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Defending Price-Anderson Act Claims

Presented to:
Department of Energy Contractor Attorneys Association

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Atomic Energy Act

1946 – Federal Monopoly

1954 – Licensing, private construction, ownership and operation of nuclear facilities “under the strict supervision of the AEC.”

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The Price-Anderson Act (PAA)

- Originally passed in 1957, the Price-Anderson Act (PAA) provides a government-backed indemnification program for the dual purpose of:
 - protecting the public, and
 - encouraging atomic energy development.
- In 1988, Congress amended the PAA to create an exclusive cause of action, a “public liability action,” for claims involving nuclear incidents.
 - Original federal court jurisdiction for public liability actions
 - Right of removal

Price-Anderson Act of 1957, Pub. L. No. 85-256; Price-Anderson Act of 1988, Pub. L. No. 100-408.




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Public Liability Action - Defined

- Any action asserting public liability based upon alleged exposure to source, special nuclear, or byproduct material. 42 U.S.C. §§ 2014(hh),(q).
- “Public liability” – any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation. 42 U.S.C. § 2014(w).

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Nuclear Incident - Defined

- “Nuclear incident” - any occurrence:
 - causing bodily injury, sickness, disease, death, loss of or damage to property, or loss of use of property; and
 - arising out of or resulting from the radioactive, toxic, explosive or other hazardous properties of source, special nuclear or byproduct material.

42 U.S.C. § 2014(q).




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Early Dismissal of PAA Claims

- Preemption
- Pleading Deficiencies
 - Violation of Federal Standard of Care
 - Inconsistent State Law Claims




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Preemption of State Law Claims

- Through the Atomic Energy Acts, the USG occupies the field of nuclear safety.
 - Atomic Energy Act of 1946, Pub. L. No. 79-585
 - Atomic Energy Act of 1954, Pub. L. No. 83-703
- State regulation through legislation or tort litigation is preempted.
 - “[S]tates are precluded from regulating the safety aspects of nuclear energy.” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 240-41 (1984); See also *O’Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 859 (3d Cir. 1991).




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Preemption of State Law Claims

- Courts have rejected plaintiffs’ efforts to assert claims under both the PAA and state law.
 - “[Plaintiff] can sue under the Price-Anderson Act as amended or not at all.” *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997)
 - “A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or it is not compensable at all.” *In re TMI II*, 940 F.2d 832, 854 (3rd Cir. 1991)
- The PAA provides the exclusive cause of action for any claim arising from a nuclear incident.




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Failure to State a Claim

- **Unless inconsistent** with the PAA, the substantive rules for a public liability action are derived from the law of the state where the nuclear incident occurs. 42 U.S.C. § 2014(hh).
- Federal law, not state law, governs the standard of care for PAA claims.




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Federal Standard of Care

- Every circuit that has considered the issue has held that NRC safety regulations establish the duty of care.
 - Third, Sixth, Seventh, Ninth and Eleventh Circuits
- NRC permissible dose limits
 - Members of the public – 10 C.F.R. § 20.1301
 - Adult occupational exposure – 10 C.F.R. § 20.1201
- Plaintiffs must plead an exceedance of the federal dose limits in order to state a PAA claim.




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The PAA and State Law

- The public liability action is the exclusive cause of action. It preempts independent state law claims.
- Courts will determine the substantive rules for the public liability action by looking to state law, unless it is inconsistent with the PAA.




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Inconsistent State Law Claims

- Strict Liability
 - Inconsistent where it would impose liability without breach of federal dose limits
- Emotional Distress
 - Facially inconsistent if state law does not require actual physical injury
- Nuisance and Trespass
 - Inconsistent if state law does not require property damage
 - Diminution in value insufficient
- Derivative claims – wrongful death, loss of consortium, etc.
 - Fail, if the underlying tort theory (negligence, strict liability, etc.) fails

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Adkins Case Study

- Putative class action
 - 143 named plaintiffs
 - Residents and former employees
 - Personal injuries and property damage
- Nuclear Fuel Services, Erwin, TN
 - Processes, pelletizes and loads enriched uranium, thorium and plutonium into fuel rods or cylinders used as nuclear fuel
- Allegations of facility “releases” spanning fifty years

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Acceptable Limits Movie Trailer




- <http://vimeo.com/30504065>



"Acceptable Limits" Trailer
 from See Rock City Productions 1 year ago (40716293)

The devastating health and environmental effects of a dilapidated, 54 year old, nuclear fuel processing facility on a small Appalachian community in East Tennessee. For more information, visit acceptablelimitsthemovie.com




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Adkins – Class Claims

- Putative class – all persons who lived, resided, or owned real property in Erwin, TN, or any area that was contaminated by emissions from the facility, who have suffered personal injury, death or property damage
- Plaintiffs contended the facility “was never operated in compliance with applicable state, local and federal laws.”




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Adkins – Alleged Releases

- First Amended Complaint
 - Dr. Michael Ketterer (Northern Arizona University) published a report documenting radioactive contamination emanating from the facility
 - Additional non-specific releases of radioactive and hazardous materials
- Second Amended Complaint
 - 86-page “Exhibit A” identifying specific instances of “non-compliance” between 1962-2010
 - Issues included material control, accountability, criticality safety controls, license violations, NRC enforcement, and falsification of documents




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Adkins – Eleven Causes of Action

- One federal public liability action under the PAA
- Ten state law claims
 - Negligence and negligence per se
 - Absolute or strict liability
 - Private nuisance and trespass
 - Wrongful death
 - Intentional, Reckless and Negligent Infliction of Emotional Distress
 - Loss of Consortium

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Adkins – Court Holdings

Adkins v. Chevron Corp., et al. (December 2012)

- The PAA “completely preempts” plaintiffs’ state law claims.
- Plaintiffs “must plead and prove a breach of the federal numerical dose limits” to pursue a PAA claim.
 - Expressly rejected ALARA standard as the standard of care in a public liability action
 - Conclusory allegations of “non-compliance” with federal, state and local laws are insufficient
 - Plaintiffs must identify the specific applicable standard of care
 - Plaintiffs must allege sufficient facts to establish breach (i.e., exceedance) and causation




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Adkins – Court Holdings

- Plaintiffs' 86-page exhibit on "non-compliance" did not establish a violation of any of the statutes or regulations identified
- Plaintiffs may not rely on discovery to identify facts necessary to plausibly plead a PAA claim.
- All claims DISMISSED. Motion to amend DENIED.




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Post-Adkins Decisions

- *Dawson v. The Boeing Co., et al.* (C.D. Ca. April 15, 2013)
- *McClurg v. MI Holding, Inc.* (E.D. Mo. March 27, 2013)




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Dawson v. Boeing - Complaint

- Alleged exposure to radioactive contaminants released from the Santa Susana Field Laboratory (SSFL)
 - Specifically alleged exposure in excess of government standards including but not limited to 10 C.F.R. § 20.1301
 - Treating oncologist opined plaintiff's rectal cancer was caused by living in close proximity to SSFL




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Dawson v. Boeing - Holdings

- The Complaint failed to set forth specific facts that would support a plausible inference of exposure in excess of federal limits
 - Plaintiffs failed to identify past or present radiation levels in the region
 - The medical opinion failed to identify the level of radiation to which plaintiff was exposed
- Mere allegations of proximity to a facility are insufficient to establish an exposure above permissible federal limits
- Violating federal safety standards versus exposure




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McClurg v. MI Holdings, Inc.

- Property owners alleged personal injuries and emotional distress arising from decades of exposures in North St. Louis County, MO
 - Public liability under PAA
 - State law claims for negligence, negligence per se, strict liability, IIED, NIED and medical monitoring
- Dismissed with leave to amend
 - PAA preempts all state law claims
 - Federal dose limits establish duty of care in PAA claims




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Other Recent, Notable PAA Cases

- *Irwin v. CSX Transp., Inc.* (E.D.Tenn. Mar. 16, 2011)
- *Texas Instruments, Inc. v. United States* (Fed. Cl. June 13, 2011)
- *Cotroneo v. Shaw Env't & Infrastructure, Inc.* (5th Cir. 2011)
- *Wilcox v. Homestate Mining Co.* (10th Cir. 2010)
- *McMunn v. Babcock & Wilcox Power Generation Grp. Inc.* (W.D. Pa. 2012)




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Irwin v. CSX Transp., Inc.

- Railroad employee claim under FELA for illness allegedly arising from exposure to ionizing radiation / radioactive substances
- Defendant railroad sought to remove case to federal court based on PAA
- Court held PAA only applies to entities that are NRC licensees or DOE contractors
- Case remanded




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Texas Instruments, Inc. v. United States

- Plaintiff-contractor suit under Contract Disputes Act and the PAA to recover litigation expenses under indemnification provisions of AEC contracts
- Contractor's indemnification Complaint was not deficient despite absence of specific allegations linking
 - (1) the tort plaintiffs' harm to radioactive materials used in performance of contract and
 - (2) contract performance to the radioactive materials found at contaminated site




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Cotroneo v. Shaw Env't & Infrastructure, Inc.

- Workers at nuclear source fabrication facility allegedly exposed to excessive radiation during clean-up
- Summary judgment for defendants on plaintiffs' bodily injury claims upheld by Fifth Circuit
 - Plaintiffs failed to offer evidence excluding alternative causes
 - Plaintiffs' "offensive contact" battery claim was inconsistent with the PAA
 - "offensive contact" under Texas law did not require proof that battery caused any physical injury




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Occupational Exposures Claims

- Cases such as *Adkins*, *Cotroneo*, *Dawson* and *McClurg* evidence a growing trend of courts requiring plaintiffs to provide detailed allegations of violations of federal safety standards
- While identifying sufficient facts might be difficult for plaintiffs alleging public exposures, it is less so for plaintiffs alleging occupational exposures
- Workplace safety regulations may provide workers all the data required to assert viable PAA claims




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Occupational Exposure Data

- NRC regulations require creation and maintenance of worker exposure data
 - Pocket dosimeters
 - Radiation surveys
 - Records maintenance
 - Reporting requirements




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Defending Occupational Exposure Claims

- Workers compensation exclusivity may not apply in some states
 - *Day v. NLO* (S.D. Ohio 1994) - intentional torts excluded from workers compensation protection
- Like public, workers must establish that alleged releases exceeded applicable federal limits
 - *Debevec v. Gen. Elec. Co.* (6th Cir. 1997) – employees' intentional tort claims dismissed where complaint failed to specify amount of thorium released or that the release exceeded regulatory limits




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Defending Occupational Exposure Claims

- Prevention is the best defense.
 - Monitor compliance with regulations. If an issue arises – particularly one involving a dose exceedance – get on top of it right away.
- Prepare to go on the offensive.
 - Don't limit data collection and maintenance to exceedances
 - Also collect and maintain data that would establish operations within federal guidelines
- Focus on available PAA defenses.
 - Don't be afraid to make the arguments for early dismissal.

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QUESTIONS?

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