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Six Environmental Groups Slapped by Coal Association

The Global Warming Debate Heats Up

David Rubenstein

ENVIRONMENTALISTS have long predicted that somebody would get sued over global warming, but they weren't expecting this.

Western Fuels Association Inc., a coal-purchasing cooperative and advocacy group based in Westminster, Colo., has filed a lawsuit that names six environmental groups as defendants.

The lawsuit, filed in Colorado federal court, alleges commercial defamation under Section 43 of the Lanham Act. The complaint accuses the environmental groups of "promulgating false and misleading statements about the impact of burning fossil fuels" and asks for injunctive relief as well as treble damages and legal costs.

Western Fuels Association is the personification of high-grade, low-cost, low-sulphur, western U.S. coal, an important source of energy for the gargantuan U.S. power grid, which generates more electricity than Germany, France, the United Kingdom and Japan combined. According to the Western Fuels complaint, 53 percent of U.S. electricity is produced by plants that are fired by coal. About one-third of it comes from the Powder River Basin of Wyoming, where Western Fuels buys coal, then sells to its members, which are consumer-owned utilities.

But Western Fuels is more than a coal-buying cooperative. It is also a professional advocacy group, and an effective one. Its CEO and general manager (and former general counsel) is an attorney named Frederick D. Palmer, a native of Arizona, honors graduate and Law Review editor at the University of Arizona College of Law, and former staff assistant to Democratic Rep. Morris K. Udall.

Coal, Palmer reminds listeners, wore a white hat not too many years ago when energy independence was considered important, and it was heavily promoted by the government and many media pundits.

It was during that period that Western Fuels was founded, in fact, specifically to obtain coal for "Project Energy Independence," which was established by an executive order from President Carter.

Palmer was general counsel of the group until 1985, when he was made CEO. With Palmer still actively involved on the legal side, the decision was made not to bring on a new general counsel.

Palmer appears to be a man of strongly held beliefs, among them that the best defense is a good offense, and that publicity can only help his cause. He says the lawsuit was his idea, and he considers it a legitimate vehicle for extolling the virtues of coal and exposing the perfidiousness of its enemies and what he takes to be the shuck of global warming catastrophism.

“When people say things about our business,” he says, “and our effect on people in a public forum, in a New York Times’ ad, the Internet or national television, by God, they better be ready to back up what they say.

“I’m talking in the context of the Lanham Act,” he adds, “about people who are competing with us.”

A NOVEL CASE

Brian Dunkiel, senior attorney with defendant Friends of the Earth, a national environmental group based in Washington, D.C., says he was not expecting this lawsuit.

“Any organization is surprised when it is hit with a SLAPP suit,” he says.

But he notes there is a certain logic to this one.

SLAPP suits (the acronym stands for Strategic Lawsuits Against Public Participation) have in the past been brought under state law. But many states have passed SLAPP-suit protection statutes, while the federal government has no such protections.

David Vladeck, director of litigation at Public Citizen in Washington, D.C., says he has seen many SLAPP lawsuits, and this is the first he has seen filed under federal law.

“I think the novelty of this case is a sign of its fundamental weakness,” he says.

“This is an inappropriate use of the Lanham Act. For that reason, among others, the case will be dismissed.”

The defendants are still working out their strategy. Dunkiel declines to comment on the case, except to say they believe it is without merit, they will work to have it dismissed, and that “the distinction between commercial speech and protected free speech will be at issue.”

SHOVEL ON THE COAL

“What set this off was the ad with the mosquito,” Palmer says.

He is referring to a full-page ad that ran in The New York Times on Dec. 13, 1999.

The ad was also featured on the web site of the Turning Point Project, a coalition of about 50 environmental groups and one of the named defendants.

Along with a picture of a mosquito, the ad included a warning that “disease-carrying mosquitoes are heading north” and other statements that predicted that global warming would spread the range of drought, famine and disease.

The ad referred to a 1996 study, by The London School of Hygiene and Tropical Medicine, warning that “nine of the world’s 10 most dangerous vector-borne diseases (including malaria, dengue fever and yellow fever) are likely to expand or shift their ranges due to climate change.”

The Western Fuels’ complaint follows that reference with a brief refutation, invoking an EPA expert panel which concluded there was too much uncertainty to make a definitive statement about the health effects of global warming.

(However, the panel noted some positive outcomes of global warming had been identified, “notably, reduced cold-weather mortality”).

The complaint essentially lays out a skeptic’s position on global warming: It’s not “appreciable,” but that, to the extent it is occurring, it’s a plus.

“[S]cientific observations reveal that the impact of carbon dioxide emissions on our environment is both modest and benign,” the complaint says.

“[T]he defendants ignore the demonstrated benefits of increased CO2 levels and, instead, focus on outlandish and completely speculative horror stories about the environment.”

Asked to elucidate, Palmer says he will accept at least for purposes of discussion that global warming is occurring and that human activity contributes to it.

“But that is not the issue,” Palmer says.

“The issue is whether there is ‘dangerous interference with the climate.’ Those are the words of the Rio Treaty.”

The offending ad, according to Palmer, “essentially says that by using fossil fuels we are killing people, and coal is specifically mentioned in that context.”

Soon after the ad ran, the association began to look for a legal recourse to protect itself against what it considered an unfair attack, Palmer says. It concluded that a case could be brought under the Lanham Act because many of the environmental groups involved in the ad campaign competed, “directly or indirectly,” with Western Fuels.

“The gravamen,” he says, “is that they claim what we are doing is dangerous to people’s health. We think the opposite is true. And since they are competitors of ours, we don’t think they have the right to do that under federal law.”

THE COMPETITION CLAIM

The competition aspect of the claim is based in part on the fact that defendant groups get some financial backing from companies that have an interest in renewable energy sources which compete with coal.

The complaint says, for example, that Friends of the Earth receives funding from BP Amoco, and that the company has become the world's largest player in the solar-energy business.

To underscore the point, Palmer adds that his group, too, has solicited BP for contributions to its advocacy program.

“We rely for our advocacy business on outside funding, as do they. So that is a major component of our allegations: They are, in fact, competitors, as is required in the Lanham Act. Otherwise it would be protected speech.”

The competition claim also relies on the fact that Western Fuels, through an affiliated company called the Greening Earth Society, publishes a newsletter called the World Climate Report, which the complaint characterizes as “the leading newsletter that analyzes the science and politics of global climate change, including the effects of CO₂ on our biosphere.”

Through the Greening Earth Society, Western Fuels also contributes to a joint publishing venture with The Heartland Institute in Chicago.

“I think,” says Vladeck, “that the coal companies are trying to force a square peg into a round hole.”

“The theory of injury here is so monumentally attenuated and silly it is clear that is really not what is at issue.” Western Fuels did not cite this suit to collect on judgment, according to Vladeck.

“It was to get people like you writing stories about it, to generate some press coverage, and ultimately to chill environmental groups like the defendants from voicing their view on matters like global warming.”

ECHOES OF SEATTLE

According to Palmer, his ultimate strategy is a lot more rarified than that.

He says he wants this lawsuit to establish, on the record in a court of law, that the science his group espouses is correct and the science his opponents advocate is incorrect.

This, he says, will lay the groundwork for the next phase of the struggle, which, thanks to a masterful piece of political work by the global warming catastrophists (“I take my hat off to them,” he says), will be in an international arena. Science that will shape this issue internationally is now being developed by a United Nations body, the Intergovernmental Panel on Climate Change or the IPCC, according to Palmer, and it is all being done overseas.

“You can’t get at it,” he laments. “You can’t challenge the regulatory principles as you would if it were coming out of the EPA,” he says.

But if as a result of this lawsuit, his group’s scientific views have been accepted, Palmer thinks it will be possible to wage an effective political battle against U.S. participation in global CO2 treaties, which he thinks are in the cards.

“I would go further and say that if the court rules the way I think it will, under U.S. law the government cannot constitutionally, by treaty or otherwise, regulate carbon dioxide at all.”

“The police power of the state can only be exercised where you can show you are doing it for a public good.”

“NO THERE THERE”

When asked if he is concerned this lawsuit might promote a backlash, Palmer says he is not.

The facts are on his side, he says, pointing to the success of what he calls his road show on the subject, complete with slides and science.

He took that show to a succession of state legislature during the 1990s.

At the time, there was a movement to add a charge to utility bills for coal-based electricity on the grounds that coal’s real costs were being externalized in the form of pollution, and that a surcharge would even the playing field for solar and wind power.

“We resisted that successfully everywhere we went, except for a little bit in Minnesota,” he says.

“We succeeded on the grounds set forth in our complaint: you can’t show a present value cost based on any vision of the apocalypse. That is speculation, and you can’t set policy based on speculation. That has essentially been our argument for 10 years. And we have never lost it.

“So no, I am not worried about a backlash. I am anxious for this to get into the public domain, so people can see that insofar as the concerns over apocalyptic global warming are concerned, there is no there there.”

GLOBAL WARMING could bring a rash of tort lawsuits, according to some environmental groups. Some might even say that the energy sector, or parts of it, will be the tobacco industry of the new millennium.

If that occurs, according to Ozone Action Inc.-a Washington, D.C., environmental group and a defendant in the Western Fuels Association Inc. SLAPP suit-advocacy groups for the polluter-defendants could be found liable as well.

Two groups in particular, Western Fuels and the Washington, D.C.-based Global Climate Coalition, could find themselves wearing the same cement shoes as the Tobacco Institute, the

tobacco industry's now defunct science-cum-public relations arm.

The Global Climate Coalition, like Western Fuels, maintains that global warming is speculation, and that regulation addressing it is unwarranted. In the last several months, the coalition has lost members, including Ford Motor Co., Shell Oil, Texaco Inc., and BP Amoco. Ozone Action has suggested companies may be dropping out to try to insulate themselves from liability in case of global warming lawsuits.

"The GCC is almost a cookie-cutter version of the Tobacco Institute," says a spokesperson for Ozone Action. "We use that comparison all the time."

No one at Ford's legal department would comment.

However, a company spokesman says Ford dropped out because the GCC "had become a lightning rod and an impediment," and not because of liability fears.

BP Amoco's General Counsel Peter Bevan says the company's position on global warming is the result of a high-level decision that was outlined in a statement by CEO Sir John Browne.

In that statement, Browne said that global warming looks increasingly plausible and carbon emissions are a likely contributor to the problem, and he pledged that BP Amoco will cut down on carbon emissions and move more heavily into the alternative energy business.

Liability concerns did not influence the company on this issue, according to Bevan, although he acknowledges that "if one leads with one's chin and turns out to be wrong, one may incur liabilities that wouldn't otherwise be incurred."

Western Fuels has also been likened to the Tobacco Institute by Ozone Action, according to Frederick D. Palmer, Western Fuels CEO and general manager.

"They say it about anyone who disputes their vision of the apocalypse," Palmer says. "But they have for sure directed it at Western Fuels, and about me personally, I might add.

"Basically they say that we are promoting junk or dishonest science like the tobacco companies did, when we draw conclusions from the science we support that more CO₂ in the air is good, not bad, because of the benefits to the biosphere. In their view, more CO₂ is so obviously bad it is beyond argument and those who argue to the contrary are like the scientists from the Tobacco Institute who said smoking does not cause cancer or they don't know if it does."

Attorney David B. Hunter, executive director of the Center for International Environmental Law in Washington D.C., and a board member of Ozone Action, declines to make any direct comparison between the GCC and the Tobacco Institute.

But, he says, "if one were building a [climate change] case, part of the evidence would be what company X was doing during the time when it should have been doing research on alternatives."

You could argue, according to Hunter, that if a company were running a counter-propaganda campaign, or helping to finance one, it could be liable under tort theories.

“That would be my argument,” he says. “I hope to make it some day.”

-David Rubenstein