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LAWSUIT ROULETTE: PURSUIT OF THE “CHILDREN’S TRUST” CLIMATE CHANGE LITIGATION

by

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There are 38 possibilities of winning on a roulette table. Eighteen black, eighteen red, and two green. If one were to place a bet on just one number, the possibility of winning is a long shot. But, if one were to bet on multiple numbers, for example 34 of them, the odds of winning measurably increase.

This roulette philosophy is behind the latest round of climate change lawsuits aimed at regulating carbon dioxide (CO₂) emissions. In May, the first of these new lawsuits were filed in a federal District Court in California and state courts in Alaska, Arizona, California, Colorado, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Oregon, and Washington. The group sponsoring the litigation has indicated that similar lawsuits will be filed in every state. If just one of these lawsuits “hits” – which could simply mean surviving early dismissal – the sponsor may be on its way to winning the jackpot.

From a legal perspective, these lawsuits are a substantial stretch – even more speculative than blindly putting a chip down on a roulette table. They take a novel legal theory called the “public trust doctrine,” which has been applied in only a narrow set of cases involving state-owned water rights, and try to turn it into an expansive theory where literally the sky would not even be the limit. In effect, they allege that the federal government and each state’s government has an independent “public trust” obligation to protect the state or entire nation’s atmosphere from global climate changes.

To enhance the public relations appeal of the lawsuits, the organizers have brought in students to serve as the plaintiffs (under guardian *ad litem* procedures) so the media can be told that children in grade school, high school, and college are bringing these claims to protect their environmental future. The most prominent of the groups sponsoring the litigation is the Oregon group set up specifically for the litigation called “Our Children’s Trust.” The children even have their own web site, www.ourchildrenstrust.org.

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What Are the Lawsuits Seeking?

The Children's Trust lawsuits claim that the federal government and state governments each have a fiduciary duty as a "trustee" to preserve and protect the atmosphere. While the lawsuits have drawn wide media coverage, there has been less focus on what this actually means. The specifics are enlightening. They want judges to order state and federal agencies to engage in specific policy and regulatory actions, and expend significant public resources in the following ways:

- Enact regulations with the specific intent of reducing U.S. fossil fuel emissions by at least six percent a year through at least 2050;
- Take specific measures with regard to forest land and soil conditions on agricultural lands;
- Engage in detailed annual accounting to inventory all greenhouse gas (GHG) emissions in that jurisdiction and submit that accounting for judicial approval; and
- Set aside an annual budget for these and other projects.

These lawsuits do not stop at judicially requiring executive and legislative branches to take actions that are solely within their discretion. They also enter areas of foreign policy. For example, if the Children's Trust theory prevailed, the United States government could be ordered by a judge to "provide financial and technological assistance to developing countries to support them in reducing their own emissions, at an aggregate rate consistent with a rate of global emissions decline of six percent a year."

The Legal Theory Behind the Children's Trust Cases

The legal theory behind the Children's Trust cases, as alluded to above, is that governments bear a "public trust" responsibility to protect certain communal property under their control. This theory has been used to prevent states from selling public property along waterways to private interests. For example, in *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892), the Supreme Court of the United States indicated that the shore line of Lake Michigan was held in public trust by the State of Michigan and could not be transferred out of public ownership to a private railroad.

This case and similar decisions are discussed in a lengthy academic paper written by Professor Mary Christina Wood of the University of Oregon School of Law. See Mary Wood, *Atmospheric Trust Litigation*, in CLIMATE CHANGE READER (W.H. Rodgers, Jr. and M. Robinson-Dorn, eds., Carolina Academic Press). The paper serves as the intellectual engine for the Children's Trust cases. In spite of a valiant effort by Professor Wood, none of the cases cited support the litigation; courts do not have the institutional authority to order any state or the federal government to set specific goals to reduce GHGs, allocate budgets, and make foreign policy decisions.

In the Lake Michigan case, the state was simply ordered not to sell public waterway land to a private interest, a remedy within the state's authority. The Children's Trust cases, by contrast, seek to use the public trust doctrine here even though no state or national government in the world can control the gases in the atmosphere above them. As pointed out in an editorial in the *Wall Street Journal*, sources throughout the world, such as China, create "ubiquitous carbon mixes that are spread evenly over the globe." *The Children's Crusade*, WALL ST. J., May 19, 2011, at A16.

Even the most extreme use of the public trust doctrine, which occurred in *National Audubon Soc’y v. Superior Court*, 658 P.2d 709 (Cal. 1983), was limited to having a state consider wildlife and other environmental values in making water allocation decisions. This case, often referred to as the “Mono Lake” case, has not been followed in other states, but it still dealt with matters that were clearly under the state’s control and jurisdiction. Most states have limited application of the public trust doctrine to protect navigable waters and submerged lands under those waters from being transferred to private use.

Because the public trust cases are brought under the common law, the doctrine is subject to a court’s decision to change it. But, the chasm between current public trust law as spelled out in actual decisions versus what would be required to allow the Children’s Trust cases to go forward cannot be bridged under any rational use of precedent. *See generally* Victor E. Schwartz, Cary Silverman & Phil Goldberg, *Toward Neutral Principles of Stare Decisis in Tort Law*, 58 S.C. L. REV. 317 (2006).

Overlap with the AEP Climate Change Case

The Supreme Court of the United States, in *AEP v. Connecticut*, 2011 U.S. LEXIS 4565 (U.S. June 20, 2011), recently decided another case seeking to effectively regulate GHG emissions through the common law. In this case, a group of eight state attorneys general attempted to force private and public electric power companies to reduce GHGs by three percent a year over ten years by alleging that their emissions contributed to the “public nuisance” of global climate change. A unanimous 8-0 Court held that the appropriate path for regulating GHG emissions is through the Environmental Protection Agency (EPA) acting pursuant to the Clean Air Act (CAA), and that there is “no room for a parallel track” of federal tort litigation seeking the same relief. *Id.* at *24.

As the *AEP* Court explained, “[T]he Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants.” *Id.* at *22. The Court went on to state that determining the “appropriate amount of regulation” for GHG emissions and balancing “our Nation’s energy needs” is far outside of the judiciary’s expertise. *Id.* at *27. “Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present.” *Id.* at *29.

This ruling should provide another major impediment to the Children’s Trust cases. Nevertheless, the advocates behind these cases will likely seek to distinguish *AEP* on the theory that the attorneys general were acting within the compass of their own jurisdiction and responsibilities, whereas the public trust cases are brought against state officials to force them to act where neither the executive branch nor the legislative branch has chosen to do so. Under any theory, however, the public trust cases represent a broader reach into legislative and executive branch responsibilities than that put forth by the state attorneys general in *AEP*.

If the Children’s Trust Cases Have No Basis in Law, Why Are they Being Brought?

The question of why these lawsuits are being initiated has been raised in many quarters, as millions of taxpayer dollars may be required to defend this litigation. One goal may be to obtain publicity for the view that elected officials should do a better job of protecting the atmosphere. It is true that the amount of news coverage on the filing of the cases was extensive, *see, e.g.*, F. Barringer, *Suit*

Accuses U.S. Government of Failing to Protect Earth for Generations Unborn, N.Y. TIMES, May 5, 2011, at A22, but that publicity faded quickly. Proponents of the litigation may also argue that the expense of bringing these cases is worth it because as the cases mature, more publicity will follow. Publicity alone, though, is not the end-game.

There is the “hope” of success somewhere, somehow. If lawsuits are filed in every state, like the metaphor of the roulette wheel, there may be some modest success, at least initially in a jurisdiction or two. This initial victory will almost certainly be overturned by any law-abiding state or federal Supreme Court. Perhaps, the greater danger is that some governmental entity empathetic with the plaintiffs’ positions will enter into an unnecessary settlement, the effect of which would be adverse to society as a whole. For example, fuel prices, which many consumers already find too expensive, could rise significantly, and these higher costs would disproportionately hurt those who can least afford it.

What Should Be Done?

The state and federal defendants in each of these cases should swiftly file motions to dismiss. Publicity should be given to these rebuttals, and courts should grant them quickly and definitively. The Supreme Court of Montana, for instance, has already taken a clear and concrete first step in this direction by dismissing a petition to invoke the court’s original jurisdiction in the public trust case filed in that state. *See Order, Barhaugh v. State*, No. OP 11-0258 (Mont. June 15, 2011). If there is such a concept as the public trust in Montana or any other jurisdiction, by requiring the public to waste valuable taxpayer resources on this litigation, it is the plaintiffs in this case who violate it. Taxpayer resources must be reserved for more serious judicial matters.

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