

GREEN LITIGATION

Richard O. Faulk
Chair, Litigation Department
Environmental Practice Group Leader
Gardere Wynne Sewell LLP
Dallas, Houston, Austin, Mexico City
rfaulk@gardere.com

LITIGATION ISSUES

- **CLIMATE CHANGE**
- **PUBLIC NUISANCE**
- **STATES' USE OF CONTINGENT FEE COUNSEL**

CLIMATE CHANGE CASES

- **CONNECTICUT v. AEP**
Petition for certiorari filed August, 2010
- **COMER v. MURPHY OIL**
Petition for mandamus filed August, 2010
- **KIVALINA v. EXXONMOBIL**
Briefing to completed September, 2010

CLIMATE CHANGE ISSUES

- **POLITICAL QUESTION:** *Is it a legitimate judicial function for courts to set standards for greenhouse gas emissions in tort cases?*
- **STANDING:** *Do public and private plaintiffs have standing to sue for abatement or damages when the defendant's emissions cannot be "plausibly traced" as causes of plaintiffs' injuries?*
- **EQUITABLE MAXIMS AND CAUSATION:** *Does the inability to award efficacious relief or to show a distinct causal impact of the defendants' emissions matter?*
- **DISPLACEMENT OF FEDERAL COMMON LAW:** *Have the EPA's new GHG regulations displaced federal common law in this area?*

"Standardless" Liability

- Justice Scalia in *Vieth v. Jubelirer*: "[O]ne of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*."
- Dean Prosser's comments to § 821B: "[I]f a defendant's conduct ... does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, *the court is acting without an established and recognized standard*."
- Professor Henderson: "[T]he lawlessness of these aggregative torts inheres in the extent to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring recovery."

"Ordinary Tort Suits"

- *AEP* and *Comer* panels did not find anything extraordinary about global warming cases.
- Found that such suits were "ordinary tort suits" based on traditional federal common law public nuisance (e.g., river pollution cases).
- But "traditional" cases always were constrained by geographical boundaries, identifiable parties and time periods.

Equitable and Causation Issues

- Can courts award efficacious relief in climate change cases?
- Traditional maxims require equitable relief to solve the problem – equity does not render vain, useless or merely symbolic relief or engage in idle gestures.
- To have standing to pursue a claim for public nuisance, plaintiffs must plead facts showing that the defendants' interference was substantial and significant – not merely contributory.

Has Climate Tort Liability Already Been “Displaced”

- Federal common law liability can be “displaced” – not preempted – if EPA or Congress acts to regulate the field the litigation addresses.
- The extent of regulation required is unclear, but cases suggest that it need not be complete or pervasive.
- EPA has acted to declare GHG an “endangerment,” has issued a “reporting” rule, and has issued a “tailoring” rule.

LIABILITY “DISPLACEMENT” THE SG’S SURPRISE IN *AEP*

- “Since this court held in 2007 that carbon dioxide falls within that regulatory authority, EPA has taken several significant steps toward addressing the very question presented here . . . That regulatory approach is preferable to what would result if multiple district courts - acting without the benefit of even the most basic statutory guidance -- could use common-law nuisance claims to sit as arbiters of scientific and technology-related disputes and *de facto* regulators of power plants and other sources of pollution both within their districts and nationwide.”
- Plaintiff’s counsel Matt Pawa: “We feel stabbed in the back . . . This was really a dastardly move by an administration that said it was a friend of the environment. With friends like this, who needs enemies?” *New York Times* (August 25, 2010)

PUBLIC NUISANCE

- **NORTH CAROLINA v. TVA (4th Cir., July 27,2010)**
 - *Neighboring state cannot sue to abate alleged public nuisance created by lawful emissions regulated and permitted by EPA and adjacent state authorities.*
 - *Public nuisance is an unacceptable means of regulating air pollution issues because of the court's inability to craft meaningful liability standards.*

PUBLIC NUISANCE

“We doubt seriously that Congress thought that a judge holding a twelve-day bench trial could evaluate more than a mere fraction of the information that regulatory bodies can consider. Courts are expert at statutory construction, while agencies are expert at statutory implementation.” *North Carolina v. TVA,*

PUBLIC NUISANCE

- **Texas Pattern Jury Charge committee is working on a new proposed jury charge for public nuisance cases tried in Texas.**
- **Counsel in the Kivalina public nuisance case in the 9th Circuit is on the committee and is very active in drafting.**
- **The proposed charge is not completed and is still in committee, but efforts are being made to liberalize the standard to permit a more liberal submission.**

STATES AND CONTINGENT FEE LAWYERS

- **SANTA CLARA V. SUPERIOR COURT (ATLANTIC RICHFIELD) (July 26, 2010)**
 - *Public nuisance suit by California counties and cities against lead paint manufacturers.*
 - *Public entities represented by contingent fee counsel, including lawyers in tobacco cases.*
 - *California Supreme Court changes prior law to allow public entities to be represented by contingent fee counsel. Allowing those who represent the public to have a financial interest in a case does not compromise the advocate's "neutrality."*

STATES AND CONTINGENT FEE LAWYERS

- A "means" test to determine the need for neutrality?

"There is no indication that the contingent-fee arrangements in the present case have created a danger of governmental overreaching or economic coercion. Defendants are large corporations with access to abundant monetary and legal resources. Accordingly, the concern we expressed in Clancy about the misuse of governmental resources against an outmatched individual defendant is not implicated in the present case."

STATES AND CONTINGENT FEE LAWYERS

- Under California's "control" corollary, agreements must provide:
 - (1) that the public-entity attorneys will retain complete control over the course and conduct of the case;
 - (2) that government attorneys retain a veto power over any decisions made by outside counsel; and
 - (3) that a government attorney with supervisory authority must be personally involved in overseeing the litigation.

**GREEN LITIGATION:
PLAINTIFF'S VIEW**



**GREEN LITIGATION:
DEFENDANT'S VIEW**





Further Reading Regarding Climate Change and Public Nuisance Litigation

Publications designated with an asterisk are available for review online at http://works.bepress.com/richard_faulk

- Faulk, *Uncommon Law: Ruminations on Public Nuisance*, 25 *Toxics L. Rept.* 411 (April 29, 2010)(in press at the *Missouri Law Review* for Fall, 2010).*
- Gray and Faulk, *The Boundaries of Public Nuisance*, 31 *Westlaw Env. J.* 4 (Sept. 15, 2010).*
- Faulk, *Copenhagen's Disappointing Denouement: Anatomy of a Failed Convocation*, 30 *Andrews Litigation Reporter* (December 23, 2009).*
- Faulk and Gray, *Premature Burial? The Resuscitation of Public Nuisance Litigation*, 24 *Toxics L. Rept.* 1231 (October 22, 2009).*
- Faulk, *Lifting the Veil? Pressures Mount for Climate Change Disclosures* 22 *The Electricity Journal* 59 (July 2009).*
- Faulk and Gray, *A Lawyer's Look at the Science of Global Climate Change*, *BNA World Climate Change Report* (March 10, 2009).*
- Faulk and Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 *Mich. St. L. Rev.* 941 (2008).*
- Victor E. Schwartz and Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 *Washburn L. J.* 541-53 (2006).
- Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 *U. Cinn. L. Rev.* 741 (2003).

**Copies of
Amicus Briefs and Other Articles**

**Richard O. Faulk
Gardere Wynne Sewell LLP
(713) 276-5651
rfaulk@gardere.com**
