Sui Generis

Providing Insight into the Contours of Emerging Insurance Coverage and Environmental Issues

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A Duo of Climate Change Suits Gains Traction Under the Public Trust Doctrine

Concurrently with the recent heat wave, things are also heating up with regard to state claims seeking to force regulators to reduce greenhouse gas emissions (GHGs). Such claims made headway in two states within days of each other. While the rulings provide only a toe hold for environmental groups at this point, will it be a matter of time before one of these groups hits their mark?

On July 9, 2012, Judge Triana of the 200th District Court in Travis County, Texas issued a two-page letter opinion in *Bonser-Lain v. Texas Commission on Environmental Quality*, D-l-GN-11-002194. That action was commenced on behalf of children and young adults who contended that the TCEQ was required to regulate GHGs under the public trust doctrine. Because other pending litigation as to TCEQ's ability to regulate GHGs was the subject of appeal, the court stopped short of ordering the TCEQ to undertake any action towards regulating GHGs. That did not stop the court, however, from squarely rejecting the TCEQ's argument that the Federal Clean Air Act preempted the State's ability to enact more stringent air regulations. More importantly, the court also rejected the argument that application of the public trust doctrine is limited to water – finding that argument "legally invalid."

Similarly, on July 17, 2012, in *Reed v. Martinez*, Case No. D-101-CV-2011-01514, Judge Singleton of the First Judicial District Court of Santa Fe, New Mexico issued a written order denying defendants' motion to dismiss and for an immediate appeal of a similar suit alleging that the state is in breach of its fiduciary duty to protect the public trust by failing to regulate and reduce GHGs.

Just what is the public trust doctrine and why should you care? According to WildEarth Guardians, a co-plaintiff in the *Reed* action, "The New Mexico lawsuit is part of a larger, innovative climate litigation strategy—the international iMatter Trust Campaign. As part of this campaign, youth plaintiffs launched legal actions in 49 states and the District of Columbia, in addition to a federal lawsuit." So application of the public trust doctrine to GHGs could ultimately be far reaching.

The origins of the doctrine date back to Roman times, when the air, land and sea were incapable of private ownership and were instead dedicated to public use. This principle was carried over to English common law and applied to navigable waters and submerged lands. *See generally* Albert C. Lin. Public Trust and Public Nuisance: Common Law Peas in a Pod?, University of California, Davis, School of Law, Vol. 45, No. 3, 1081, February 2012.

While traditionally limited to navigable waters and tidal lands, both *Bonser-Lain* and *Reed*, seek to expand the doctrine to air resources. Some advocates base this expansion upon state constitutional provisions, that like Pennsylvania's provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

See Article I, Section 27 of the Pennsylvania Constitution.

Prior attempts by citizens to abate GHG emissions based on common law claims have been rejected by the U.S. Supreme Court, which held that claims of public nuisance arising from GHGs were preempted by the Clean Air Act. *See American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (U.S. June 20, 2011). But Judge Triana in *Bonser-Lain* explained that a provision in the Texas constitution, similar to the one in Pennsylvania's, made the public trust doctrine more than just a mere common law doctrine. It remains to be seen if application of the public trust doctrine can successfully be used to compel regulators to crack down on GHG emissions.

For the regulated community, the success of these suits could bring additional regulatory burdens and costs. For insurers, new regulations could translate into claims for regulatory infractions or fines and penalties, for those environmental insurers whose policies afford such coverage. In addition, environmental insurers should be cognizant of these types of claims and consider if such claims would fall within coverage for pre-existing environmental conditions migrating from a covered location. While most pre-existing coverage is limited to the release of pollutants after policy inception, policyholders may nonetheless attempt to recover the costs of installing pollution control equipment and legal defense costs associated with suits arising from GHG emissions. Whether such claims will be successful is an entirely different matter.

A copy of the letter opinion in *Bonser-Lain* is available here, as well as the amended complaint in *Reed v. Martinez*.

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