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Remedies in American Courts

*by Peter Herzberg**

There is always an advantage and a disadvantage to speaking toward the end of the program. The disadvantage is that everything you wanted to say has been said already. The advantage is that you can add some perspective to what went on before you.

I'd like to tell you a story that might be reflective of what we have seen here today, when economists, scientists and lawyers are gathered together.

A company president who wanted to hire an assistant put an ad in the paper, to which people responded. The first person the president interviewed was an economist. He asked the economist, "How much is two and two?"

The economist answered, "Before taxes or after taxes?"

The company president threw him out of the office.

The second person who came into the company president's office was a scientist. He asked the scientist, "How much is two and two?"

The scientist said, "How much is my margin of error?"

The company president threw him out of the office.

The third person who walked in was a lawyer. He asked the lawyer, "How much is two and two?"

The lawyer got a little nervous and looked uncomfortable. Seeing that the door to the company president's office was open, he went to the door, shut the door, went back to his seat and leaned over the desk to the company president and said, "How much do you want it to be?" in answering the problems posed in the program.

That's how I feel about the way things are today. The various interest groups and the lawyers who have represented their interests have said, "How much do you want it to be?"

Before I begin my address, I'd like to make a disclaimer. The opinions expressed in my address are my personal views. They do not in any way reflect the views of the Attorney General's Office in New Jersey or the Department of Environmental Protection in New Jersey. So, with that in mind, let me begin.

The view of the landscape when flying into Cleveland is one of the few sights in the world that can give a superiority complex to a person from Trenton, New Jersey. In Cleveland, factory stacks belch clouds of smoke and emit acrid smells. In New Jersey, we have only the acrid

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smells. But, slander aside, due to the long-range transport of pollution by meteorological conditions, the view flying into Cleveland vividly brings home the point that Ohio's air pollution problems are also New Jersey's air pollution problems; Ohio's sulphuric dioxide is New Jersey's sulphuric hydroxide.

The question is how to equitably apportion responsibility for solving the pollution problems caused by the long-range transport of pollutants. One way to answer this question is through litigation, another is through legislation. My topic today is litigation theories which may be used to solve problems caused by the long-range transport of pollutants. My conclusion is that presently available litigation theories are not an effective mechanism for solving the long-range transport problem, and that little hope should be placed on such judicially imposed solutions. Rather, I find that legislation provides the only effective means for solving the long-range transport problem. Legislative will, not judicial mandate, is what must be pursued.

The essence of the long-range transport of pollutants is that emissions from a source or group of sources do not have an immediate impact within the state in which the pollutants are emitted, but rather impact downwind in areas under the jurisdiction of other states. Thus, the obvious target of any litigation strategy is to compel emitting sources in the upwind states to control their pollution from traveling downwind. One such potential litigation theory is the common law of interstate nuisance.

The common law in the U.S. legal system is a set of general principles, which evolved in the courts over the centuries, for finding appropriate resolutions to situations that bring people in our society into conflict.

Not surprisingly, a body of common law has developed regarding the regulation of nuisances. For instance, courts have been called upon to intervene and regulate situations such as an explosion set on one property which throws rocks onto other properties or where odors from a slaughterhouse invade a neighboring residential area.

However, it was not until 1972, and it took no less an environmentalist than Justice Douglas, to confirm the existence of a Federal common law of interstate nuisance in the United States. This occurred in the case of *Illinois v. Milwaukee*, in which the State of Illinois sought to restrict Milwaukee's dumping of raw sewage into Lake Michigan. Wishing to restrict such sewage dumping, but having no Federal legislation on which to rationalize its decision, the Supreme Court confirmed the right of a State to sue a polluting source in another State on the theory of the common law of interstate nuisance.

While the availability of a common law theory is present to abate an interstate nuisance, substantive problems exist which frequently render the application of the common law theory virtually useless. For instance, a State must show that specific actions of an identified polluter are causing an actual injury. In the early case of *Missouri v. Illinois* (1906), which typifies the problems of isolating causation, the Supreme Court failed to

find fault, thus barring any remedy. In that case, Missouri tried to prove that certain pollution in the Mississippi River around St. Louis was caused by the up-river City of Chicago. Missouri, however, could not link specific damages to particular acts of pollution by Chicago, so no recovery or injunctive relief was granted by the Court.

This failure to establish a link between a specific polluter's act and a pollution injury suffered is a basic problem in the common law litigation of interstate air pollution. Mathematical models are often used to show a cause and effect relationship because the United States has no systematic or consistent way of monitoring the changes that occur in the chemistry of precipitation. Unfortunately, these models do not produce accurate results for isolating a particular source which is causing a downwind problem.

Moreover, the Federal common law of interstate nuisance can only be used to remedy an existing air pollution problem. It cannot be easily used to prevent a pollution problem from occurring.

Also, the common law remedy can only be used by States to abate the interstate nuisance. Individual citizens, even those whose property is being damaged, cannot sue under this particular theory.

Due to this inability to give definite relief to those injured by interstate pollution, Congress decided to pass legislation to remedy the inadequacies of the common law in this area. The result was the Clean Air Act, which became law in 1970 and which was significantly amended in 1977. From this Federal legislation there are several other potential litigation theories to control interstate pollution.

Before discussing these litigation theories, an overview of the Clean Air Act is necessary. While the Act is somewhat imposing, the basic structure is relatively simple, as various speakers before me have pointed out.

In essence, the Clean Air Act requires a minimum Federal level of control technology on all sources, as well as a pre-construction permitting review program. The Act otherwise grants States the discretion to develop necessary additional standards in the State Implementation Plan (SIP) process beyond the Federal technology standards, as long as the additional provisions of the SIP allow the State to meet National Ambient Air Quality Standards and applicable Prevention of Significant Deterioration increments. This scheme obviously corrects many of the weaknesses of the common law system. First, it provides a preventive approach, under the permitting review process, so that pollution injuries are less likely to occur. Also, no causation between an injury and an act need be shown because a SIP sets pollution emission levels on the basis of the technological standards as well as standards set to meet National Ambient Air Quality Standards or applicable Prevention of Significant Deterioration increments. Furthermore, the Clean Air Act provides for citizen suits so that individuals may sue for emission violations.

This scheme does have its own weaknesses, however, which prevent it from adequately handling the interstate abatement problem. First, the

SIP system will only control pollution in the downwind State; for instance, an upwind State will not need to install control equipment meeting stricter standards than the technology standards required by the Clean Air Act. The upwind State is likely to meet National Ambient Air Quality Standards and the applicable PSD increment, even though its emissions interfere with National Ambient Air Quality Standards and the attainment of PSD increments in the downwind State. Therefore, downwind States may bear an undue burden in pollution control.

This outcome is further encouraged by the fact that the upwind States' politicians are not accountable to the citizens of the State where the impact of interstate pollution occurs.

The minimal power accorded the Federal Government in this scheme, as opposed to the significant discretion given to the States, leaves the Federal Government without the ability to force a State Implementation Plan to require stricter standards than the National Ambient Air Quality Standards, which would protect citizens of another State from interstate pollution. In fact, present EPA regulations do not require upwind States to control their contributions to the pollution of other States, but instead put the whole burden of control on the receptor State.

Also, this scheme really controls only the new sources, not previously uncontrolled sources. Because estimates place the blame for the acid precipitation problem on existing sources, the existing Clean Air Act is generally ineffective. As a footnote, the EPA estimates that by the year 2000, 70 percent of the sulfur dioxide being emitted by power plants in the United States will come from old plants that were built prior to 1970, despite the projected doubling in the usage of coal in the United States.

Realizing that the basic Clean Air Act approach would not remedy existing interstate pollution, Congress, while amending the Clean Air Act in 1977, passed two provisions to deal directly with the interstate pollution problem. One change was Section 126 about which Paul Stolpman has already spoken. I agree with him that this section is basically ineffective in dealing with the pollution problem.

The other new provision is Section 110(A)(2)(E) which directly attacks the interstate pollution problem. That provision requires that a State Implementation Plan must prohibit any stationary source within the State from emitting any air pollutant in amounts which will prevent attainment or maintenance by any other State of any national, primary or secondary ambient air quality standard; or, interfere with measurements required to be included in the applicable implementation plans for any other State. This provision, it seems to me, can be used to deal directly with the interstate pollution issue. The EPA, however, has not done so. To my knowledge, in the implementation plans which it has approved it has not even considered the interstate impacts of the sources from one State on the pollution problems of another State. For this reason, many suits have been brought against the EPA to try to enforce the provisions of Section 110(A)(2)(E). No decisions on this issue have been reported as

yet.

One such case against the EPA occurred in West Virginia where an SIP revision was granted to two of, I believe, that State's power plants. The increase in emissions, as well as the existing emissions from these plants, from what I understand, severely impact upon Pennsylvania. A citizens' group originally brought suit in the Third Circuit. I think that the case has been in the courts now for at least two years.

The EPA submitted to the Third Circuit that it really hadn't considered the interstate problem. It requested additional time so that it could develop a model to justify what it did.

The Third Circuit gave the EPA that time. The EPA returned with a proposal or mathematical model which Pennsylvania claims is totally inadequate. Pennsylvania is now challenging that model. To my knowledge there is no decision at this point, but I suspect that a decision will be reached within the year.

Another Section 110(A)(2)(E) case, in which I was involved, dealt with two power plants here in Cleveland which are owned by the Cleveland Electric Illuminating Company. One plant is in Avon Lake and the other plant is in Eastlake. The Sierra Club Legal Defense Fund and the Environmental Defense Fund saw a trend of secret relaxations in the country in which utilities that had previously avoided complying with the Clean Air Act were not only polluting at already high levels, but furthermore were asking to increase their pollution levels by putting out higher sulfur dioxide emissions.

At the time that the Sierra Club and the Environmental Defense Fund got involved in the project, I believe there were 18 such relaxations contemplated in the country. We recognized that Section 110(A)(2)(E) was not going to be dealt with by the EPA. Accordingly, we attended a hearing here in Cleveland and put on record our desire that the EPA not ignore this provision and moved to force the Agency to consider Section 110(A)(2)(E). The EPA arrived at a decision which in essence said, "Well, you might be right. There might be interstate pollution. So, we will change our tall stack policy."

The EPA did significantly change its tall stack policy from what it had been before, but it totally avoided the problem of Section 110(A)(2)(E). I don't believe it even mentioned Section 110(A)(2)(E) in its decision. Essentially, it said that CEI could return in a year and show that it was not causing any interstate pollution, or that its tall stacks are justified on the basis of monitoring that was going to be done, although I don't believe that monitoring was included. I don't know where that case stands right now. I understand that the year is almost up and that CEI should be submitting a new proposal. I don't really have much hope that Section 110(A)(2)(E) will be confronted by the EPA, especially on the basis of what Mr. Stolpman said earlier, and because I don't think that the new administration has the political will to become involved in a controversy of this nature.

I should add that the States of New York and Pennsylvania along with several other Eastern States including the State of New Jersey have also complained about the CEI/SIP relaxations, but where they are going to go, I don't know.

In conclusion, let me just say that litigation under the common law of nuisance and the Clean Air Act can, at best, be a holding action against further pollution; and, at worst, much ado about nothing.

One further fact cannot be omitted. All of these litigation theories beg the essential question raised by interstate pollution which is: once the long-range transport of pollutants is taken into account by permitting that of agencies and industry, how does one allocate the burden for ameliorating the problem? And, which facility should bear the burden of additional controls? I believe that only a new legislative or public policy strategy can provide the answers to such questions.

Specifically, I feel that a regional approach needs to be taken to control certain pollutants. Pollutants such as sulfur dioxide and ozone need to be regulated under Regional Implementation Plans (RIPS), not State Implementation Plans (SIPS). Moreover, concerns over specific technological approaches such as scrubbing or coal washing in any RIP should be abandoned. Instead, a loading or atmospheric tonnage limit should be set, and all sources emitting the pollutant should be required to meet that standard. Reductions in emissions could be accomplished by forming a public corporation which would determine those sources for which an emissions reduction would be at the least marginal cost, and would finance these pollution reductions through revenues obtained by taxing all regional sources contributing to the pollution problem.

The Clean Air Act is currently under consideration for amendment in Congress. Now is the time to implement any legislative changes. While the general conservative swing in the United States is toward less Federal intervention in economic decisions, the problems of the interstate transport of pollutants is a particular problem requiring a federally imposed solution. It is now time to act. And, I think that Congress would appreciate any of your contributions to the debate since this problem is really an intractable problem for all of the States as well as Canada. Thank you.