pollution injuries.

***For Harmel Ouellette** (Counsel of Record, Peter F. Langrock, Drawer 351, Middlebury, VT 05753; telephone (802) 388-6356) **The State of Vermont as a member of the class** (Meredith Wright, Pavilion Building, Montpelier, VT 05602; telephone (802) 828-3171)*

1. Nothing in the federal statutes or the Supreme Court's decisions ousts the historic interest in allowing local suits for injuries sustained.
2. The federal water pollution laws do not preempt state common law remedies for interstate water pollution. There is no express preemption, there is an express state law savings clause, the governing federal regulation is not so comprehensive as to impliedly preempt state law and state law remedies do not conflict with federal interests served by the federal water pollution laws.
3. Vermont law applies to the entire controversy and Vermont courts (either state courts or federal courts) are a permissible venue for the litigation.

AMICUS ARGUMENTS

In Support of International Paper Company

Mid-America Legal Foundation argues that:

1. The decision of the Second Circuit in this case was erroneous in allowing state common law nuisance suits to be brought in any court and under the law of any state.
2. Principles of statutory construction require that the common law savings provision of the Clean Water Act be construed to forbid this suit.

In Support of Harmel Ouellette

The United States argues:

1. Vermont residents may maintain a common law nuisance action for Vermont injuries against a New York-based polluter, using ordinary choice of law principles.
2. Remedies in such a suit are limited by federal law which preempts abatement by injunction and the award of punitive damages.

The State of Tennessee and twelve additional states contend in a separate brief:

1. The Clean Water Act has not preempted victim-state state law as it applies to injuries caused by source-state water pollution discharges.
2. The decision of the United States Circuit Court of Appeals for the Seventh Circuit (*Milwaukee III*) was erroneous.