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# Law and Public Policy Support Lockyer's Suit Against Auto Manufacturers for CO2 Emissions

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## Law and Public Policy Support Lockyer's Suit Against Auto Manufacturers for CO2 Emissions

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By Sean B. Hecht and Cliff Rechtschaffen

Controversy has followed Attorney General Bill Lockyer's decision earlier this fall to sue the six largest automakers, alleging that car emissions constitute a public nuisance because they contribute to global warming. Some even have dismissed the lawsuit as election year grandstanding. To the contrary, the Attorney General should be applauded for creatively using a venerable legal tool to protect California's environment and to plug a gaping hole left by federal failures in this area.



Global warming is the most important environmental issue of our time. As Governor Schwarzenegger recently proclaimed: "The debate is over. We know the science, we see the threat and we know the time for action is now." Indeed, there is a scientific consensus that global warming is real and that its consequences for our environment will be devastating. In California, global warming will shrink our coastlines, reduce the Sierra snowpack that supplies our drinking water, increase ozone pollution, and increase the threat of wildfires.

Emissions from cars and trucks unquestionably are a major reason why the planet is heating up. Motor vehicles are responsible for 20 percent of U.S. carbon dioxide emissions, and 30 percent of California's. Yet this pollution is not regulated under our environmental laws. The federal government has refused to limit auto emissions, contending that carbon dioxide is not a "pollutant" under the Clean Air Act. And automakers are trying to convince a court to strike down California's innovative law mandating reductions in carbon dioxide emissions from cars.

A lawsuit seeking to hold automakers liable for their share of the harms caused by global warming is a natural extension of long-standing legal doctrine. The common law for centuries has allowed our government to prevent activities that threaten the public health or welfare, and to seek restitution for the people harmed by them. This doctrine has protected fish and wildlife in our rivers and forests, air quality threatened by pollution from neighboring states, and water quality harmed by sewage, mining wastes, or factory discharges, and also should protect our state's resources against the impacts of global warming. Moreover, it is a bedrock principle that one need not sue every responsible party in order to prevail. Any party that contributes to the harm can be asked to pay its share.

In recent years, as government regulation has failed to adequately address important environmental harms, the common law has re-emerged as a potent tool for protecting the environment. For example, over 50 states and localities have sued lead paint companies on a public nuisance theory to recover the costs of abating lead contaminated properties. The courts largely have endorsed this approach, ruling that lead paint currently found in thousands of buildings is a nuisance, despite the fact that the lead paint was lawfully sold years before. In a case brought by Rhode Island, a jury earlier this year ordered the manufacturers to pay for the costs of abating lead hazards in 300,000 homes, which could total several billion dollars. Likewise, some municipalities have used public nuisance as a tool to try and hold gun manufacturers and distributors liable for the costs of gun violence that results from the sale of their products. In California, courts also have extended traditional common law products liability law to hold the manufacturers of products like MTBE (a gasoline additive), DBCP (a pesticide) and perchloethylene (a solvent widely used in dry cleaning) liable for the harms they have caused to drinking water, and ordered them to pay millions of dollars in cleanup costs.

The automaker lawsuit filed by Lockyer is a logical next step following the public nuisance action filed by California and eight other states in 2004 against the five largest coal-fired power plants in the U.S. for their contributions to global warming. That suit also was filed in federal court and based on federal common law nuisance, alleging that global warming poses threats of severe harm to human health from heat and increased air pollution, of property damage from flooding, and of ecological destruction. Federal common law is well suited to this type of case because it is grounded in the rights of states as sovereigns to defend themselves against harmful activity, such as pollution, that crosses state borders. And nuisance allows for liability against parties, such as the five power plants, that contribute to the pollution. (The power plant case was tossed out by a federal district court judge who refused to reach its merits, holding that courts should not address "political questions" such as how to respond to global climate change. The court in that case misapplied the law, and its decision is on appeal now.)

Are auto emissions the only source of greenhouse gases? Obviously not. But given that California constitutes one of the largest car markets in the world, these emissions clearly are a very significant contributor to the problem.

One noteworthy aspect of the case is the straightforward relief it seeks. It does not ask for changes in the ways cars are produced, but rather that California be compensated for the costs it is incurring in dealing with the impacts of climate change—such as monitoring the state's coastline, funding a Climate Action plan, planning for reduced snowpack and earlier runoff, and reinforcing levees on the Delta to prevent saltwater intrusion. These adaptations to climate change will be necessary, since our climate is already changing. The lawsuit thus complements the regulatory solutions California is putting in place to reduce greenhouse gas emissions.

Will California prevail in its case? That remains to be seen. Sometimes common law cases push the boundaries of existing law, and seem like long shots at the time they are filed—such as the lawsuits against asbestos manufacturers and the tobacco producers for their

harms to public health. But one of the hallmarks of the common law is its flexibility and ability to evolve over time to deal with previously unanticipated problems. It is true that the common law has never been asked to deal with a problem of this magnitude – but then again, we have never had a problem before on the scale of global warming.

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Clifford Rechtschaffen is a professor and director of the environmental law program at Golden Gate University School of Law. He is the author of numerous articles and books about environmental law, including *Reinventing Environmental Enforcement and the State/Federal Relationship* (with David Markell); *Environmental Justice, Law, Policy and Regulation* (with Eileen Gauna); *The Environmental Common Law: A Practical Guide to Heroic Litigation* (with Denise Antolini, forthcoming) and *Environmental Enforcement: Cases and Materials* (with Joel Mintz and Robert Kuehn, forthcoming). He is the chair of the Environmental Law Section of the American Association of Law Schools, and a member scholar with the Center for Progressive Reform. He practiced environmental law with the Environment Section of the California Attorney General's Office for seven years. He is a graduate of Princeton University (summa cum laude) and Yale Law School, where he was an editor of the Yale Law Journal.

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