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CALIFORNIA CLIMATE CHANGE SUIT SEEKS REGULATION THROUGH LITIGATION

The Washington Legal Foundation (WLF) today called for the dismissal of a highly novel “public nuisance” lawsuit filed by the State of California aimed at regulating carbon dioxide emissions from automobiles. After analyzing the attorney general’s complaint against auto makers, WLF attorneys concluded that the federal courts have numerous grounds on which to dispose of the suit.

California Attorney General Bill Lockyer filed suit in *California v. General Motors, et. al* on September 20, urging a federal district court to hold the auto companies “jointly and severally liable for creating, contributing to, and maintaining a public nuisance.” The attorney general seeks damages and “future monetary expenses” which together could amount to billions of dollars.

“Reasonable minds may disagree on global warming or how human activity, such as driving to work, may contribute to it” said Glenn G. Lammi, Chief Counsel of WLF’s Legal Studies Division. “However, there is nothing reasonable about addressing what is a national, or even a global, problem with a liability lawsuit,” Lammi added. “The attorney general is asking unelected judges to impose new regulatory barriers on an entire industry and higher prices on automobile consumers. If such drastic solutions are required, they must be allowed to develop democratically through the legislative and executive levels of government, not the federal judiciary,” Lammi said.

WLF noted that earlier this year a federal district court judge in New York dismissed a lawsuit filed by several northeastern state attorneys general which made allegations essentially identical to Attorney General Lockyer’s – that economic activity was creating a public nuisance by producing greenhouse gasses. In that case, *Connecticut v. American Electric Power*, the judge dismissed the AGs’ case, ruling that issues as complex and controversial as global warming should be addressed by elected officials. The plaintiffs appealed this ruling to the U.S. Court of Appeals for the Second Circuit, and a decision is expected soon. WLF filed an *amicus* brief in support of the defendants.

“For decades, courts in California have ruled that a legal theory as amorphous and sweeping as ‘public nuisance’ is an entirely inappropriate vehicle for regulating everyday business conduct,” said Paul D. Kamenar, WLF’s Senior Executive Counsel. Kamenar pointed to a case decided 35 years ago, where individuals brought a public nuisance class action lawsuit against nearly 300 businesses, including auto makers, for their alleged role in polluting the air. A California appeals court forcefully rejected the nuisance claim, stating that “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.”

WLF noted that the courts have a number of additional grounds on which they could dismiss the suit. “Attorney General Lockyer has substantial hurdles to clear, such as whether a sufficient, present injury is being claimed; over whether a federal tort law claim of ‘nuisance’ can be argued; and whether such a claim has been displaced by national or international efforts to address global warming,” said WLF’s Kamenar. “The defendants have strong arguments on each of those issues,” Kamenar added.

The outcome of a case pending before the U.S. Supreme Court, *Massachusetts v. Environmental Protection Agency*, may also have a significant impact on the California lawsuit, WLF noted. In that case, several states sued the federal EPA to force it to regulate carbon dioxide as a pollutant. EPA administratively determined that it lacks statutory authority to do so, and the U.S. Court of Appeals for the D.C. Circuit agreed in a divided opinion. In addition, standing to sue is also a key issue in that case. “Anyone interested in Attorney General Lockyer’s suit should keep a close eye on that case,” WLF’s Lammi stated. The case, in which WLF will be filing an *amicus* brief in support of the EPA, will be argued in December with a ruling from the Court expected by the end of next June.

For more information contact Glenn G. Lammi at (202) 588-0302. A copy of WLF’s brief in the *Connecticut v. American Electric Power* case is available at www.wlf.org.

Washington Legal Foundation, a national, non-profit public interest law and policy center, has opposed government abuse of the legal system for over 29 years. WLF’s Litigation Department and Legal Studies Division have played an integral role in explaining the pitfalls of unreasonable government litigation and regulatory enforcement to policy makers and the public. To learn more about WLF’s work visit www.wlf.org.