Legal Backgrounder

WLF Washington Legal Foundation

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2009 Massachusetts Avenue, NW
Washington, DC 20036
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Vol. 23 No. 45 October 10, 2008

NINTH CIRCUIT SHOULD REJECT CALIFORNIA'S LEGAL CLAIM THAT AUTOS ARE A "PUBLIC NUISANCE"

by

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It is no surprise that the State of California and the United States government have a clear difference of opinion over climate change and how it should be addressed. The United States executive and legislative branches have to date rejected the Kyoto Protocol or any unilateral domestic greenhouse gas emissions reductions without obtaining similar commitments from developing countries – whose emissions are growing along with their population – such as China and India. By contrast, in the California Global Warming Solutions Act of 2006 (AB 32), the California legislature declared, "global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California." CAL. HEALTH & SAFETY CODE § 38501(a). While AB 32 acknowledges that "[n]ational and international actions are necessary to fully address the issue of global warming" (*Id.*, § 38501(d)), the state believes the federal government's actions to address greenhouse gas emissions have been insufficient. The state has thus thrust itself into the breech with a variety of legislative and regulatory efforts to reduce greenhouse gas emissions.

Added to these legislative and executive efforts have been a series of lawsuits brought by the state and private groups, seeking to impose their vision of how climate change should be addressed by the local and federal government, as well as private companies. In September 2006, in what "was widely seen as an election year stunt" (Walters, *Auto suit unmasked as a stunt*, SACRAMENTO BEE, Sept. 19, 2007, at A3, available at http://www.sacbee.com/111/story/386775.html), then-Attorney General Bill Lockyer filed a lawsuit against six major auto manufacturers, alleging that their cars were responsible for causing global warming damages to the state. *People of the State of California ex rel. Lockyer v. General Motors Corp.*, N.D. Cal. No. 06-CV-05755 MJJ. The premise of Lockyer's suit: the automakers created a public nuisance under federal law by selling automobiles that emitted a "tortious" amount of carbon dioxide. The suit alleged that emissions from vehicles manufactured by the automakers were responsible for more than 20% of the carbon dioxide emissions in the United States, and 30% of the emissions in California. These emissions cause global warming, which in turn was responsible for coastline erosion, increased risk of wildfires, and melting of the snow pack in the Sierra Nevada.

Despite his own apparent doubts about the viability of the lawsuit before he was elected (Walters, *supra*), and after failing to persuade the automakers to settle, California's current Attorney General – and former governor – Jerry Brown pressed forward with the lawsuit after his election. The automakers sought to dismiss the lawsuit, arguing that claims based on global warming were non-justiciable political questions,

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and that there was no public nuisance claim available under federal law that would provide the damages sought by the Attorney General on behalf of the state.

The District Court Dismisses the Attorney General's Lawsuit. On September 17, 2007, U.S. District Judge Martin Jenkins dismissed the lawsuit, agreeing that the public nuisance claim was not justiciable under federal law. Judge Jenkins' order drew heavily from an earlier global warming decision, Connecticut v. American Electric Company, Inc., 406 F. Supp. 2d (S.D.N.Y. 2005), in which the district court had dismissed similar public nuisance claims brought by the attorneys general of several states (including Lockyer) against electric utilities over alleged global warming impacts of carbon dioxide emissions. As with the Connecticut decision, Judge Jenkins reasoned that ruling on the state's claims would require the court to engage in policy determinations that must initially be made by the political branches, including "what is unreasonable in the context of carbon dioxide emissions" and how "to quantify any potential damages" from the claim that the automakers contributed to 30% of California's carbon dioxide emissions. Those determinations "would require the Court to balance the competing interests of reducing global warming emissions and the interest of advancing and preserving economic and industrial development," which remain "under active consideration" by the other branches of government, particularly under the Clean Air Act and the Energy Policy and Conservation Act.

The court also drew support from *Massachusetts v. Environmental Protection Agency*, 125 S. Ct. 1438 (2007) – in which the Supreme Court held that EPA could not refuse to regulate carbon dioxide emissions as "pollutants" within the definition of the Clean Air Act – to find that primary responsibility for regulating carbon dioxide emissions was with the federal government, through EPA.

Judge Jenkins determined that exercising jurisdiction over the federal claim to proceed would impose burdens on legal conduct of the automakers in other states, and thus implicated the interstate commerce clause. He also held that the claims would interfere with the executive and legislative branch's rejection of the Kyoto Protocol – due to the lack of binding emissions reductions requirements on developing countries – and the decision to "refrain from unilateral commitment" to reducing emissions.

The District Court was Correct in Dismissing the Lawsuit. Attorney General Brown has appealed the order dismissing the complaint. He argues that the Ninth Circuit should allow the case to proceed, because "[u]nless and until Congress or EPA establishes a comprehensive scheme that speaks directly to greenhouse gas emissions and provides remedies for interstate greenhouse gas pollution, the common law continues to provide a basis for federal jurisdiction." Appellant's Opening Brief, *People ex rel. Brown v. General Motors Corp.*, Ninth Circuit No. 07-16908. Despite the Attorney General's rhetoric, his dispute with the federal government over the pace or actions he believes are necessary to combat global warming – legitimate or not – is the quintessential political question. It is one thing for the state to adopt a regulatory framework to address climate change in the absence of federal action. It is quite another for the state's Attorney General to sue companies who acted legally and whose products were certified by the state, and where there is no standard for deciding whether conduct, in hindsight, was tortious. The federal common law, to the extent that it remains viable in the context of public nuisance, is simply the wrong vehicle to address the questions presented by the Attorney General's complaint.

The Supreme Court has established six conditions that will result in a court declining to exercise jurisdiction under the political question doctrine. *Baker v. Carr*, 396 U.S. 186 (1962). Three of those factors are particularly apt in this situation: (a) a "textually demonstrable constitutional commitment of the issue to a coordinate political department," (b) "a lack of judicially discoverable and manageable standards for resolving it," or (c) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

All of these factors first require a determination of what "the issue" is, and highlight the major dispute for the Ninth Circuit. According to the Attorney General, the "issue" is a claim for damages to the

alleged harms to California's quasi-sovereign interests under the doctrine of public nuisance. But, as the automakers correctly point out, the issue of imposing damages is not the whole story. First, because a public nuisance is "an unreasonable interference with a right common to the general public" (Rest. (2d) Torts, §821B (1979)), there is some level of carbon dioxide emissions that would not be "tortious" – and thus would not constitute a public nuisance – and determining that level is a threshold part of "the issue." Second, imposing damages would have a direct regulatory impact, since a company that wished to avoid damages in the future would be to forced reduce emissions below whatever that "reasonable" level of emission is determined to be.

Framed correctly, it is beyond reasonable dispute that the attempt by the Attorney General to regulate the automakers' greenhouse gas emissions is a nonjusticiable political question. And the first two *Baker* criteria are substantially intertwined with the third: the court cannot decide the question of "unreasonable" emissions without an initial policy determination of a kind that is committed to the legislative and executive branches.

Climate change presents by far the most complex environmental issue that modern society has faced. Unlike a cross-border pollution case, carbon dioxide emitted anywhere in the world can contribute equally to climate change. Because carbon dioxide is emitted as a result of nearly all combustion activities, any attempt to regulate emissions will require first an economy-wide assessment of energy use, including all modes of transportation and heat and electricity generation, and an analysis of what "reasonable" emissions are within each of those areas. Initial questions to be decided include not only the extent of global or regional emissions that may be deemed appropriate in order to obtain desired goals of atmospheric carbon dioxide concentrations, but also technical considerations regarding the relative extent to which various sectors can contribute to emissions reductions, social considerations as to which emissions reductions activities (or consequences) are more or less desirable, and the relative costs of such regulatory requirements. EPA's own advanced notice of proposed rulemaking (73 Fed. Reg. 44353, July 30, 2008) demonstrates that, just within the confines of the Clean Air Act, a substantial number of policy decisions are raised by the Supreme Court's determination in *Massachusetts* that carbon dioxide is a pollutant under the Act.

As framed by the Attorney General, the single-minded focus of a claim for damages due to alleged public nuisance tramples this complex analysis; it asks simply whether the state should obtain damages for some undefined "unreasonable" amount of emissions, while begging the question of how the court would define "reasonable." The Attorney General's contention that courts have the capability to decide interstate pollution nuisance cases ignores the fact that defining the "reasonableness" of greenhouse gas emissions of six companies is not the type of decision that can be made by a court, without an initial policy determination. To be sure, courts and juries everyday consider the question of whether a business acted "reasonably" in a certain set of circumstances. However, the lack of extant objective criteria against which to evaluate the conduct at issue makes it simply inappropriate for a court or jury to determine reasonableness. Automakers supply a product that is integral to modern society, and is used by everyone, including the state of California, itself. Cars are but one source of carbon dioxide emissions, with other major sources including other transportation vehicles (trucks, trains, airplanes), electricity generation, and industrial operations. Not only are cars are woven into the fabric of American life, so are these other sectors. The question of what amount of carbon dioxide emissions are reasonable for cars made by six companies cannot be determined in isolation, and is simply not the kind of question that a court should attempt to answer in the first instance.

Moreover, economy-wide regulation of carbon dioxide emissions, as sought by the Attorney General's request that the court impose damages for "unreasonable" carbon dioxide emissions, treads heavily on the Commerce Clause, under which "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states . . . ." The Attorney General does not dispute this general issue, but argues that, nevertheless, the federal courts have a duty to adjudicate cross-border pollution cases. However, the Attorney General's complaint does not seek damages or an injunction against emissions from

a plant located across the California border that drift into the state or its waters, and perhaps tangentially impacts interstate commerce (*cf. Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972)), but to obtain damages from sellers of products used worldwide and by the state's own citizens, and, by necessity, requires the court to define worldwide emissions levels that are "reasonable." Commerce Clause jurisprudence typically focuses on whether a state may regulate interstate commerce, and allows a state to impose an incidental burden on commerce when it regulates under its police power based on local conditions. Here, however, there is no support for a conclusion that a federal court can ignore the separation of powers doctrine and trample the Commerce Clause by arrogating to itself the resolution of the issues inherent in the Attorney General's complaint. The issue is clearly textually committed to another branch of government.

Finally, there are no judicially discoverable and manageable standards for resolving the Attorney General's claim. As the automakers point out, since this is a claim about conduct, if the Attorney General's suit is allowed to proceed, every individual and entity that operates an automobile, or is otherwise responsible in some fashion for emitting carbon dioxide, is a potentially a party to the lawsuit. How could a court possibly sort out who is liable, and in what percentage, for an economy-wide issue?

Over 30 years ago, the California Court of Appeal rejected a similar attempt to regulate an entire economy through public nuisance litigation. In *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374 (1971), the court affirmed the dismissal of a lawsuit brought against automakers and other businesses, seeking injunctive relief and damages under a public nuisance theory, due to the defendants' alleged contributions to air pollution. As the court recognized that the remedy sought by the plaintiff was beyond its means: "Plaintiff is simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court." 20 Cal. App. 3d at 382-83. Where plaintiff's objective "is judicial regulation of the processes, products and volume of business of the major industries of the county . . . [i]t was entirely reasonable for the trial court to conclude from the face of the pleading that such an undertaking was beyond its effective capability. The plaintiff has paid the court an extravagant compliment in asking it to supersede the legislative and administrative regulation in this critical area, but the trial judge showed the greater wisdom in declining the tender." *Id.* at 383.

Conclusion. The U.S. Court of Appeals for the Eighth Circuit has commented that, if it were to adopt a theory that holds a product manufacturer to be held liable for nuisance for supplying an otherwise legal product, "Nuisance thus would become a monster that would devour in one gulp the entire law of tort, a development we cannot imagine the North Dakota legislature intended when it enacted the nuisance statute." *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). In this case, the Attorney General's complaint would go far beyond devouring the entire law of tort – it would devour an entire legislative and regulatory system. While the federal common law is not a legislative enactment, it surely remains in the control of judges. The Ninth Circuit should exercise that control, and affirm the dismissal of this case, leaving the elected branches of government to decide whether, and how, to address climate change.

  ISBN 1056 3059