States Sue Companies Over Global Warming

On July 21, 2004, New York, California, New Jersey and five other states, as well as three environmental groups, sued five major U. S. power companies in federal court in New York. The lawsuit claims that carbon dioxide emissions from the companies’ fossil fuel combustion are contributing to global warming and seeks an order requiring the utilities to make substantial reductions in carbon dioxide emissions over the next ten years. The suit proceeds on a theory that the utilities have created a public nuisance by emitting carbon dioxide.

While the lawsuit most directly affects the five named utility companies, it has broader implications for industry as a whole.

- The suit is a dramatic manifestation of the growing trend among environmental groups, state attorneys general and the plaintiffs’ bar to use the courts to seek extraordinary relief for the externalities of often wholly-compliant business practices and operations.

- More specifically, by expanding common law doctrines such as public nuisance, the public and private plaintiffs’ bar hopes to achieve (and has already achieved) very costly environmental remedies for emissions, releases, discharges and historical waste disposal, without regard to the limits or standards under established statutory and regulatory requirements.

- The trend reflects an unusual marriage of convenience between certain public officials (e.g., attorneys general) who are critical of the vigor of current Administration policies (enforcement, legislative and regulatory) and the plaintiffs’ bar, which seeks to export to new legal frontiers the theories, tactics and strategies they have employed in major product liability and other toxic tort cases we have been litigating, including, for example, the tobacco cases.

- We have observed resulting increases in citizens suits under RCRA and other statutes, increases in common law-based cleanup litigation, and increased toxic tort activity by and on behalf of employees, neighbors, or other individuals, as well as new initiatives in the natural resources damages (“NRD”) area.

This summary is intended to be a general summary of various laws and regulations, and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation.

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The global warming lawsuit itself paves the way to new types of "regulation by litigation" initiatives—against other utility companies or other alleged, major contributors to local, national or even global air quality problems.

Specific targets might include: emitters of currently unregulated (or allegedly under-regulated) pollutants (e.g., mercury); major sources of criteria pollutants contributing to nonattainment designations; sources of hazardous air pollutant that comply with existing standards (NESHAPs), but that arguably could make meaningful reductions below health-effects levels with additional investment.

The first major global warming lawsuit is not likely to be the last. The attorneys general who filed this litigation have themselves conceded that this is only the "opening" salvo.

The global warming plaintiffs in the newly-filed litigation face very substantial legal defenses, and a formidable set of scientific and technical evidentiary challenges, to succeed in these cases. Our own experience in litigating public nuisance cases and in contesting similar "battle of the experts," science-driven causation theories, has made us particularly mindful of the benefits of being well prepared. Closely watching the unfolding of this new global warming lawsuit may also be worth the effort, as the plaintiffs seek to refine and synthesize their causation arguments, expert damages testimony, and expansive legal theories. To be sure, much of the plaintiffs' bar will be watching.

Please feel free to call any of us if you would like to discuss the global warming litigation, our thoughts about defending such litigation, or proactive measures your company may wish to consider.

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