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Federal Preemption: State Law Principles of Strict Liability in a Nuclear Accident — A Preemption Problem in Light of the Price-Anderson Act

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FEDERAL PREEMPTION: STATE LAW PRINCIPLES OF STRICT LIABILITY IN A NUCLEAR ACCIDENT—A PREEMPTION PROBLEM IN LIGHT OF THE PRICE-ANDERSON ACT?—*Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566 (W.D. Okla. 1979)

INTRODUCTION

In the event of a major nuclear accident, Congress has imposed a form of strict liability on the nuclear industry through the Price-Anderson Act.[1] The Act provides for a waiver of state and common law defenses[2] in the event of an "extraordinary nuclear occurrence"[3] by federally licensed nuclear facilities. Thus the Act proscribes federal strict liability upon the nuclear industry for injuries caused by an extraordinary incident.

If, however, the nuclear accident is less than an extraordinary nuclear occurrence, an accident often referred to as "subthreshold," a question arises whether preemption will prevent imposition of state strict liability law. In *Silkwood v. Kerr-McGee Corp.*,[4] the District Court for the Western District of Oklahoma held that the Price-Anderson Act does not preempt state law in a "subthreshold" nuclear accident.[5]

Silkwood was the first major personal injury case to assess a manufacturer's liability for the escape of radioactive material.[6] The

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1. 42 U.S.C. § 2210 (1976).

2. For specific defenses waived *see* note 29 *infra*.

3. The term "extraordinary nuclear occurrence" signifies any event which results in (1) a substantial release of radioactive material or substantial radioactive levels offsite and (2) has resulted in substantial damage to persons or property offsite. *See* 42 U.S.C. § 2014(j) (1976). The Nuclear Regulatory Commission has determined that the first criteria is satisfied: if a specific dosage of radiation is absorbed by specific organs; or if a specific amount of radiation, released from a production or utilization facility, has contaminated at least 100 square meters of property; or if a specific amount of radiation, released in the course of transportation, has contaminated any offsite property. 10 C.F.R § 140.84(a)-(b) (1980). The second criteria is satisfied if there is:

> (1) [T]he death or hospitalization, within 30 days of the event, of five or more people . . . showing . . . physical injury from exposure to . . . [radiation] . . .; or (2) The Commission finds that $2,500,000 or more of damage offsite has been or will probably be sustained by any one person or $5,000,000 . . . in the aggregate . . . or (3) The Commission finds that $5000 or more damage offsite has been or will probably be sustained by each of 50 or more persons, provided that one million or more . . . in the aggregrate has been or will probably be sustained. 10 C.F.R. § 140.85(a) (1)-(3) (1980).

4. 485 F. Supp. 566 (W.D. Okla. 1979).

5. *Id.* at 573-74.

6. Letter from District Judge Frank G. Theis to Bureau of National Affairs, January 14, 1980 (on file at the University of Dayton Law Review Office).

district court held that traditional state[7] tort concepts mandate imposition of strict liability upon a defendant for any injury which results from the escape of radiation from its facility.[8]

In an exhaustive opinion on the defendant's post-trial motions for judgment notwithstanding the verdict and/or, alternatively a new trial,[9] the district court addressed three main contentions raised by the defendant, Kerr-McGee.[10] The defendant first contended that federal preemption prohibited the imposition of strict liability unless federal law, as provided for in the Price-Anderson Act, required it.[11] Strict liability, therefore, could not be imposed for a subthreshold nuclear accident. Second, the defendant contended that liability could not attach if exposure levels were within the permissible levels set by the Atomic Energy Commission (AEC) and the Nuclear Regulatory Commission (NRC).[12] Third, the defendant contended that even assuming initial liability, its substantial compliance with federal regulations barred an award of punitive damages.[13]

This note analyzes the preemption issue in view of the statutes, the applicable case law and the legislative history of the Price-Anderson Act. The effect of compliance on the issues of liability and punitive damage will be analyzed together in view of the federal regulations and the applicable case law. This analysis will lead to the conclusion that state law is not preempted by the Price-Anderson Act and compliance with federal regulations is only evidence of reasonable care, and is, therefore, not a shelter from liability.

FACTS AND HOLDING

Karen Silkwood was employed by the defendant, Kerr-McGee Nuclear Corporation, at the Corporation's fuel rod fabrication plant in Oklahoma, from August 3, 1972 to November 13, 1974.[14] On three

7. Except in matters governed by the Constitution or by Act of Congress, the law to be applied in any case is the law of the state, as established by its legislature or its highest court. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). *But see* note 76 *infra*.

8. 485 F. Supp. at 571.

9. A verdict may be set aside and a new trial granted when the verdict is against the clear weight of the evidence or whenever in the exercise of sound discretion the trial judge decides that it is necessary to prevent a miscarriage of justice. Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d 350, 352 (4th Cir. 1941).

10. 485 F. Supp. at 572. The defendant alleged 22 separate grounds to support the motions; however, the trial court opinion mainly addressed the three main propositions. This note will analyze these three main propositions.

11. 485 F. Supp. at 572.

12. *Id.* *See* note 42 *infra*.

13. *Id.*

14. Silkwood v. Kerr-McGee Corp., 460 F. Supp. 399, 401-02 (W.D. Okla. 1978) (this was a separate action brought by the Silkwood Estate alleging that the Kerr-McGee Corporation prevented Ms. Silkwood from organizing a labor union).

occasions in 1974, she was exposed to radiation from plutonium. On November 5 and 6, the exposure took place at the facility and on November 7, at her apartment.[15] Investigations uncovered that the levels of radiation in her apartment on November 7 constituted approximately one fourth of that permitted by federal regulations for a radiation worker during her lifetime, and exceeded by two and one half times the exposure permitted to any other member of the public.[16] The radiation levels, however, were not high enough to be considered an extraordinary nuclear occurrence under the Price-Anderson Act.[17] On November 13, 1974, six days after Ms. Silkwood was exposed to the radiation, she died in an automobile accident that was unrelated to her irradiation.[18]

A personal injury action was filed in the district court by Bill M. Silkwood, administrator of Ms. Silkwood's estate, against Kerr-McGee Nuclear Corporation.[19] The complaint alleged that the defendant was liable, under either strict liability or negligence principles, for the decedent's injuries caused by her exposure to plutonium that had escaped from the defendant's facility.[20] The complaint alleged that Ms. Silkwood's injuries included radioactive contamination of her internal organs, tissues and genes. It further charged that as a result of her ex-

15. 485 F. Supp. at 595 app. (jury instruction number two).

16. *Id.* at 583. *See generally* Keyes & Howarth, *Approaches to Liability for Remote Causes: The Low Level Radiation Example*, 56 IOWA L. REV. 531, 542 (1971) [hereinafter cited as Keyes & Howarth]. In the determination of whether the risk of contamination from specific levels of radiation is acceptable, Congress has identified two classes of individuals. The first class includes certain occupational workers who work for remuneration at a radioactive source. The second class includes members of the general public who work or live near a generated source of radiation. The levels for the public are set at one-tenth those set for radiation workers. It is argued that the rationale behind the distinction is that the occupational worker somehow assumes the risk attached to receiving radiation doses that do not exceed the currently acceptable standards. *Id.* Assumption of risk is an affirmative defense that is established by showing that the plaintiff was informed and appreciated the magnitude of risk he incurred. The choice must be shown to be entirely voluntary and freely made. W. PROSSER, THE LAW OF TORTS § 79 at 523 (4th ed. 1971). It is questionable that a radiation facility worker assumes the risk of contamination onsite. *See* Keyes & Howarth, *supra* note 16, at 542. After consideration of the defense of assumption of risk, the district court ruled that it was clear Ms. Silkwood did not assume the risk of contamination at her apartment. 485 F. Supp. at 583. Therefore, the court did not have to decide the question of whether she assumed the risk of contamination at the facility. *Id.*

17. *See* note 3 *supra*.

18. Ms. Silkwood died in an auto accident when her car left the highway and struck a concrete abutment. She was on her way to discuss her allegations of the unsafe working conditions at the defendant's facility with a New York Times reporter and a union representative. *See* Time, January 18, 1975, at 8-9.

19. 485 F. Supp. at 566.

20. It was stipulated that the plutonium in Ms. Silkwood's apartment came from the defendant's plant where Ms. Silkwood worked. 485 F. Supp. at 595 app. (jury instruction number two).

posure, she had experienced mental and emotional trauma, suffering, and anguish.[21] Punitive damages were also requested.[22] The trial culminated on May 18, 1979,[23] with a general verdict for the plaintiff of $10,505,000.00.[24] The verdict was accepted by the court and judgment entered against the defendant.[25] Kerr-McGee then made alternative motions, for judgment notwithstanding the verdict and for a new trial, both of which were denied.[26]

The district court held that state tort law principles were applicable to an injury caused by a federally licensed nuclear facility. The injury arose out of a nuclear incident[27] not within the purview of the Price-Anderson Act, that is, a subthreshold nuclear accident.[28] The court held that because the Act establishes a waiver of defenses to state law claims,[29] as opposed to a federal law of strict liability, Congress intended that all questions of liability for radiation injuries be submitted for a determination under state tort law.[30] The court concluded that the Price-Anderson Act was not intended to supplant or preempt state tort concepts of strict liability for injuries caused by a subthreshold nuclear incident.[31] This conclusion was based upon the absence of a

21. 485 F. Supp. at 595 app. (jury instruction number two). The damages were correctly limited to those injuries which began on November 5, 1974, and ended with her death on November 13, 1974. 485 F. Supp. at 602 app. (jury instruction number eighteen).

22. 485 F. Supp. at 595-96 app. (jury instruction number two). The jury could award punitive damages if they found the defendant's conduct to be willful or wanton. *See* note 35 *infra*.

23. 485 F. Supp. at 570.

24. The jury awarded actual damages of $505,000.00 and punitive damages of $10,000,000.00. *Id.*

25. *Id.*

26. *Id.* at 573.

27. "The term 'nuclear incident' means any occurrence, including an extraordinary nuclear occurrence . . . causing . . . bodily injury . . . or loss of or damage to property . . . arising out of or resulting from the radioactive . . . [material]. . . ." 42 U.S.C. § 2014(q) (1976).

28. A subthreshold nuclear incident does not meet the requirements to be classified as an extraordinary nuclear occurrence. *See* note 3 and accompanying text *supra*.

29. Specific defenses waived under the Price-Anderson Act include

> (i) any issue . . . as to conduct of the claimant or fault of persons indemnified, (ii) any issue . . . as to charitable or governmental immunity and (iii) any issue . . . based on any statute of limitations if suit instituted within three years from . . . (when) . . . the claimant first knew or reasonably could have known of his injury . . . but in no event more than twenty years after the date of the nuclear incident.

42 U.S.C. § 2210(n)(1) (1976).

30. The United States Supreme Court stated in *Duke Power Co. v. Carolina Environmental Study Group Inc.*, 438 U.S. 59, 65-66 (1978), that "a waiver of defenses was thought to be the preferable approach since it entailed less interference with state tort law than would the enactment of a federal statute proscribing strict liability."

31. 485 F. Supp. at 573.

clear manifestation of congressional intent to preempt state law.[32]

After concluding that state tort principles should be applied, the court considered the weight to be given to compliance with the federal regulations[33] regarding levels of permissible doses of radiation.[34] After considering the weight that has been given to compliance with federal regulations in the aircraft and drug industries, the court said that compliance with AEC and NRC regulations is only evidence of reasonable conduct. Although the court stated that compliance is not a bar to the imposition of liability, under either strict liability or negligence, such compliance is strong evidence that punitive damages are not appropriate.[35]

The court, applying state tort principles, determined that the operation of the defendant's facility constituted an abnormally dangerous activity. It adopted the Restatement (Second) of Torts view that one who carries on an abnormally dangerous activity is subject to strict liability for damages that result from the activity even though he has exercised the utmost care to prevent the harm.[36] Therefore, the defendants would be held strictly liable for any injuries that resulted from the escape of plutonium from the facility[37] unless they could prove either lack of causation,[38] or alternatively, that Ms. Silkwood intentionally carried the plutonium into her apartment.[39]

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32. *Id.*

33. Federal regulations set out limits of error, that is, the amount of material that is allowed to be unaccounted for, as well as permissible levels of radiation both onsite and offsite. The regulatory scheme allows .5 grams of plutonium to be unaccounted for. *See* 10 C.F.R. § 20.101-20.106 (1980).

34. The defendant contended that compliance with federal standards bars any application of strict liability, and is conclusive evidence of reasonable care. Alternatively it alleged that substantial compliance barred any award of punitive damages. 485 F. Supp. at 577.

35. Oklahoma law requires a showing of malice and evil intent for the plaintiff to recover punitive damages in a tort action. Malice and evil intent can be inferred if the defendant commits willful and wanton acts in reckless disregard for another's rights. *See, e.g.*, Pennsylvania Glass Sand Corp. of Okla. v. Ozment, 434 P.2d 893 (Okla. 1967). Since substantial compliance is evidence of reasonable conduct, it would be conclusive evidence against the award of punitive damages which require willful and wanton acts in reckless disregard for another's rights on the part of the defendant.

36. RESTATEMENT (SECOND) OF TORTS § 519(1) (1977).

37. 485 F. Supp. at 571.

38. To find the defendant liable, the plaintiff must prove that radiation was a cause in fact of the injuries. This can be very difficult in cases of low level contamination or levels within the permissible doses set by the AEC and NRC. The plaintiff must also show that the radiation was the proximate cause of his injuries. Proximate cause involves a public policy decision as to whether, after a showing of factual causation, society wishes to hold the defendant liable. Failure to prove either a cause in fact or proximate cause will prevent the plaintiff from recovering. *See generally* Keyes & Howarth, *supra* note 16, at 547.

39. 485 F. Supp. at 597 app. (jury instruction number seven). *See* 42 U.S.C. §

An analysis of the court's decision must begin by addressing the threshold question whether the Price-Anderson Act preempts the imposition of state strict liability law. To answer this question, it will be necessary to examine the history of the Act.

ANALYSIS

A. History of the Price-Anderson Act

The Price-Anderson Act is an amendment to the Atomic Energy Act of 1954.[40] The Atomic Energy Act was enacted to introduce private industry into the development field of atomic energy and to end the federal government's absolute monopoly over the production of nuclear power.[41] The Atomic Energy Act was designed to encourage widespread private sector involvement in the development of nuclear energy. It permits private investors to construct and operate nuclear facilities under federal licensing and regulation by the NRC.[42] Congress anticipated that the private sector would immediately step into the production and sale of nuclear energy.[43] Private industry, fearful of unlimited liability arising out of a nuclear accident, remained uninterested.[44] This lack of interest was primarily because of the prohibitive cost and nonavailability of liability insurance.[45] Accordingly, Congress, to further encourage private sector investment, passed the Price-Anderson Act[46] in 1957. This legislation provided for indemnification of nuclear facilities licensed by the federal government for losses sustained in the event of an extraordinary nuclear occurrence.[47]

2210(n)(1) (1976). Even in the event of an extraordinary nuclear occurrence, the Price-Anderson Act does not require a waiver of a defense based upon the intentional conduct of the claimant. *Id.*

40. 42 U.S.C. § 2011-2281 (1976).

41. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 63 (1978). For a formal statement of the purpose of the 1954 Act, *see* 42 U.S.C. § 2013 (1976).

42. The NRC is authorized to prescribe safety and security regulations. *See* 42 U.S.C. § 2061(b)(2c) (1976). Under the original 1954 Act, this function was handled by the AEC. In 1974, the AEC was abolished and all of its functions were transferred to the NRC pursuant to 42 U.S.C. § 5814 (1976) (originally enacted as Pub. L. No. 93-438. 88 Stat. 1233 (Oct. 11, 1976)).

43. *See* Green, *Nuclear Power: Risk, Liability, and Indemnity*, 71 MICH. L. REV. 479, 490 (1973).

44. *Id. See also* 438 U.S. at 64.

45. *Id.*

46. Price-Anderson Act, 42 U.S.C. § 2210 (1976). The Act had the dual purpose of protecting the public and encouraging the development of the atomic energy industry. *See* 42 U.S.C. § 2210(i) (1976).

47. The Price-Anderson Act limits the liability arising out of a nuclear accident to 560 million dollars ($500 million limit on federal indemnity plus $60 million which is

In 1966, the Act was amended to provide for waivers of state and common law defenses by licensees in the event of litigation arising as a result of an extraordinary nuclear occurrence.[48] The amendment has the effect of imposing strict liability on the nuclear industry for injuries caused by an extraordinary nuclear accident.[49]

The issue presented in *Silkwood* was whether the Price-Anderson Act preempted the field of strict liability in a "subthreshold" nuclear accident. The district court's decision that the Act does not preempt state strict liability law was based primarily on the lack of congressional intent to "occupy the field."[50] This conclusion is strengthened by an analysis of the doctrine of federal preemption.

B. Federal Preemption of the Price-Anderson Act

The doctrine of preemption is rooted in the supremacy clause of the Constitution which provides that the Constitution and the laws of the United States shall be the supreme law of the land.[51] According to this doctrine, a state law cannot stand if it frustrates the objectives of Congress.[52] In determining whether a state law is preempted, a court will examine the language of the federal statute and its legislative history.

Preemption can be either express or implied.[53] Express preemption occurs when the language of a federal statute expressly voids state power.[54] In the event of a nuclear accident which meets the requirements of an "extraordinary nuclear occurrence" under the Act, all state law defenses are expressly preempted.[55] Preemption results because such an accident would come within the specific provisions of

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available from the nuclear facility's private insurance). 42 U.S.C. § 2210(c) (1976). In 1975, Congress, in anticipation of damages accruing in excess of $560 million, added "Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." 42 U.S.C. § 2210(e) (1976) (originally enacted as Pub. L. No. 94-197 § 6, 89 Stat. 1113 (1975)).

48. *See* note 29 *supra*.

49. *See* Murphy & Pierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392, 407 (1976) [hereinafter cited as Murphy & Pierre].

50. Congress is said to "occupy the field" when the federal regulation is so extensive as to preclude state regulation, even concurrently, in the same area. *See* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

51. U.S. CONST. art. VI, cl. 2.

52. Goldstein v. California, 412 U.S. 546, 561 (1973).

53. Note, *May a State Say No to Nuclear Power? Pacific Legal Foundation Gives a Disappointing Answer*, 10 ENVT'L L. 189, 194-95 (1980).

54. *See* Meek, *Nuclear Power and State Radiation Protection Measures: The Impotence of Preemption*, 10 ENVT'L L. 1 (1979).

55. *See* Murphy & Pierre, *supra* note 49, at 407.

the Congressional Act. Express preemption was not raised as an issue in *Silkwood* because the Price-Anderson Act does not contain an explicit provision voiding the imposition of strict liability by state law in a substhreshold nuclear accident.[56] The defendant's argument, therefore, was based upon implied preemption.

Implied preemption occurs if the legislative history of a federal statute clearly shows a Congressional intent to exclude state control.[57] In attempting to set forth a standard for determining the existence of implied preemption, the United States Supreme Court in *Rice v. Sante Fe Elevator Corp.*,[58] stated: "[W]hen Congress legislated . . . in a field which the States have traditionally occupied . . . we start with the assumption that . . . the power of the state . . . [was] . . . not . . . [to be] . . . superseded by the federal act . . . unless that was the clear and manifest purpose of Congress."[59] In *Silkwood*, therefore, a presumption in favor of state law existed since the imposition of strict liability is within an area of traditional state authority.[60] The focus in *Silkwood* was whether this presumption was rebutted by Congressional intent to displace state imposition of strict liability for injuries caused by the escape of radiation from a federally licensed and regulated facility.

A determination that Congress has intended to preempt state law can be reached in two ways.[61] The first manner in which implied preemption will occur is when the congressional action is in a field in which federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.[62]

In evaluating whether the federal interest is so dominant as to preclude state action, the purposes of the Price-Anderson Act must be examined. The Act was intended to further two objectives. First, the Act was to assure that funds would be available to satisfy liability claims arising out of a catastrophic nuclear accident.[63] Second, the Act

56. 42 U.S.C. § 2210 (1976).

57. *See* Murphy & Pierre, *supra* note 49, at 407.

58. 331 U.S. 218 (1947), *cited in* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

59. 331 U.S. at 230.

60. Prior to the enactment of the Price-Anderson Act, a plaintiff's only relevant right was to utilize his existing common law rights and state law rights to vindicate any harm visited upon him from whatever sources. *See* Duke Power Co. v. Carolina Environmental Study Group Inc., 438 U.S. 59, 89 n.33 (1978).

61. Sekuler & McCullough, *Litigating Nuclear Waste Disposal Issues Before the NRC: A Fable of our Time*, 15 TULSA L.J. 413 (1980).

62. Hines v. Davidowitz, 312 U.S. 52 (1941).

63. *See* notes 43-47 *supra*.

was intended to remove the impediment that discouraged the entry of private industry into the nuclear energy field.[64] While appraising the 1965 extension, the joint committee on atomic energy found a key consideration to be that victims of a nuclear accident might remain uncompensated as a result of the vicissitudes of state tort law.[65] At that time, many states did not impose a rule of strict liability. Thus recovery in these states would be predicated upon proving negligence in the operation of the reactor.[66] Because the possibility of recovery would vary from state to state, Congress was urged to enact a federal law of liability. Congress chose not to do so. Instead, in order to insure that strict liability would be imposed in the event of an extraordinary nuclear occurrence, Congress amended the Act and provided for a waiver of state law defenses on the part of nuclear facilities.[67] The dominant federal interest in amending the Act was to insure a uniform scheme of strict liability in the event of an extraordinary nuclear occurrence with only a minimum interference with state law.

Secondly, implied preemption will result if the federal scheme is so pervasive to make the reasonable inference that Congress left no room for supplemental state action.[68] Under the Act, the scheme of imposing strict liability is not so pervasive to make a reasonable inference that Congress intended to preempt the application of state tort law in the event of a "subthreshold" nuclear accident.

Clearly, the state tort law must apply since the Price-Anderson Act does not create an independent cause of action.[69] Under the Act, the claim arises out of state law. The Act does not determine whether a claimant will recover, but instead determines whether certain obstacles to recovery will be removed. These defenses are only removed in the event of an extraordinary nuclear occurrence.[70] Congressional committee reports indicate that Congress intended that state law, including strict liability, should be applied to cases like *Silkwood* in which the in-

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64. *See* Comment, *The Irradiated Plaintiff: Tort Recovery Outside Price Anderson*, 6 ENVT'L L. 859 (1976).

65. *See, e.g.*, Joint Committee on Atomic Energy 89th Cong., 1st Sess., Selected Materials on Atomic Energy Legislation 31-40 (Subcomm. on Leg. print 1965).

66. *See* Note, *The Extraordinary Nuclear Occurrence "Threshold" and Uncompensated Injury Under the Price-Anderson Act*, 6 RUT.-CAM. L.J. 630 (1974).

67. 10 C.F.R. § 140.81(4) (1980). *See also* note 30 *supra*.

68. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1944).

69. Whether or not there is an extraordinary nuclear occurrence "the claimant must proceed (in the absence of settlement) with a Tort Action . . . under the law applicable in the relevant jurisdiction." 10 C.F.R. § 140.81(4) (1980).

70. 10 C.F.R. § 140.81(4) (1980).

jury arose out of a subthreshold nuclear accident.[71] Even the NRC regulations state that in the absence of an extraordinary nuclear occurrence, the plaintiff must proceed with a tort action under the applicable state law.[72]

It is evident, therefore, that the legislative history of the Price-Anderson Act and subsequent regulations promulgated by the NRC does not reveal the clear and manifest intent of Congress that is required to preempt state authority in the imposition of strict liability in the event of a subthreshold nuclear accident.

Thus an analysis of the doctrine of federal preemption together with the legislative history of the Price-Anderson Act, support the district court's conclusion that the Act does not preclude the application of state tort principles in a nuclear accident.

C. *Application of State Law—Effect of Compliance with Federal Regulations*

Once it had concluded that the Price-Anderson Act did not preempt application of state law, the *Silkwood* court had to determine whether a strict liability or negligence standard was the law of Oklahoma. In strict liability, the plaintiff would be relieved of the burden of proving fault or breach of the standard of care,[73] and would only have to prove causation.[74]

The *Silkwood* court adopted a strict liability theory holding that the operation of the defendant's facility constituted an abnormally dangerous activity.[75] Thus the defendants would be liable for any injury which resulted from the escape of radiation from the facility whether or not the level was within the NRC limits. In determining that a nuclear facility is a dangerous activity, the court used a *Ryland v. Fletcher*[76] analysis. The court considered: whether the risk of harm

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71. "It is desirable not to invoke the mechanisms and procedures of the new system . . . in situations which are not exceptional and which can well be taken care of by the traditional system of tort law." Proposed amendments to the Price-Anderson Act: Hearing on H.R. 15913 before the Joint Committee on Atomic Energy, 89th Cong., 2d Sess. 6 (1966). (Statement of Ramey, Commissioner of the AEC). *See also* S. REP. NO. 1605, 89th Cong., 2d Sess. 6-10, *reprinted in* U.S. CODE CONG. & AD. NEWS 3206-08.

72. 10 C.F.R. § 140.81(4) (1980).

73. *See* Keyes & Howarth, *supra* note 16, at 544.

74. *Id.*

75. 485 F. Supp. at 579 app. (jury instruction number seven).

76. 3 H.L. 330 (1868). The rule of *Rylands* is that one who brings, on his land for his own purpose, an activity that is likely to do mischief if it escapes, does so at his own peril and is answerable for all damages which are a natural consequence of its escape. On appeal, the holding in *Rylands* was limited by Lord Cairns to unnatural uses of the land. 3 H.L. 330, 331 (1868). *See also* Foster & Keeton, *Liability Without Fault in Oklahoma*, 3 OKLA. L. REV. 1, 30 (1950). It is questionable, however, whether

is great; whether the risk cannot be eliminated with the utmost care; and whether the activity is not one of common usage.[77] Clearly there is a great risk of harm in operating a nuclear reactor which cannot be eliminated with the utmost care. The activity, even in this nuclear age, is probably not one of common usage. Therefore, the *Silkwood* court ruled as a matter of law that the defendant's fuel rod fabrication plant was an abnormally dangerous activity.[78]

In so ruling, the *Silkwood* court did not give adequate consideration to the possible ramifications of holding the nuclear industry strictly liable for any injury which results from the escape of radiation from a facility whether or not the level was within NRC limits. Under *Silkwood*, any person who is exposed to radiation from a nuclear facility, need only prove causation in order to recover his actual damages for injuries sustained from the exposure. Liability is imposed without regard to fault, lack of reasonable care or breach of duty.[79] Therefore, even if Congress intended that the regulations establish the standard of reasonable care, this would not evidence an intention to dictate the legal relationship of the parties in a situation where fault is irrelevant.[80] Absolute liability presumes no violation of an applicable standard of care.[81] Compliance with federal regulation, therefore, will not be a defense.

When strict liability is imposed on a nuclear facility, the issue of the amount of weight that should be given to compliance with federal regulations can only be properly raised in the determination of whether punitive damages should be awarded.[82] Any proof of reasonable care

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Rylands is followed in Oklahoma. The Supreme Court of Oklahoma specifically rejected by name the *Rylands v. Fletcher* type of strict liability in *Gulf Pipe Line Co. v. Sims*, 168 Okla. 209, 32 P.2d 902 (1934). *Gulf Pipe* has not been overruled. In *Young v. Darter*, 363 P.2d 829 (Okla. 1961), however, the Oklahoma Supreme Court, in dicta, stated that the spraying of pesticides came within the *Rylands v. Fletcher* type of strict liability without making reference to, or overruling *Gulf Pipe*. Dean Prosser stated, in his treatise on torts, that Oklahoma was one of seven states that had not yet accepted the *Rylands* approach to strict liability. *See* W. PROSSER, *The Law of Torts* § 78 at 516 (4th ed. 1971).

77. 485 F. Supp. at 597 app. (Jury instructions six and seven). *See also* McLane v. Northwest Natural Gas Co., 255 Or. 324, 467 P.2d 635 (1969).

78. 485 F. Supp. at 571.

79. *See* Keyes & Howarth, *supra* note 16, *supra* at 544.

80. McLane v. Northwest Natural Gas Co., 255 Or. 324, ____ , 467 P.2d 635, 641 (1969) (the defendant was held strictly liable for injuries which resulted from an explosion of defendant's gas storage tank).

81. *Id.*

82. The issue of compliance would be an important consideration if this case were proceeding upon a negligence theory in which the plaintiff's recovery would depend upon proof that the defendant did not exercise reasonable care. *See also* Note, *The "Extraordinary Nuclear Occurrence" Threshold and Uncompensated Injury Under the Price-Anderson Act*, 6 RUT.-CAM. L.J. 360 (1974).

would negate the finding of willful, wanton or reckless conduct which is mandatory in establishing punitive damages.[83] Proof of reasonable care would, therefore, prohibit the imposition of punitive damages.

Regulations are generally no more than a minimum standard of care and do not preclude a finding that the actor did not exercise reasonable care in failing to include additional precautions.[84] An examination of the AEC and NRC regulations reveal that they are not intended to be conclusive. They require that the nuclear industry make every reasonable effort to maintain the lowest radiation levels (minimum permissible doses) possible with the technology available.[85] This represents a changing standard commensurate with the level of technology. The *Silkwood* court held that compliance is evidence of reasonable care,[86] a conclusion supported by the weight given to compliance with regulatory schemes in other industries, such as the aircraft industry and drug manufacturers.

In the aircraft industry, complete compliance with Federal Aviation Administration's safety regulations is evidence of reasonable care, but is not conclusive.[87] Similarly, compliance with federal laws and regulations by a drug manufacturer is admissible as evidence of reasonable care, but it is also not conclusive.[88] In both industries, strict liability may be imposed even though full compliance with governmental regulations has been demonstrated.[89]

Thus the maintenance of the nuclear facility within a federal regulatory scheme should be an important consideration, not in the imposition of liability,[90] but in determining whether an award of punitive damages is appropriate. As evidence of reasonable care, compliance would seem to negate a finding of willful or wanton conduct, and therefore, would preclude an award of punitive damages.[91] Accordingly, the district court instructed the jury that substantial compliance with AEC and NRC regulations is "strong" evidence prohibiting the award of punitive damages.[92] The jury's verdict, however,

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83. *See* note 35 *supra*.
84. W. PROSSER, *The Law of Torts*, § 36 at 204 (4th ed. 1971).
85. 10 C.F.R. § 20.1(c) (1980).
86. 485 F. Supp. at 580.
87. *See* Bruce v. Martin-Marietta Corp., 544 F.2d 442, 446 (10th Cir. 1976).
88. *See* Brick v. Barnes-Hines Pharmaceutical Co., 428 F. Supp. 496, 498 (D.D.C. 1977).
89. *See* Stromsodt v. Parke-Davis & Co., 257 F. Supp. 991, 997 (D.N.D. 1966), *aff'd* 411 F.2d 1390 (8th Cir. 1969) (drug manufacturer); *In re* Paris Air Crash, 399 F. Supp. 732 (C.D. Cal. 1975) (aircraft manufacturer).
90. *See* note 82 *supra*.
91. *See* note 35 *supra*, *see also* 485 F. Supp. at 586.
92. *Id*.

would seem to indicate a finding of gross lack of compliance with the regulatory scheme.[93]

CONCLUSION

Silkwood was the first major personal injury case to hold the nuclear facility liable for injuries caused by an escape of radiation.[94] The significance of this case lies in the final resolution of the question of federal preemption with respect to the ability of courts to apply state law principles of strict liability to the nuclear industry. If this case is upheld, a plaintiff, to establish liability, will not have the additional burden of proving negligence, and will only have to prove causation.[95] By establishing that nuclear energy production is an abnormally dangerous activity, the *Silkwood* court has paved a road that other courts, both federal and state, may choose to follow.

Kerr-McGee's proposition, that federal preemption prohibits the imposition of strict liability except in accordance with federal law, fails. In a personal injury action the imposition of liability is an area where the state has traditionally exercised its power. Partial regulation without clear and manifest intent to preempt is insufficient to supplant state action. Scrutiny of the Price-Anderson Act reveals that Congress intended that state law be applied to determine the liability of the nuclear industry.

By establishing that compliance with federal regulations is evidence of reasonable care, the *Silkwood* court attempted to give the nuclear industry some protection against excessive jury awards. As the $10,000,000 punitive damage award indicates, however, when conflicting evidence of compliance is presented[96] and the issue goes to the jury, the nuclear industry is susceptible to large damage awards. Further guidance, either judicially or legislatively, may be needed to limit the discretion of the jury in this area in order to effectuate the original objectives that led to the enactment of the Price-Anderson Act.

John P. Napoli

93. The Silkwood Estate established evidence tending to show defendant's reckless handling of plutonium. This evidence included "poor training, poor security, workers who knew of a variety of ways to remove large amounts of plutonium from the facility without detection, [and] workers indifferent to the hazards of plutonium . . ." 485 F. Supp. at 591. If such evidence was found to be credible by the jury, it would support a large punitive damage award. *Id.* at 593. Also evidence of non-compliance with federal regulations was admitted. A Kerr-McGee witness testified that the inventory difference, *see* note 33 *supra*, on the amount unaccounted far exceeded that permitted by NRC regulations. 485 F. Supp. at 586.

94. *See* note 6 *supra*.

95. *See* note 38 and accompanying text *supra*.

96. *See* note 93 *supra*.