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IN THIS ISSUE

This article is the third and final part of a three piece effort on the history and future of the common law doctrine of public nuisance. It concludes with an analysis of how public nuisance theories have been misused by plaintiff counsel and their clients in climate change litigation against US businesses, private and public, large and very small companies. In house counsel should take note of the content in this article as the future of climate based public nuisance litigation against US businesses is explored in detail. Government counsel should find this article to be “must reading” for their work.

What Next Rough Beast....The Second Coming of Nuisance Law Litigation – Part III

ABOUT THE AUTHOR



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This is the third part and conclusion of an effort to review, analyze, and report on an ancient, out dated, theory of property common law called “public nuisance”, and its use and abuse by groups, through the American legal process. There are some in the American legal system who, using public nuisance as an aggregative tort, seek the largest transfer of wealth in history from the American economy to privateers, ideologues, and fellow travelers. As stated above, this is the conclusion of a series of articles chronicling the continual use and abuse of public nuisance law in American jurisprudence. It is, sadly, not the end of this story or of this ancient legal theory. It is, simply, the turning of yet another page.¹ With apologies and thanks to Bob Seger, “...you always seem outnumbered, you don’t dare make a stand...There I go - turn the page.”²

PUBLIC NUISANCE LAW THEORY IN CLIMATE CHANGE LITIGATION

A Note on Climate Science Ideology

To fully understand the context of public nuisance litigation relating to “climate change”, it is important that an explanation be provided of the science issues involved, their development and “management” by certain parts of the scientific community,

and the ideology behind that management. It is a short, but essential digression, before the analysis of legal issues and positions in this latest use of public nuisance theory so as to provide a critical background to the development of science positions and legal theories that make up the current litigation.

In 2005 the following e-mail was sent by Phil Jones, the Director of the UK University of East Anglia’s Climate Research Unit (CRU):

“The two MMs have been after the CRU data for years. If they ever hear there is a Freedom of Information Act now in the UK, I think I’ll delete the file rather than send to anyone...we also have a data protection act, which I will hide behind.”

The “two Ms” were Stephen McIntyre and Ross McKittrick, two Canadians who had devoted years to seeking the raw data and codes used in climate graphs and models and then fact checking the published conclusions on such data. They had consistently found significant discrepancies from any such data they had been able to review. Such a review is what good, legitimate scientists do and should believe in and embrace rather than hide from.³

The e-mail was one of over 3,000 e-mails and documents released at the time after the

¹ “Is Public Nuisance Universe Expanding?” ; Bloomberg Law News, BNA, January 31, 2017; www.bna.com/public-nuisance-universe-n57982083122. “What Next Rough Beast...The Second Coming of Nuisance Law Litigation”, Joseph F. Speelman, IADC , Committee Newsletter, Corporate Counsel & Toxic and Hazardous Substances Litigation; September, 15, 2017. “A Tidal Wave of Public Nuisance Law

Suits across the US Involving Opioid Litigation”, James K. Holder, Joseph F. Speelman, IADC Committee Newsletter, Corporate Counsel Committee; October 13, 2017.

² “Turn the Page” , Bob Seger & The Silver Bullet Band, (1973).

³ “Global Warming With The Lid Off”; The Wall Street Journal, Review & Outlook, November 24, 2009, 7:18 am ET.

CRU's servers at East Anglia University were hacked and thousands of messages between some the world's most high profile climatologists were then published on the internet.⁴ The following note was dated in May, 2008 and sent to the Director of Penn State University's Earth System Science Center: *"Mike, can you delete any emails you may have had with Keith re AR4? Keith will do likewise...can you also e-mail Gene and get him to do the same?"* AR4 is shorthand for the UN's Intergovernmental Panel of Climate Change's Fourth Assessment Report (IPCC) which asserted that a "consensus view" existed on the science related to climate change.⁵ Mr. Jones wrote in an August, 2008 e-mail to a NASA official, *"IPCC (the UN Commission) is exempt from any countries' FOI (freedom of information laws) ..."*.⁶

The East Anglia and UN Climate Change (IPCC) scientists attempted to intimidate scientists who disagreed with or questioned their "findings" on global warming. They threatened their jobs and attempted to destroy the livelihoods and educational reputations of scientists who disagreed with their theories and findings, or those who merely asked to review their research supporting such findings.⁷ As of December, 2009, hundreds of emails provided every appearance of evidence of the existence of concerted and coordinated efforts by leading climatologists to fit "data" to their

pre-established conclusions while they attempted to silence and discredit, even defame, their scientist critics. In an era when the phrase "inconvenient truth" has been loudly associated with Hollywood actors/climate experts and a former Vice President (who claims to have invented the internet) as an asserted notion of "final truth" on the complex subject of climate science and global warming, the above memos most certainly present inconvenient truths about how certain scientists and international agencies went about "proving" such important and profound "truths".⁸

It is clear that an ideology on global warming, and the science that seeks to examine and define climate change has become a significant component of defining and expressing beliefs as scientific facts. This is troubling and must be kept in mind as legal issues are brought to bear based upon such "facts". This, unfortunately, must now always create an ongoing need for a "calm second thought" or more, on what some urge in any climate change/global warming related legal conflict. This ideological bell cannot be "unrung" or "put behind us". It becomes a measure of constant reserve and potential disregard of "climate science". Confidence in this science has been destabilized.

⁴ Supra, at Note 3.

⁵ Supra, at Note 3.

⁶ Supra, at Note 3.

⁷ Supra, at Note 3.

"Show Me The Money"; published remarks of Joseph F. Speelman before the **5th Annual Judicial Symposium of Civil Justice Issues**, (250 Federal &

State judges); George Mason University School of Law, Judicial Education Symposium, December 5-7, 2010.

⁸ "Climategate: Science Is Dying", Daniel Hemminger; The Wall Street Journal; Wonder Land, December 3, 2009, 12:33 pm, ET.

I offer the following advice from a trustworthy source:

*We can rebuild that confidence by uniting around the qualities of the scientific method. As the name suggests, the scientific method is not a belief system, it is a practice. We would all benefit from more practice.*⁹

Scientific knowledge is always provisional; The point is to produce evidence, not doctrine.¹⁰

Public Nuisance in Climate Litigation

Public nuisance is an ancient English based common law doctrine within the much broader law of Property.¹¹ It is most notable for the American plaintiff's bar use of the doctrine as an alternative to Federal class action law suits in order to avoid the burden of proving class certification standards. (which were created to avoid abuse of class or aggregative tort litigation, ironically).¹² As well, the American plaintiff bar found it to be an easy way to achieve, in a much quicker fashion, massive aggregative tort claims against companies, commercial entities and, virtually all elements of private enterprise in the US.¹³ The doctrine is also notable for its failure to become an established, viable and accepted legal doctrine in such mass tort actions across the US when those relying

upon it were forced to defend its use and explain its legitimacy to both state and Federal appellate courts from California to Texas, to Missouri, to Rhode Island, to New York...the list is long and distinguished.¹⁴

North Carolina vs TVA . In 2006 the Attorney General of North Carolina, a Democrat, sued the TVA asserting that the federally owned utility's plants posed a public nuisance because their air pollution crossed state lines and contributed to haze over his state's western mountains.¹⁵ On July 26, 2010, the 4th US Circuit Court of Appeals reversed the trial court's finding that emissions from four TVA plants constituted a public nuisance to North Carolina residents that would have cost TVA \$1 Billion. The Fourth Circuit panel stated that "if allowed to stand the injunction would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air...The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike."¹⁶ The opinion went on to state, "It ill behooves the judiciary to set aside a congressionally sanctioned scheme of many years that reflects the extensive applications of scientific expertise and that has set in motion reliance, interests,

⁹ "Be Skeptical of Those Who Treat Science as an Ideology", Guest editorial, The Wall Street Journal, by Dr. Sue Desmond-Hellmann, MD, CEO of the Bill & Melinda Gates Foundation, January 19, 2018.

¹⁰ Supra at Note 9.

¹¹ "What Rough Beast...The Second Coming of Public Nuisance Law" Part I.

¹² "The Lawlessness of Aggregative Torts", James A. Henderson, Jr, ; 34 Hofstra Law Review 2, p. 9-10; 2005.

¹³ Supra, at Note 12, pgs 9-13.

¹⁴ Supra at Note 11.

¹⁵ "TVA Air Pollution", NY Times, citing Greenwire, Gabriel Nelson, July 28, 2010.

¹⁶ McGuire Woods Legal Alert, August 2, 2010, [Citing from the opinion, https://www.mcguirewoods.com/Client-Resources/Alerts/2010/8/FourthCircuitReverses1BillionInjunctionRelatedtoAirEmissionsinStateofNorthCarolinavTVA.aspx](https://www.mcguirewoods.com/Client-Resources/Alerts/2010/8/FourthCircuitReverses1BillionInjunctionRelatedtoAirEmissionsinStateofNorthCarolinavTVA.aspx)

and expectations on the part of those states and enterprises that have complied with its requirements. To replace duly promulgated ambient air quality standards with standards whose content must await the uncertain twists and turns of litigation will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country.”¹⁷

The Fourth Circuit opinion in this case is worth reading from front to back as it is a clear, direct expression of the difficulties created by ANY public nuisance theory approach to climate or air quality situations across the country or, indeed, the globe. The opinion eviscerates the use and applicability of public nuisance based claims, describing them as “vague”, “an ill-defined omnibus tort of last resort”, “at such a level of generality as to provide almost no standard of application”, “without any manageable criteria” or “principle”.¹⁸ The Circuit court concludes with the following absolute rejection of public nuisance theory in environmental matters: “Thus, while public nuisance law doubtless encompasses environmental concerns, it does so at such a level of generality as to provide almost no standard of application. If we are to regulate smokestack emissions by the same principles we use to regulate prostitution, obstacles in highways, and bull fights... we will be hard pressed to derive any manageable criteria.”¹⁹

On February 6, 2011, the North Carolina Attorney General appealed the 4th Circuit

ruling to the U.S. Supreme Court. On April 4, 2011, the parties entered into a consent decree that dismissed the appeal, leaving in place the 4th Circuit opinion, including the scathing findings regarding the use of public nuisance legal theory in environmental claims.²⁰

Connecticut vs American Electric Power. In July, 2004 eight states (California, Iowa, Wisconsin, New York, New Jersey, Rhode Island, Vermont, and New York City), along with three land trusts, sued American Electric Power Company and five other power supply companies in Federal Court in New York (2nd Circuit) claiming that the Defendants’ greenhouse gas emissions constituted a public nuisance and were ongoing contributors to global warming. The trial court dismissed the case as presenting nonjudicial political questions. The plaintiffs appealed and the 2nd Circuit reversed the trial court decision, finding that the courts had jurisdiction over the matter and holding that the plaintiffs had stated a claim under federal public nuisance common law.²¹ The US Supreme Court granted a Writ of Certiorari from the defendants and took the case for consideration. On June 20, 2011, the Supreme Court blocked an attempt by the plaintiffs to use federal public nuisance common law to force the reduction of greenhouse gases from power plants by holding that the Federal Clean Air Act and the EPA action which the Act authorizes, displace (preempt) any federal common law right to seek abatement of carbon dioxide emissions from fossil fuel

¹⁷ Supra at Note 16.

¹⁸ Supra at Note 16, [citing from the opinion.](#)

¹⁹ Supra at Note 16, [citing from the opinion.](#)

²⁰ Sourcwatch, www.sourcwatch.org

²¹ “US Supreme Court Rejects Nuisance Claims for Power Plant GHG Emissions” , Lexology; <https://www.lexology.com/library/detail.aspx?g=71474695-1a4a-4d13-b002-cf015b4382e0>.

fired power plants.²² The ruling made clear that the plaintiffs could not bring federal public nuisance common law claims because the Federal Clean Air Act displaced any such common law causes of action. The court also found, separately, that when a statute, such as the Clean Air Act, “speaks directly to the questions at issue” involving common law public nuisance theory, displacement on a separate basis prohibits such claims.²³

The court went on to explain “Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order”. The opinion further explained that: “expert agencies such as the EPA could commission scientific studies, could convene groups of experts for advice and comment, whereas judges are confined to the evidence the parties present.”²⁴

The lasting and likely final significance of *Connecticut vs AEP* is in doing away with public nuisance claims based upon common law in dealing with greenhouse gas emissions and climate change claims based upon such emissions. The reasons for such legacy are those set forth above including and especially the finding of displacement of public nuisance claims when climate change issues are involved and the fact that the opinion was an 8-0 US Supreme Court decision. (Justice Sotomayor took no part in the consideration or decision of the case.)

As you will shortly see, the above legacy may or may not be close at hand.

Native Village of Kivalina vs ExxonMobil Corporation et al. On February 28, 2008 the native village of Kivalina, Alaska filed a law suit in federal court against the 6 largest energy companies in the world and numerous other large energy companies alleging that ice was melting around their village and they were experiencing more severe storms than in the past and asserting public nuisance claims against the defendants for greenhouse gas emissions and global warming supposedly resulting from such emissions as the cause of the melting ice and more severe storms. Plaintiffs sought an estimated \$400 million in damages. The defendants raised a lack of standing to bring the suit under Article III of the US Constitution because the claims were non-justiciable political questions and the public nuisance claims were displaced by the US Clean Air Act.²⁵

The trial court dismissed the federal public nuisance common law claims in October, 2009, stating the plaintiffs lacked standing because the claims were non-justiciable political questions. The plaintiffs appealed to the US Ninth Circuit Court of Appeals. On September 21, 2012, The Ninth Circuit unanimously affirmed the trial court’s dismissal of the case.²⁶ Prior to the appellate court’s ruling, the US Supreme Court decision in *Connecticut v AEP* was

²² *American Electric Power Company vs Connecticut*, 564 U.S. 410 (2011.)

²³ *Supra* at Note 22, Citing from the opinion.

²⁴ *Supra* at Note 22, Citing from the opinion.

²⁵ “Native Village of Kivalina v. ExxonMobil Corp : The End of ‘Climate Change’ Tort Litigation ?” Quin

M. Sorenson, Trends, ABA Section of Environment, Energy, and Resources newsletter; Vol. 44, No. 3, January/February 2013.

²⁶ *Supra* at Note 25, pages 2-3.

published and cited extensively by the Ninth Circuit panel as a basis, in part, for the circuit court's decision in the Kivalina case.

It is interesting to note that the Ninth Circuit opinion provided that, while plaintiff's public nuisance claims were displaced by the Clean Air Act, (citing AEP), such federal common law did exist and could apply to transboundary pollution suits and are often founded on a public nuisance theory.²⁷ This detail is important to keep in mind as we go forward in an analysis of public nuisance law in climate change matters. The Ninth Circuit, as clearly demonstrated recently, has exhibited some ideological tendencies in certain matters and on certain panels. Keep that in mind as we go forward. Public nuisance theory in climate change/global warming has not fared well. Based upon the above significant cases on the subject, public nuisance has been precluded by federal courts, including the US Supreme Court from being considered, generally, and put aside. It has been given short and mostly rude disregard. Displaced by the EPA and the Clean Air Act. Will that be "the end" of plaintiffs' long affinity for the outdated theory? Perhaps not yet.

What Lies Ahead for Public Nuisance

The traditional "public rights" at issue in public nuisance litigation were public rights to be free of criminal violations of what could be deemed "gross offenses" to public

morality.²⁸ Public nuisance is a legal doctrine that gives courts the task of social planner, which should, more appropriately, belong in legislative or regulatory functions of government.²⁹ When considering the actual success, legally, of public nuisance climate change related cases in aggregative "mass tort" or sweeping, breathtakingly large numbers of plaintiffs, plaintiff issues, and size of judicial rewards, sustained upon appeal, the common law tort of public nuisance in climate litigation is an abject failure. The above three significant cases; North Carolina vs TVA , Connecticut vs AEP, and Kivalina vs ExxonMobil et al., being the most recent attempts by plaintiffs (notably states, environmental activists and local cities and counties, assisted by the renowned American plaintiff bar), when taken together, have accomplished the following: 1.) No jury verdicts or damage awards, 2.) no trials at the trial court level, 3.) the rejection of public nuisance common law in climate related law suits in all three cases, and 4.) the finding that such common law public nuisance claims are displaced or preempted by legislation and regulatory enactments by the US Federal government.

³⁰ Zero, nil, nada...nothing. Nine states, including New York and California, two cities including New York City, and various non-governmental environmental activist groups or land trusts, have failed completely regarding the use of public nuisance common law "causes of action" in climate change litigation.³¹

²⁷ Supra at Note 25, pg 3.

²⁸ "The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort", Victor E. Schwartz & Phil Goldberg, 45 Washburn Law Journal 541, (2006).

²⁹ "The Mismatch Between Public Nuisance Law and Global Warming"; David A. Dana, Professor,

Northwestern University School of Law; Supreme Court Economic Review 18 (2010); 9-42, Vol. 18, number 1.

³⁰ Supra at Notes 15-27.

³¹ Supra at Note 30.

The essential problem with public nuisance in climate change litigation is the absence of key principles that allow courts, or governments to formulate even the basic structure of a judicially recognized and manageable theory of “interference” with rights; whose rights; how something interferes; how it is abated; and is there control and authority by a defendant over each and all of the elements of the interfering force or entity. Especially so in interferences based upon increasing global warmth and global climate change.³² Public nuisance, as with all nuisance common law, is generally limited in remedies to abatement. While some clever plaintiff counsel argue that abatement is merely another way of saying “damages”, the clear history of public nuisance in courts, is limited to abating the public right that is interfered with by a party.³³ The “interference” that is “unlawful” in public nuisance based climate change/global warming litigation is not an entity, it is a “thing” or “monster” called by a variety of names; greenhouse gases, carbon dioxide emissions, global climate change or global warming.³⁴ A “swarm” of things that may increase temperatures in parts of the globe, the control of which is not really under the “control” of a defendant as much as it is “identified” with such defendants.³⁵

Greenhouse gas emissions, individually, do not translate into warming or any identifiable harm at all. It will be impossible to show that the “defendants” emissions were even a substantial part of the total emissions that caused the alleged harm. Since even in the absence of the defendants’ emissions, it will be plausible to suppose that the same degree of warming would have occurred or will occur.³⁶ What is really the “elephant” **not** in the room (or Courthouse) in public nuisance claims relating to climate change litigation has a name that is well known around the globe. According to a recent international climate change report, this “elephant” is responsible for 50% of global greenhouse gas emissions. Its name is China.³⁷ While it has not been added to lawsuits in the US, there it sits...smiling at the American legal system. As one justice stated in an opinion dismissing a plaintiff’s public nuisance complaint, the dismissal was proper because the plaintiffs’ injuries are not “traceable to the individual defendants but are instead... attributable to a larger group that are not before this Court...”³⁸

“Once one abandons the level of generality of [do not harm others]...one searches in vain, I think, for anything resembling a principle in the common law of nuisance.”

**Justice Blackmun,
Lucas vs South Carolina Coastal Council,**

³² “The Mismatch Between Public Nuisance Law and Global Warming”; David A. Dana, Professor, Northwestern University School of Law; Supreme Court Economic Review 18 (2010); 9-42, Vol. 18, number 1. Pages 3-5.

³³ “The Transmutation of Public Nuisance Litigation”, Richard O. Faulk & John S. Gray, 2007 Michigan State University Law Review, 941, 950.

³⁴ Supra at Note 32, pages 5-7.

³⁵ Supra at Note 32, pages 10-11.

³⁶ Supra at Note 32, page 10.

³⁷ World Resources Institute, Wash. DC, <https://wri.org/blog>.

³⁸ “Three Federal Courts Reject Public Nuisance as Climate Change Control”, Washington Legal Foundation (WLF) Opinion Letter, Vol. 17, No. 24, available at www.wlf.org.

505 US 1033, 1055 (1992.)³⁹

“Make no mistake about it, aggregative torts are inherently lawless and unprincipled... What is happening in the minority of American jurisdictions that have allowed these claims to proceed is...not in the best interests of this country.”

**James A. Henderson, Jr.
Cornell University School of Law⁴⁰**

Public nuisance gained “success” not as a legitimate legal principle for the 21st Century but as a weapon for private plaintiff counsel to use in order to bring to bear aggregative mass tort litigation against private entities to create intolerable legal, economic, and social risks upon such targeted private, tax paying, employers and companies engaged in lawful conduct. The intent was to utilize such pressure, in pre-selected judicial “Hell-holes”, to compel such private companies to settle claims rather than seek a just trial in a place where justice did not exist. The settlements caused the transfer of outrageous sums of money to the American plaintiff bar, and their carefully selected group of clients, in exchange for the dismissal of such suits and “peace in our time” for the defendants. It worked. Consider tobacco litigation, asbestos litigation, MTBE litigation. But as has been shown, do not mistake the above for “justice” or anything resembling principled results.⁴¹

Had this abusive risk aggregation “weapon” been applied to Wilbur and Orville

Wright...no flight at Kitty Hawk would have taken place. Humans would not have walked on the Moon. It is completely lawless, standardless, and without any worthy principle. This “weapon” should be put away...permanently...by whatever means. Don’t take my word... In the first October, 2012 edition of The Economist Magazine, the following observation was made about the American legal process:

“America’s overlapping layers of regulators and litigators, state, federal and contingency fee, have all expanded. Businesses face a prosecutorial maze.

Lawsuits and investigations too often end up looking like a shakedown because of the sheer volume of cases – and because we all know – they are a shakedown.

This mess therefore needs to be brought under control. America needs a way out of its legal labyrinth.”⁴²

And the Chinese Elephant just keeps smiling..... and accepting the benefits of a completely unresponsive and irresponsible American approach to what risk the climate change issue may be creating for us all... Chinese, Russian, European, Indian, South American, and, of course, North American!

Public nuisance claims relating to Climate Change/Global Warming issues will, ultimately, fail as, based upon all of the foregoing discussion, they should. Does that mean they will not be brought by states, cities, counties and even individuals in “predictable” jurisdictions? No! Will they succeed? No! As you will see, courts in the

³⁹ Supra at Note 32, page 5.

⁴⁰ Supra at Note 12, page 9.

⁴¹ Supra at Note 1.

⁴² The Economist Magazine, First week of October, 2012 US Edition, Editorial Remarks.

US will be unable to properly deal with the unbelievably complex and vexing nature of the issues. There is an epilogue to Public Nuisance climate change litigation. I have already set out how it will end, but, as if to reinforce the above, we come to the turning of the last page in this analysis.

*"...you don't feel much like riding you just wish the trip was through... There I go ... Turn the page."*⁴³

Epilogue

The Washington Post on July 20, 2017 "gushed" with its headline "This Could Be The Next Big Strategy For Suing Over Climate Change" and the article disclosed that Marin County, San Mateo County, and the City of Imperial Beach, California filed a law suit against dozens of oil, coal, and other fossil fuel companies for damages they will incur because of rising seas. The suits target Chevron, ExxonMobil, BP and Royal Dutch Shell and claim the defendants are collectively responsible for about 20 percent of global carbon dioxide emissions between 1965 and 2015.⁴⁴

Two additional cities, San Francisco and Oakland, filed similar complaints against five fossil-fuel companies on September 19, 2017 citing state common law public nuisance claims. Subsequently, the defendants removed all of these actions to the US District Court for the Northern District of California.⁴⁵

The Washington Post wrote that New York City was filing an almost duplicate suit against the same five major oil companies asserting public nuisance damage claims, citing state common law claims.⁴⁶ Apparently the California plaintiffs were not nearly as certain about their vulnerabilities to rising sea levels caused by climate change when they recently sold debt to investors according to local court filings and required bond certificates they signed under oath.⁴⁷ As well, the New York State Comptroller publicly disagreed with Governor Andrew Cuomo suggesting the state should divest itself of Bond holdings it has of the five major oil companies because they are "solid investments". Separately, the NYC Comptroller disagreed with Mayor De Blasio about divesting the same stocks for fear it would harm teacher and police retirement funds, which pay retirement checks each month.⁴⁸

Chevron responded to the suits as follows: "This law suit is factually and legally meritless, and will do nothing to address the serious issue of climate change. Reducing greenhouse gas emissions is a global issue that requires global engagement. Should this litigation proceed, it will only serve special interests at the expense of broader policy, regulatory, and economic priorities."⁴⁹

⁴³ Supra at Note 2.

⁴⁴ Washington Post, July 20, 2017, Chris Mooney and Brady Dennis.

⁴⁵ Horvitz & Levy Litigation Review, David Axelrad editor; Gibson, Dunn & Crutcher, 2017 Litigation Review, p. 13-14.

⁴⁶ Washington Post, January 10, 2018.

⁴⁷ Wall Street Journal, January 8, 2018, by Andrew Scurria.

⁴⁸ Wall Street Journal, December 27, 2017, by Thomas Mac Millan.

⁴⁹ Supra at note 46.

An interesting phrase, “requires global engagement”. I personally read the entire list of defendants in each of these cases with some help from some very fine local attorneys. Funny thing ... none of the plaintiffs sued or even attempted to sue Sinopec, Aramco, PDVSA (Venezuela), Petrobras, Gazprom, Lukoil, Statoil, NIOC (Iranian), Total (France), Qatar Petroleum. All of these companies are national oil companies, meaning they are owned by a foreign country. All produce greenhouse gas, most have offices in New York City or Houston, and, taken together, they produce between 60 and 80 percent of the greenhouse gas associated with hydrocarbons in the entire globe.⁵⁰ I won’t bother asking why but you can imagine. If the plaintiffs truly seek the reduction of greenhouse gases by using public nuisance litigation they should have at least attempted such action. There would have been Act of State Doctrine issues as well as sovereign immunity questions, which might have prevailed. But the point would have been made in a principled fashion. But, no, it was not done. Purposefully. Why? It is not about greenhouse gas, it is about political power. It is the old, failed plaintiff counsel public nuisance sham... create intolerable pressure or risk, improperly or any other way possible, to force a “shakedown settlement”. It is business as usual in the regular American legal “Hell Holes”.

That “chuckling” sound you might hear is the Chinese elephant beginning to laugh out loud rather than merely smiling at the American legal system.

“America needs a way out of its legal labyrinth” The Economist.

WHERE THIS SHOULD GO

Briefly. This situation requires US Federal Appellate courts to preclude public nuisance climate related claims on the basis of displacement or preemption, consistent with current Supreme Court precedent.

The appellate process should utilize its authority under the US Constitution to frame Climate Change issues, including disputes, within the context of a “Global Atmospheric Commons” and to characterize that context as an “International Tragedy of the Atmospheric Commons”

The US Executive and Legislative branches should begin a process to integrate this tragedy into political and diplomatic priorities. This process will not be easy or fast but it must compel an international recognition and adherence thereto. Everyone is involved, including the many elephants not yet in the room.

The concept of an atmospheric Commons Tragedy is set forth very effectively in an excellent overview in the **Supreme Court Economic Review** article entitled “The Mismatch Between Public Nuisance Law and Global Warming” by Professor David A. Dana.⁵¹ This article was cited in the above portion of this article in discussing public nuisance litigation. I encourage you to read this article “front to back”. It combines significant economic, legal, social, and

⁵⁰ Supra at Note 37.

⁵¹ Supra at Note 32.

political analysis of the most pressing and important issue of our time.

Be Careful Out There.

“THIS NEWS JUST IN!”

Two Law 360 news items published March 5, 2018 detail breaking developments in the public nuisance climate change/global warming cases discussed in this article. Essentially, ExxonMobil has filed a case in Texas asserting that an investigation, including depositions, should be allowed by the energy company to determine if the attorneys representing the plaintiffs in the California cases are involved in a conspiracy to deny or preclude ExxonMobil's constitutional rights to free speech and other fundamental American Civil Rights.

Separately, the Federal judge in San Francisco who has the removed state court cases before him has denied the plaintiff's motion to remand but has asked the defendant/removing parties (the energy companies) to provide their view on whether federal common law or state common law should be controlling law in these cases. This is an unusual ruling and request but it drives straight into the analysis the above article discusses in some detail regarding federal, state common law, preemption or displacement and the ultimate outcome of these new cases.

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