# The Price of Political Grandstanding: Attorneys General Sue over Global Warming

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**By Sam Batkins**

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The role of an Attorney General (AG) is to represent the legal interests of a state. Increasingly, however, AGs have used their positions as "bully pulpits" for advancing their own political aspirations. The term AG has sarcastically been referred to as "Aspiring Governor." Indeed, several current governors were once AGs, and the debate over global climate change has given officeholders with higher ambitions a reason to grandstand on the taxpayers' dime once again.

This fall, California Attorney General Bill Lockyer filed a quixotic attempt to curtail global warming through judicial fiat. This represents yet another legal foray that most of the public (and the courts) would view as meritless. First there were claims against gun manufacturers for causing violence, then against fast food restaurants for causing obesity, and now Lockyer argues that car manufacturers "substantially" cause climate shifts. Lockyer filed suit in the U.S. District Court for the Northern District of California arguing that global warming, caused by carbon dioxide ($CO_2$) emissions from sources such as automobiles, constitutes a public nuisance to the citizens of California.

Lockyer seeks retrospective and prospective monetary damages for the harms he claims to be $CO_2$-related (increased heat and wildfires, reduced snow packs, and air pollution), along with attorneys fees. In his complaint, he alleges that General Motors, Toyota, Ford, Honda, Chrysler, and Nissan "have caused and are causing global warming;" together the firms emit over 289 million metric tons of carbon dioxide, and account for over 30 percent of $CO_2$ emissions in California.

Using the federal common law action of public nuisance, Lockyer argues that this is "an unreasonable interference with a right common to the general public."[1] This includes conduct involving a "significant interference with the public health … [and conduct] of a continuing nature [that] has produced a permanent or long-lasting effect."[2] Some legal and public policy observers view this as an innovative approach to addressing global warming. It is not. Using the courts to advance a political objective has been employed since John Adams's midnight appointment of judges at the end of his presidency.

Attorney General Lockyer knows that the courts will not unilaterally take it upon themselves to control $CO_2$ emissions, typically the province of elected branches. As one court in a similar case wrote, "Plaintiff is simply asking the Court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this country, and enforce them with the contempt power of the Court."[3] History has witnessed repeated attempts by overzealous politicians to circumvent the legislative process and implement their preferred public policy. And of course, all of the legal bills are charged to the very taxpayers these frivolous lawsuits aim to protect.

## Public Nuisance Claims

The *Second Restatements of Torts* describes a public nuisance as "an unreasonable interference with a right common to the general public."[4] Not all interferences, however, constitute a public nuisance. An act must also be "dangerous or injurious to the general public."[5] Allegedly, the act of releasing massive amounts of $CO_2$ into the atmosphere that traps the earth's heat – and consequently causes maladies such as reduced snow pack, increased wildfires, and heat deaths – constitutes a nuisance under common law.

Ever since 17th Century English courts of law and equity confronted the claim of public nuisance, the judiciary has recognized four distinct categories of nuisance claims: "(i) Unlawful, intentional acts; (ii) lawful conduct involving conflicting uses of property; (iii) lawful conduct, not involving the use of land that leads to unintended consequences; and (iv) otherwise tortuous conduct."[6] In the past, plaintiffs have used this basic framework to bring suit against gun manufacturers and MTBE (a fuel additive) and lead producers. Frequently, however, public nuisance suits against these entities have failed.

In Chicago v. Berretta, the Supreme Court of Illinois held that negligence claims against gun manufacturers would not withstand legal scrutiny because Berretta did not "owe a duty of care to the City of Chicago … to exercise reasonable care to prevent their firearms from ending up in the hands of persons who use and possess them illegally."[7] The Court also held that the narrow parameters of nuisance law should not be extended to the realm of product liability, whereby the producer has no reasonable means of control over the product after it has been purchased. Justice Garman, writing for the unanimous Court, explained that making producers liable for eventual criminal acts would create an "unprecedented expansion of the law of public nuisance."[8]

If courts have ruled that gun manufacturers cannot be held liable for making legal products – sold legally, and then used in an illegal manner – how will Attorney General Lockyer expand the narrow field of public nuisance to hold these companies liable for legally selling cars, and then having the public at large, including Attorney General Locker, drive them? The answer is courts will defer weighty issues of climate change and $CO_2$ emissions to the proper branches of government, as they have in the past.

## Past Attempts to Litigate

In 1972, the United States Supreme Court heard an appeal against a regular defendant in the global warming fight: General Motors Corporation. Eighteen states filed an action to invoke the original jurisdiction of the Supreme Court, urging that the nation's four major automobile manufacturers contributed so heavily to air pollution as to constitute a public nuisance.[9] In a unanimous opinion, Justice William O. Douglass denied relief, noting, "To be sure, Congress has largely preempted the field with regard to emissions from new motor vehicles."[10] This failure forced plaintiffs to seek relief in federal and state district courts. Even local courts, however, were wary of trudging into the murky waters of environmental regulation, a field of public policy better ceded to entities such as the Environmental Protection Agency.

In Diamond v. General Motors Corp., Los Angeles residents sought to join together as a class and sue General Motors for unspecified damages from air pollution caused by GM products.[11] The plaintiffs claimed GM was "willful, malicious, and oppressive" and that they negligently produced defective machines.[12] Again, the Court was not sympathetic to the claim that the simple production of a legal product and the election of a willful party acting under the color of law could represent a tortuous act of nuisance. Since the plaintiffs originally sought an injunction from the further production of automobiles, the Court addressed this complaint first.

Judge Files noted that the granting of an injunction would immediately cut off commerce in a city of over 7 million people and cripple the economy: "The immediate effect of such an injunction would be to halt the supply of goods and services essential to the life and comfort of the persons whom plaintiff seeks to represent."[13] In public nuisance claims it is vital to strike a "balance between the gravity of the harm and the utility of the conduct."[14]

With regard to GM, the utility of faster transportation, increased productivity, and lower prices was deemed an acceptable trade-off to the air pollution created in the Los Angeles basin, to which most of the 7 million residents contributed. As Judge Files wrote, the legislative branch already reconciles such balancing tests that involve policy decisions, and should continue to do so. He noted, "Both the United States Congress and the California Legislature have decided that the discharge of air contaminants must be controlled. Legislative enactments have provided for administrative machinery at the federal, state, and local levels."[15]

The plaintiffs' main charge, as is the case in Attorney General Lockyer's current complaint, was that this machinery was simply not performing its mandate to protect citizens from the invidious harm of air pollution. Returning to the opinion previously cited in this study, Lockyer seems to be emulating past plaintiffs in "asking the Court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of contaminants in this country, and enforce them with the contempt power of the Court."[16] After readily observing that the Court is not an administrative

board that sets the "correct" level of air pollution, or doles out the "fair" level of relief for legally selling manufactured products, the Court declined to enter into the realm of environmental regulation.

General Motors faced a similar battle in Chicago when the city, on behalf of its citizens, opted to file suit to enjoin GM from further polluting the area.[17] Again, the Court decided not to wade into environmental regulation and denied the plaintiffs relief for several reasons. Among them was the need to let regulatory and legislative bodies establish the proper standards for pollution, and perhaps most importantly from the standpoint of legal efficiency, ensure that the plaintiffs should have even filed the suit.

In order for a plaintiff to maintain an action, they must show an injury in fact that is "concrete and particularized … actual or imminent … a causal connection between the injury and the conduct complained of … fairly traceable to the challenged action of the defendant … not the result [of] the independent actions of some third party… [and] likely as opposed to merely speculative."[18] Chicago could not prove even the most vital of standing requirements: "To allege that an indeterminate number of persons are generally harmed by an atmosphere polluted and contaminated by an indeterminate number of sources does not state a cause of action."[19] This is precisely what General Lockyer seeks to do with his current suit against auto manufacturers in California. Of course, this is not Lockyer's first attempt at striking political gold in the courtroom.

In 2005, eight states filed suit against the largest power companies in the United States, alleging that they were responsible for global warming.[20] Among the plaintiffs was Bill Lockyer, representing California. He and the other seven states' legal officials claimed that the energy companies' $CO_2$ emissions constituted a public nuisance and that the continued emissions would "cause irreparable harm to property."[21] The Court largely disregarded the policy considerations presented by the states for the same reason so many courts have stated before: specific policy determinations are better left in the hands of a legislative body. The Court concluded, "In this case, balancing those interests, together with the other interests involved, is impossible without an 'initial policy determination' first having been made by the elected branches to which our system commits such policy determinations, viz., Congress and the President."[22]

Courts have held for over 30 years that matters involving global warming and pollution on a massive scale (with little to no causal relationship to the defendants) should be left to the other two branches, yet Attorneys General around the U.S. persist.

## Control, Causation and Remedies: Why California's Suit Will Fail

According to Victor E. Schwartz, one of the leading authorities of tort law in the United States, claims against producers like GM and Honda could only succeed if the plaintiffs (in this case California) establish that the manufacturers had some degree of control over their product, that there is proximate cause between the production of cars

and global warming, and that the remedy will likely abate the harm inflicted on California residents. [23]

Control, for example, has long been held to be a "basic element of the tort."[24] Currently the auto manufacturers in question have legal sanction to produce automobiles, but how and to what extent they are used after purchase is out of their control. "If the defendants exercised no control over the instrumentality, then a remedy directed against them is of little use."[25] The auto manufacturers in the present case "exercised no control" over the vehicles after sale and it is likely the Court will not grant a remedy for California.[26] In fact, the very limited degree of control the companies might somehow exert has lately been aimed at *curtailing* greenhouse gases. Nissan hopes to sell over 50,000 of its new Altima hybrid line next year;[27] Honda and Toyota sold approximately 200,000 hybrids in 2005, and GM sold approximately 100,000. All of the named defendants have unilaterally invested money to sell hybrid and flex-fuel vehicles that produce fewer emissions.[28]

Perhaps the largest obstacle Mr. Lockyer will have to overcome is establishing proximate cause between the sale of automobiles, the pollution resulting from their increased use, the increased greenhouse gases resulting in warmer temperatures and a more volatile climate, and finally, the harm incurred by California residents as a consequence. This "House that Jack Built" causal chain hardly survives scrutiny in bedtime stories and will not impress a court tasked with separating frivolous claims from legitimate legal inquiries.

As Professor Schwartz wrote, "Thus, the injury to the plaintiff must be the type of injury that a reasonable person would see as a likely result of her conduct."[29] What reasonable person would suspect that when Henry Ford designed the first Model T, the entire climate of the world could someday change? Yet, Ford is now a plaintiff in the suit, despite its efforts at reining in emissions deemed to be hazardous.

In Chicago v. Berretta, the Court concluded there was no proximate cause since the tortfeasor (one who commits the wrong) could not have acted without the manufacturer.[30] Similarly, the 36 million people of California could not have acted without the vehicles provided by the defendants. The actions of the third party, namely California drivers, act as the "third party" that is not before the Court, thus failing the standing element established by the Supreme Court.[31]

Tremendous standing hurdles aside, even if the Court abandons its reluctance to involve itself in policy disputes, and ignores the weighty case law contradicting the plaintiff's claim, Attorney General Lockyer must still establish that abatement by the manufacturers would remedy the problem. Amidst all the claims and counter-claims over global warming, no research suggests that if the defendants in this suit stop producing cars, pollution and climate change would be arrested. As courts have concluded, the "inability to allege that the defendants have a legal right to abate the nuisance is fatal to [a] nuisance claim."[32] There are absolutely no guarantees that if the car manufacturers ceased production, air pollution would relent.

Pollution is a global issue, and emissions from nations such as China and India can cause disruptions in the U.S. Mr. Lockyer's failure to address this vital circumstance will likely doom yet another attempt to score political points in the courtroom.

## Conclusion

After 30 years of receiving negative news from the judiciary, what is it that Attorneys General expect from a court ruling awarding damages or an injunction? No evidence exists that abatement will bring about the end to air pollution. California seeks damages against these companies to convince the public that the state is tough on polluters. But, the only body on which California is being tough is the taxpaying citizens of the state who have to foot the bill for each legal misadventure of the Attorney General. If Mr. Lockyer were truly serious about his cause, he would simply ask the Court to issue an injunction against the companies, preventing them from producing more vehicles (an injunction similar to the one sought against the energy producers last year). If he succeeded, he could then go to the millions of recently-unemployed, bicycle-riding residents of his state and claim victory.

In their bids to regulate carbon dioxide emissions through the courts, Attorneys General are seeking personal political gain, not a sound discussion with the elected branches about air pollution policies and their economic effects. Taxpayers can only hope the Court will give Attorney General Lockyer a strong dose of humility, in order to clear up this rash of meritless lawsuits.

*About the Author*

*Sam Batkins is Deputy Press Secretary for the National Taxpayers Union Foundation, the research and educational arm of the 350,000-member National Taxpayers Union.*

*Notes*

[1] Restatement (Second) of Torts § 821B (1979).
[2] Id.
[3] Diamond v. General Motors Corp., 20 Cal.App.3d 374, 382 (Cal. Ct. App. 1971).
[4] Restatement (Second) of Torts § 821B (1979).
[5] 58 Am. Jur. 2d Nuisances § 39 (2002).
[6] Victor E. Schwartz & Phil Goldberg, "The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort," 45 Washburn L.J. 541, 563 (2006).
[7] Chicago v. Berretta, 231 Ill.2d 351, 362 (2004).
[8] Id. at 393.
[9] Washington et. al. v. General Motors Corp., 406 U.S. 109, 109 (1972).
[10] Id. at 114.
[11] Diamond, 20 Cal.App.3d at 374.
[12] Id. at 377.
[13] Id.
[14] Restatement (Second) of Torts § 827B (1979).
[15] Diamond, 20 Cal.App.3d at 377.

[16] Id. at 383.
[17] Chicago v. General Motors Corp., 467 F.2d 1262, 1262 (7th Cir. 1972).
[18] Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992).
[19] Chicago, 467 F.2d at 1268.
[20] Connecticut et al. v. American Electric Power Company, Inc. et al., 406 F.Supp.2d 265, 265 (S.D.N.Y. 2005).
[21] Id. at 268.
[22] Id. at 271.
[23] Victor E. Schwartz & Phil Goldberg, "The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort," 45 Washburn L.J. 541, 563 (2006).
[24] City of Manchester v. Nat'l Gypsum Co., 637 F.Supp 646, 656 (D.R.I. 1986).
[25] Id.
[26] Id.
[27] Yuzo Yamaguchi, "Nissan goal: 50,000 U.S. hybrid sales," *Automotive News*, June 6, 2005, at 32.
[28] Richard Truett, "Big 3 play catch-up in the hybrid game," *Automotive News*, April 11, 2005, at 28N.
[29] Victor E. Schwartz & Phil Goldberg, "The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort," 45 Washburn L.J. 541, 563 (2006).
[30] Chicago v. Berretta, 231 Ill.2d 351.
[31] Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992).
[32] Corp. of Mercer Univ. v. Nat'l Gypsum Co., 1986 WL 12447 (M.D.Ga 1986).