Deterring Citizen Suits: Remedies for Unsubstantiated Claims

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Defendants who prevail against inadequately substantiated citizens suits do not commonly seek attorneys fees or costs. Of course, if all parties and counsel strive to litigate responsibly, such claims should be rare.

But the controlling statutes and cases plainly authorize remedies under the appropriate circumstances, and counsel is obliged to consider seeking relief if the record justifies relief.

At times, professionalism and duties owed to courts and clients may converge to require actions that compensate defendants for defending such lawsuits. However exceptional such instances may be, they are worthy of study.
ROWING UPSTREAM: Fee Shifting in Environmental Litigation

• A “heightened standard” is applicable in determining whether a fee award is appropriate when a defendant prevails because of the “public policy importance” for plaintiffs with “legitimate, but not airtight, claims” to not be “discouraged from pursuing such claims.”


• In practice, this standard may be indulged even more liberally when citizens and their organizations are involved.

• Nevertheless, precedent exists to support such awards under the right circumstances.
ROWING UPSTREAM: Fee Shifting in Environmental Litigation

- CAA Section 307(d), 42 U.S.C. § 7604(d), provides for an award of the costs of litigation "to any party, whenever the court determines such award is appropriate."

- *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978), which permits a fee award to prevailing defendants if the plaintiff's claims were "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."

- 28 U.S.C. § 1927, which permits a fee award against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously."
ROWING UPSTREAM – AND WINNING


- Sierra Club sued power plant owner/operator alleging that facility violated Sections 304 and 505 of the Clean Air Act (CAA).

- Suit filed despite TCEQ findings that plant did not violate its Title V permit.

- Suit claimed that plant’s emissions had violated the opacity and particulate matter (PM) limits in the Texas State Implementation Plan ("SIP“), the plant's Title V Permit, and the CAA.
ROWING UPSTREAM – AND WINNING

- Court then held a bench trial on the opacity issues in February 2014 and agreed that no violations occurred.

- Held that CAA and the Title V permit allowed opacity events under certain circumstances and permitted the events that occurred at the plant, including as emissions during startup, shutdown, maintenance, or malfunctions.

- Despite the “heightened standard,” court determined that an award of the costs of litigation, including attorney's fees, was appropriate under CAA Section 307(d), and Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978), and Pennsylvania v. Del. Valley Citizens Council for Clean Air, 478 U.S. 546 (1988) because the plaintiff's claims were "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after they clearly became so."

- Awarded $6,446,019.56 in fees and costs to defendants.
ROWING UPSTREAM –
AND WINNING

• TCEQ determined that no CAA violations occurred and Defendants successfully defended against all of Sierra Club's claims.

• Sierra Club failed to show a prima facie PM violation.

• Sierra Club’s knew plant’s Title V permit allowed certain opacity-producing activities, rendering the opacity claim meritless.

• At trial, Sierra Club failed to prove either causation or injury-in-fact for its sole standing witness or any other person.

• Sierra Club insisted on retaining one defendant, even though it knew it had no role in plant ownership or operations.

• Sierra Club admitted that it failed to analyze or investigate TCEQ's investigation reports before filing suit.

• Sierra Club's suit had caused "immense discovery, expense, and use of judicial resource.”
ROWING UPSTREAM –
AND WINNING

To settle the attorney fee award, Sierra Club agreed:

- To drop all current and currently threatened lawsuits against the defendants.

- To withdraw its pending petition to EPA asking the agency to object to the renewal of several of Luminant's operating permits, to dismiss its suit against EPA alleging failure to timely respond to that petition, and to release all past claims against EFHC occurring prior to and through the effective date of the settlement.

- To withdraw a FOIA request to EPA seeking documents produced by Luminant concerning a New Source Review case in consideration of the company’s agreement to provide documents under seal or protective order.

- Defendants agreed, subject to negotiated limits, not to object to Sierra Club's intervention in the EPA's 2013 suit alleging CAA violations at the facilities.
LESSONS LEARNED?

- Even with “heightened standards” and greater judicial tolerance, citizen suit plaintiffs must still meet the fundamental obligations of all litigants.

- In “high stakes” environmental citizens suits, where defense costs may total millions of dollars, courts may (and should) insist that citizens meet the inquiry, pleading, disclosure, discovery and proof requirements commonly applicable to all parties.

- When established, well-funded, and well-known citizens’ groups are plaintiffs, they may (and should) be expected to conform to the identical standards of practice required of defendants.

- Although these developments may not yet be a “trend,” it’s reasonable to anticipate stricter scrutiny of claims, not only by opponents, but also by the courts.

- Sometimes “winning” requires something different than absolute victory – such as trading an uncertain judgment for a dependably advantageous settlement.
COMMON LAW CITIZEN’S SUITS: PUBLIC NUISANCE CASES

- Public nuisance claims under state common law are being used to redress a variety of pollution issues.

- Some federal and state courts have approved their use – others have not. Most cases have involved whether the CAA preempts state nuisance suits.

- The Supreme Court has denied certiorari in two cases, but the controversy isn’t over.

- A controversy in Kentucky state and federal courts may reinforce an existing circuit split to justify Supreme Court review.

- Whatever happens, citizens, industries and their counsel should be aware of the opportunities and risks.
COMMON LAW CITIZEN’S SUITS: PUBLIC NUISANCE CASES

- Recent references on CAA preemption of public nuisance litigation under state common law:


QUESTIONS?

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