

Second Circuit Rules in Closely-Watched Multi-State Action against Power Companies



SARAH BERTOZZI

SARAH BERTOZZI, ADVANCED LAW CLERK

On Sept. 21, a panel of the Second Circuit said the District Court should decide the merits of a suit brought by eight states, the City of New York, and three land trusts against five of the nation's fossil-fuel power plants for injuries the plaintiffs allegedly suffered and will continue to suffer due to global warming. The U.S. District Court for the Southern

District of New York had dismissed plaintiffs' complaints because they raised political questions. The panel vacated the District Court's decision and denied defendants' other motions to dismiss.

The states involved are California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin.

Plaintiffs allege that the carbon dioxide emissions produced by defendants' plants have already altered the climates in plaintiffs' states and in the next 10 to 100 years will raise temperatures and sea levels there, causing severe injury to public health, ecology, and the economy. Plaintiffs rely, primarily, on the federal common law of nuisance for their cause of action. They seek to cap defendants' emissions and to reduce them by a fixed percentage each year for at least 10 years.

The District Court reasoned that in order for it to grant such an injunction, it would have to make an initial policy determination about how best to balance the interests in pollution control with the interests in economic development—a policy judgment that the District Court said falls outside the realm of judicial discretion. The Second Circuit panel disagreed. It singled out federal common law causes of action as a special area where plaintiffs may

assert claims for injunctive relief even if Congress has not yet passed any relevant legislation. Courts can decide these claims because the Constitution doesn't commit the power to decide them to either of the other two branches, the panel said. There are also well-developed common law standards for resolving complex public nuisance cases that courts can draw on, and there is no risk to the judiciary's credibility from inconsistent pronouncements where the other branches have yet to take a position on the issue.

The panel also held that the states could bring this suit because of their interests as sovereigns in the well-being of their citizens, natural resources, and economies and their interests as property owners. The panel found significant the states' unique ability to hold power plants accountable in a way that individual citizens could not. It also concluded that the harm to the states' property is and will be actual, not hypothetical and that it is enough for standing purposes that defendants contributed, in

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NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

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part, to this harm. The role of third-party power plants' emissions in causing global warming is irrelevant.

After deciding that the District Court could hear plaintiffs' claim, the panel went the further step of deciding that plaintiffs could and did make a public nuisance claim—that is, they properly alleged an unreasonable interference with a right common to the general public. Such a federal common law claim is still available to the states to make, the panel explained, because Congress has not directly addressed the issues raised by the claim. And the states made the claim well—they identified a public right to comfort and safety and to the protection and use of natural resources and public property and demonstrated how defendants unreasonably interfered with this right by knowingly continuing to produce hazardous carbon dioxide emissions. For all these reasons, then, the panel concluded, plaintiffs' claim must be decided on the merits.

It is too early to tell the significance of this decision for other states looking to hold power plants accountable for their contributions to global warming and its attendant injuries. The panel's decision may have to withstand en banc and/or Supreme Court review or both. The states may lose on the merits on remand. Congress may use this moment to pass comprehensive climate change legislation, unequivocally displacing the federal common law cause of action. In the meantime, states will pay close attention to what happens next.

NAGTRI Awarded Federal Grant for Intellectual Property Enforcement

The National Attorneys General Training and Research Institute (NAGTRI), the training and research arm of NAAG, recently received a U.S. Department of Justice, Bureau of Justice Assistance grant to fund its Intellectual Property Enforcement Project. Under the auspices of the NAAG Intellectual Property Committee, which is chaired by Mississippi Attorney General Jim Hood and Washington Attorney General Rob McKenna, NAGTRI will conduct two Intellectual Property Enforcement trainings: an Eastern Region Intellectual Property Enforcement Training for 100 state enforcers in Washington, D.C. in spring 2010, and a Western Region Intellectual Property Enforcement Training for 100 state enforcers in Seattle, Wash., in summer 2010.

The two-and-a-half day trainings are designed to cover a broad spectrum of intellectual property enforcement issues, with a focus on the public health and safety concerns of intellectual property. NAGTRI will offer scholarships to state teams to attend the training. Teams will consist of an assistant attorney general, an assistant district attorney, and an investigator. If the secretary of state also has jurisdiction in intellectual property enforcement, the state team will include a representative from that office as well. The training will afford teams the opportunity to meet other state teams, as well as their federal counterparts, and establish task forces and working groups, thereby strengthening the capability of law enforcement to work together in coordinated statewide investigations and prosecutions. In addition, the team approach will help to reduce or eliminate duplicative enforcement efforts which drain limited resources, thereby improving the function of our nation's criminal justice system.

In addition to the two enforcement trainings, NAGTRI will create an Intellectual Property Enforcers manual, a directory of state enforcers of intellectual property rights, and a dedicated Web site containing intellectual property materials.

The goals of the Intellectual Property Enforcement Project are to: 1) increase state intellectual property theft prosecutions; (2) deepen state enforcers' familiarity with and expertise in the investigation and prosecution of intellectual property theft; (3) increase the quality of state intellectual property theft and piracy prosecutions; (4) strengthen the capability of state, local, and federal law enforcers to work together in coordinated statewide and regional investigations and prosecutions; and (5) utilize NAGTRI Web-based communication to enhance technical and case preparation assistance to state, local, and federal prosecutors in the bringing of these lawsuits. To accomplish these goals, NAGTRI will partner with experts from the National District Attorneys Association, the U.S. Chamber of Commerce, the U.S. Patent and Trademark Office, the U.S. Department of Justice, and others to develop a training curriculum specializing in the identification, investigation, enforcement, and prosecution of intellectual property theft.

For more information about this Project, contact Dennis Cuevas, Consumer Protection counsel, at dcuevas@naag.org.



MARJORIE THARP

Since joining the NAAG communications team last December, Marjorie Tharp has made a smooth transition to a job that is central to the success of the Association. As director of communications, Marjorie

is responsible for managing the NAAG information function both internally to its members and externally to the public. Part of that includes working closely with the Attorneys General public information officers in developing communication strategies and promoting the public's understanding of the role of the Attorney General. She also coordinates media-related and public information activities, oversees the production of NAAG materials and is responsible for Web site content.

"This position gives me the opportunity to work on a broad range of issues," she said. "Each day, reporters call asking about different topics. It's definitely interesting and challenging."

Prior to joining NAAG, Marjorie worked as the vice president of marketing and communications for Mdlogix, a company headquartered in Baltimore, Md. There she gained valuable business experience and worked to bring the company's clinical research system to market. Most of her career, however, has been focused on associations.

Marjorie served as public affairs director for the American Academy of Pediatrics, Department of Federal Affairs. Prior to that, she specialized in communications for the American Heart Association.

"The associations I've worked for have extremely worthwhile missions," she said. "I enjoy working with the members and their staff, and applying my communications skills to important issues."

This Pennsylvania native graduated from the University of Maryland with a bachelor's degree in journalism. Marjorie is a member of the National Press Club where she serves on the communications and marketing committee. She is also a member of the American Society of Association Executives and volunteers for charities in her spare time. She enjoys traveling, reading and writing, and hiking. She said she is notorious for trying a new sport at least once and is contemplating motorcycle lessons this year.

State, Federal Antitrust Enforcers Gather at NAAG/Columbia Conference



EMILY MYERS

EMILY MYERS, ANTITRUST COUNSEL

Ohio Attorney General Richard Cordray, Federal Trade Commission (FTC) Chair Jon Leibowitz and U.S. Department of Justice Assistant Attorney General for Antitrust Christine Varney were the keynote speakers for NAAG's annual Antitrust seminar, which was held this year in conjunction with Columbia Law School's

State Attorney General Education Program in New York. The Oct. 7 conference, entitled "Antitrust Federalism: Enhancing the State-Federal Relationship," was attended by approximately 140 state and federal enforcers as well as private attorneys and law students.

Attorney General Cordray, co-chair of NAAG's Antitrust Committee, discussed the historic importance of state antitrust enforcement and provided his views on the proper balance in federal and state antitrust enforcement. Chairman Leibowitz discussed past and current joint state-federal enforcement, noting particularly the challenge by Virginia and the FTC of a hospital merger, and outlined areas for future cooperation. Assistant Attorney General Varney discussed the Antitrust Division's new focus on agricultural markets, and how state and federal enforcers can work together to improve competition in those markets.



OHIO ATTORNEY GENERAL RICHARD CORDRAY

She also described the Antitrust Division's thinking in connection with resale price maintenance cases in light of the Supreme Court's decision in *Leegin v. PSKS*, 551 U.S. 877 (2007).

The keynote speeches were followed by a reactor panel moderated by Stephen Houck, executive director of the Center for State Enforcement of Antitrust and Consumer Protection Laws. Panelists included Phil Weiser, deputy attorney general for International and Appellate Mat-

ters at the U.S. Department of Justice Antitrust Division; Pete Levitas, deputy director of the FTC's Bureau of Competition; James Donahue, chair of NAAG's Multistate Antitrust Task Force; Ilene Knable Gotts, chair of the ABA's Antitrust Section and Scott Hemphill, associate professor of Law and Milton Handler Fellow at Columbia. They discussed state and federal antitrust enforcement in a number of contexts, including single-firm conduct, vertical price fixing, agriculture and energy markets. State and federal enforcers attended a closed afternoon session to discuss the nuts and bolts of antitrust enforcement.

To view copies of the speeches, go to <http://www.naag.org/1248>.

New Attorneys General Appointed

NAAG would like to congratulate and welcome four newly-appointed Attorneys General from Alaska, New Hampshire, Northern Marianas, and South Dakota. As these new Attorneys General take office to protect the citizens of their states, NAAG looks forward to collaborating with their offices on issues such as child support enforcement, drug policy, and consumer and environmental protection. NAAG would also like to welcome back



ALASKA ATTORNEY GENERAL DANIEL S. SULLIVAN

Joseph R. "Beau" Biden, III, who recently completed a year-long deployment in Iraq with the Army National Guard.

Daniel S. Sullivan was appointed Attorney General of Alaska by then-Gov. Sarah Palin on June 16. Prior to becoming Attorney General, Sullivan was appointed by the president and served as the U.S. assistant secretary of state for economic, energy, and business affairs from May 2006 until January 2009. In this role, he was a senior advisor to the secretary of state and other top U.S. government officials on the formulation and execution of international economic, energy, trade, finance, transportation, telecommunications and Arctic policies.

"There's a lot of really exciting opportunities that are going on in the state right now, but a key component to that is how you address these things from a legal perspective, and so I'm very interested in making sure those opportunities present themselves to Alaskans," General Sullivan said.

Sullivan also served as a director in the International Economics Directorate of the National Security Council and National Economic Council staff at the White House, and worked in private practice before serving on the state and federal levels. He has also been on active duty in the United States Marine Corps since 1993 and in the reserves as an infantry and reconnaissance officer since 1993. He has been recalled twice since 2004.

Sullivan graduated magna cum laude from Harvard University, earning a bachelor's degree in economics, where he was a Harvard College scholar during each of his four years. Sullivan then graduated cum laude from Georgetown University Law Center, earning a juris doctorate and master's in foreign service joint degree.



**NEW HAMPSHIRE
ATTORNEY GENERAL
MICHAEL DELANEY**

Michael Delaney was appointed to serve as Attorney General of New Hampshire by Gov. John Lynch in August. General Delaney first joined the Attorney General's office in 1999, serving as a prosecutor and chief of the Homicide Prosecution Unit. He served as New Hampshire's deputy attorney general from 2004 until 2006, when he became Gov. Lynch's legal counsel. As the governor's legal counsel, he helped shape important new laws that better protect children from sexual predators and help combat children exploitation over the Internet.

"I look forward to working closely with my fellow Attorneys General on NAAG initiatives and other efforts to improve our system of justice," General Delaney said.

Before joining the office of the Attorney General, he worked for five years with the law firm of Wiggin & Nourie, PA in Manchester, where he specialized in complex class action litigation and played an active role in the multi-district litigation against American Honda for bribery and racketeering claims.

In 2004, *New Hampshire Magazine's* "Ideal Attorneys" publication recognized Delaney as the state's fastest rising star in criminal prosecution. In 2005, Delaney was honored by the *Manchester Union Leader* as one of the 40 leaders in New Hampshire under 40 making a difference in New Hampshire. He has also served on the New Hampshire Bar Association's Ethics Committee and the New Hampshire Supreme Court Committee on Character and Fitness.

Delaney is a Phi Beta Kappa graduate of the Holy Cross in 1991 and he received his law degree in 1994 from Georgetown University Law Center.

Edward T. Buckingham was appointed Northern Marianas Attorney General by the governor and confirmed by the Senate in August. Buckingham has served as an assistant Attorney General since 2003, working in both the civil and criminal divisions. *A photo and bio was not available by press time.*



**SOUTH DAKOTA
ATTORNEY GENERAL
MARTY J. JACKLEY**

Marty J. Jackley was sworn in as South Dakota's 30th Attorney General on Sept. 4. General Jackley is committed to fighting crime, protecting consumers and making South Dakota a safer place to live.

Prior to becoming Attorney General, Jackley was appointed U.S. attorney for the District of South Dakota in 2006. While U.S. attorney he served on both the U.S. Attorney General's Subcommittees for Controlled Substances and the Subcommittees for Native American Issues, and the Midwest High Intensity Drug Trafficking Area Executive Board.

From 1995-97, Jackley served as a law clerk for then-Chief Judge Richard H. Battey in federal district court in Rapid City. He then joined the Rapid City law firm of Gunderson, Palmer, Nelson, and Ashmore LLP. At this time he also served as a special assistant attorney general for South Dakota prosecuting primarily controlled substance felonies. He has extensive jury trial experience on cases including murder, assault, financial crimes, controlled substances, and other felonies. His appellate experience includes evidentiary matters, jurisdictional claims, sentencing issues, juvenile transfers, reclamation law, and other substantive legal issues.

Jackley graduated with honors and received a bachelor's degree in electrical engineering from South Dakota School of Mines and Technology in 1992. He received his law degree from the University of South Dakota School of Law in 1995.

Welcome Back General Biden!



**DELAWARE
ATTORNEY GENERAL
JOSEPH R. "BEAU"
BIDEN III**

Joseph R. "Beau" Biden, III took office as Delaware's 44th Attorney General in January 2007. He serves as a Captain in the Delaware Army National Guard's Judge Advocate General's Corps and is assigned to the 261st Signal Brigade in Smyrna, Delaware. In October 2008, the Unit was activated for a 12-month deployment to Iraq. General Biden safely returned to Delaware this month.

SAVE THE DATE

PRESIDENTIAL INITIATIVE SUMMIT

FEBRUARY 8-10, 2010



Virtual World – Real Crime

The Internet affects the way we live and how we communicate. It can also compromise the safety of our children. Protecting children from online predators remains a priority issue for the state Attorneys General. Nebraska Attorney General and NAAG President Jon Bruning has made “Virtual World – Real Crime” his year-long presidential initiative with one goal being to increase the number of investigations into Internet child pornography crimes. The initiative also aims to protect consumers and businesses from fraud because online technology also affects the way we gather information, purchase products and conduct business.

Attorney General Bruning will host a two-day Presidential Initiative Summit that will be held February 8-10, 2010 in Fort Lauderdale, Fla. It will provide an opportunity for Attorneys General and other stakeholders to discuss emerging trends and new technologies for protecting children and consumers. Registration will begin soon. Please save the date!

House of NAAG Attorney Reaches “Green” Heights

NAAG as an association is committed to improving the environment, including hosting its meetings in Green Certified hotels. However, NAAG staff is part of the action too.

NAAG Bankruptcy Counsel **Karen Cordry** is leading a growing movement of home builders to build green. When building her Delaware house, she wanted to be mindful of the environment and energy use. “I wanted to do it as green as I could,” says Cordry, a longtime member and current treasurer of the D.C. chapter of the Sierra Club. “I didn’t want my beach house to have a negative impact on the environment.”

She is working to have her house certified under the Leadership in Energy and Environmental Design (LEED) standards. LEED is a certification program developed by the U.S. Green Building Council, for environmentally-sound buildings. She hopes to achieve “platinum” status for the house, the highest of four certification levels available through the program. The final result should be known in the next few months. Cordry’s house has a small carbon footprint which means its consumption of carbon-based fuels is much less than traditionally-built homes.

Cordry’s house needs a 90 point rating to meet the requirements for platinum LEED certification. She is close to accumulating those points. The house includes many energy-saving features including low-energy compact fluorescent light bulbs, carpet made of fiber spun from cornstarch, kitchen countertops made of recycled glass chips set in concrete, and power for solar heat and solar hot water generated by 24 solar panels on the roof.

Cordry is doing her part to spread the word about the benefits of building green.

Her efforts to protect the environment and limit energy use when building her house were recognized in the October issue of the Delaware Beach Life magazine. In the future, she plans to compile a booklet about its construction that will be available to the public.

“Building to a small carbon footprint isn’t weird or exotic,” she says. “You don’t have to find an old barn and recycle it. You can be green and get something that is very efficient and that is very livable.” Cordry also notes that she will have informational materials to inform the tenants who rent during the summer about the special features of the house. “I hope they will find some features they can incorporate into their own homes when they leave.”

NAAG Counsel: Speaking Engagements and Appointments

NAAG counsel is often invited by the legal community and other organizations to speak on areas of expertise or to serve on a committee. Recent NAAG speaking engagements:

Hedda Litwin, Cyberspace Law counsel, spoke about Attorneys General Internet initiatives at the “Framework for a Safe Internet” on Capitol Hill, Oct. 20, in Washington, D.C. The event was hosted by The Safe Internet Alliance, a broad private/public sector community committed to better protecting Internet users, especially children, teens and the elderly, from Internet corruption, crime, and abuse. Hedda also spoke at the Oct. 13 Cybercrime training in Oxford, Miss., on sexting issues.

Judy McKee, NAGTRI acting director, spoke about NAAG’s work toward a balanced pain policy, on Oct. 21, at the National Association of State Controlled Substance Authorities (NASCSA) in San Diego, Calif. NASCSA is a non-profit educational organization whose primary purpose is to provide a continuing mechanism through which state and federal agencies can work to increase the effectiveness and efficiency of efforts to prevent and control drug diversion and abuse.



National Association
of Attorneys General

Calendar

NAAG Winter Meeting

December 1-3, 2009

Attorneys General and AG staff only

Phoenix, AZ

Contact: Jeffrey Hunter

SAVE THE DATE

NAAG 2010 Spring Meeting

March 1-3, 2010

Washington, DC

Contact: Jeffrey Hunter