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PUBLIC NUISANCE

While public nuisance suits have fallen into disuse in recent years, a January 2009 federal district court ruling in favor of the state of North Carolina in a case involving emissions from coal-fired plants may signal a new era in public nuisance suits against corporate defendants, attorney R. Trent Taylor says in this Analysis & Perspective article.

Taylor discusses the implications of the ruling in *North Carolina v. TVA*, as well as other recent public nuisance rulings, concluding that U.S. corporations should be prepared for a flood of litigation.

State of North Carolina v. TVA—A New Era in Public Nuisance Law?

By R. TRENT TAYLOR

One of the most significant public nuisance victories ever by a plaintiff was recently achieved with a federal district court issuing a far-ranging opinion that significantly expands the doctrine of public nuisance.

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sance. On January 13, 2009, in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*,—F. Supp.2d—Civil No. 1:06CV20, 2009 WL 77998 (W.D. N.C. Jan. 13, 2009) (hereafter “TVA decision”), U.S. District Judge Lacy Thornburg of North Carolina declared that air emissions from three coal-fired plants located in eastern Tennessee and one plant located in Alabama, all operated by the Tennessee Valley Authority, are a public nuisance contributing to “significant hurt, inconvenience [and] damage” in North Carolina.¹

As a remedy, the court ordered that the TVA proceed with plans to install enhanced pollution controls in these plants and reduce emission of certain pollutants by specific time limits.² The court estimated that com-

¹ 2009 WL 77998, *15.

² *Id.*, at *17 - *19.

plying with its orders would cost, at a minimum, approximately \$1 billion.³ The court found against the TVA despite its compliance with all applicable federal and state regulations.

Yet few noticed this important decision—it caused barely a ripple in mainstream legal circles. This may be because while public nuisance as recently as several years ago was seen as the “hot” tort,⁴ some legal commentators have since written it off as a serious legal doctrine due to a string of victories for defendants in the most high-profile public nuisance litigation to date—claims against the past manufacturers of lead paint and pigment.⁵ However, it would be a mistake for practitioners to ignore this decision. Though it may not single-handedly rehabilitate public nuisance as a tort theory of consequence in the minds of the legal literati, the *TVA* decision will have a number of far-reaching implications, especially when other recent decisions on public nuisance are taken into account.⁶ Indeed, it may herald

³ *Id.*, at *12.

⁴ See, e.g., Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (Spring 2003) (“[P]ublic nuisance has emerged during the past several years as a conspicuous weapon—albeit with inconsistent results—in the arsenal of states and municipalities, as well as personal injury plaintiffs’ lawyers.”); Philip E. Karmel and Peter R. Paden, *Public Nuisance Claims in Product Liability Cases*, 236 New York Law Journal 2 (Sept. 28, 2006) (noting that public nuisance may be “a new and potentially broad vista of legal exposure for the manufacturing industry”); Scott A. Smith, *Turning Lead Into Asbestos and Tobacco: Litigation Alchemy Gone Wrong*, 71 Def. Couns. J. 119, 120 (April 2004) (“More than one observer has referred to [public nuisance] litigation against former manufacturers of lead pigment and lead paint as ‘the next tobacco’ or ‘the next asbestos.’”); Anna Stolley Persky, *Primed for Lead Paint Litigation*, ABA Journal (April 2008) available at http://www.abajournal.com/magazine/primed_for_lead_paint_litigation (“The Rhode Island case involves taking [public nuisance] and morphing it into a super tort that can overcome well-developed product liability law,” and “If the Rhode Island case succeeds, . . . [i]t could open the door for a new generation of mass tort suits.”) (both quoting Phil Goldberg).

⁵ See, e.g., Mark A. Hoffman, *R.I. High Court Rejects Lead Paint Cleanup Suit*, 42:27 Business Insurance 3 (July 7, 2008) (noting that the Rhode Island Supreme Court’s reversal of jury verdict against lead paint manufacturers “may doom future applications of the public nuisance approach in such cases”); *id.* (“The ruling by the Rhode Island Supreme Court puts an important nail in the coffin of the recent efforts to expand public nuisance theory into a supertort that can overcome all previously known bounds of civil liability.”); cf. Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. Rev. 1827, 1829 n. 10 (August 2008) (“[T]he prevailing scholarly view remains that ‘nuisance litigation is ill-suited to other than small-scale, incidental, localized, scientifically uncomplicated pollution problems.’”) (quoting Jesse Dukeminier, James E. Krier, Gregory S. Alexander & Michael H. Schill, *Property* 665 (6th ed. 2006)).

⁶ Though the *TVA* decision is the subject of this article, it would be remiss not to note the stealth return of public nuisance in other cases as well. In the first month of 2009 alone, there were two other significant decisions supporting the application of public nuisance. See, e.g., *Birke v. Oakwood Worldwide*, No. B203093, 2009 WL 58105 (Cal. App. Jan. 12, 2009) (ruling that an asthmatic 7-year-old’s suit against the apartment complex where she lived alleging that secondhand cigarette smoke in outdoor common areas is a public and private nuisance can go forward); *Smith & Wesson Corp. v. City of Gary*, No. 45A05-0612-CV-754 (Ind.) (the Indiana Supreme

in a new era of public nuisance suits against corporate defendants, both seeking to redress environmental harms as well as a renewed effort against product manufacturers. Each of these major implications will be discussed in turn below.

A. Public Nuisance

Some background on public nuisance is appropriate to begin the discussion. Public nuisance is one of the oldest and most elemental of torts, dating back over 900 years.⁷ For much of its history, it has been looked down upon, thought of as simple disputes among neighboring landowners or an antidote to various quasi-criminal offenses⁸—the province of pig farms, concrete plants, prostitution, and drug-dealing. It has been variously described as the most “impenetrable jungle in the entire law,”⁹ a “mystery,”¹⁰ “a legal garbage can,”¹¹ a “quagmire,”¹² “incapable of any exact or comprehensive definition,”¹³ and without “moral or deductive principle.”¹⁴ Indeed, courts cannot even agree as to what the most basic elements of nuisance are. Some courts believe current “control” over the nuisance is required before a defendant can be sued,¹⁵ others believe that no such control is required.¹⁶

In the past decade though, it has become one of the central battlefields in tort law. Public nuisance has become a cause of action particularly attractive to plaintiffs because “courts may apply public nuisance even to lawful, non-negligent activity if the defendant’s conduct is otherwise ‘unreasonable,’ enabling public nuisance claims to reach conduct that negligence and products liability claims cannot.”¹⁷

As a result, numerous states, counties, and municipalities, in association with the plaintiff’s bar, have filed nuisance suits against various corporate defendants (including product manufacturers), seeking damages in

Court declined review in a suit filed by the City of Gary against various gun manufacturers alleging that their distribution practices created a public nuisance, upholding an appellate court ruling that it can proceed to trial).

⁷ C.H.S. Fifoot, *History and Sources of the Common Law: Tort and Contract* 3-5 (1949) (noting that the concept of nuisance first arose in twelfth century England).

⁸ Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 964 (Winter 2007).

⁹ *City of Chicago v. American Cyanamid Co.*, 355 Ill. App. 3d 209, 212 823 N.E.2d 126 (2005).

¹⁰ Warren A. Seavey, *Nuisance, Contributory Negligence and Other Mysteries*, 65 Harv. L. Rev. 984, 984 (1952).

¹¹ William Prosser, *Nuisance Without Fault*, 20 Tex. L. Rev. 399, 410 (1942).

¹² John E. Bryson & Angus MacBeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 Ecology L.Q. 241, 241 (1972).

¹³ *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 364-65, 821 N.E.2d 1099 (2004).

¹⁴ Richard A. Epstein, *A Conceptual Approach to Zoning: What’s Wrong With Euclid?*, 5 N.Y.U. Envtl L.J. 277, 282 (1996).

¹⁵ See *State of Rhode Island v. Lead Industries Ass’n Inc.*, 951 A.2d 428 (R.I. July 1, 2008).

¹⁶ See *County of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 306 (2006) (“[L]iability for nuisance does not hinge on whether the defendant owns, possesses or controls the property.”).

¹⁷ Lisa M. Ivey, *Losing the Battles, Winning the War: Public Nuisance As A Theory of Gun Manufacturer Liability in Tort*, 34 Cumb. L. Rev. 231, 237-38 (2003-04).

the millions, and sometimes billions, of dollars.¹⁸ Public nuisance was initially tested as a panacea by which to hold manufacturers of asbestos and tobacco liable for their health effects. Though largely unsuccessful in those areas, plaintiffs were more successful in two other areas: handguns and lead paint. Numerous trial and appellate courts permitted public nuisance suits to go forward against gun manufacturers. Only the passage of comprehensive legislation granting immunity to the gun manufacturers prevented a tsunami of litigation.¹⁹

Plaintiffs' experience with lead paint has been mixed. Though paint manufacturers have largely been able to prevent the plaintiffs' bar from gaining much traction, the plaintiffs' bar gained a monumental victory when it held former lead paint manufacturers in Rhode Island liable for the cleanup of properties containing lead paint, estimated by some to be as much as \$2.4 billion in damages.²⁰ The Rhode Island Supreme Court recently reversed the verdict and dismissed the suit, holding that the suit should have never been permitted to move forward.²¹ It was this decision, coupled with similar decisions from the New Jersey Supreme Court²² and the Missouri Supreme Court,²³ that led to a number of legal commentators declaring that the threat to corporate defendants from large-scale public nuisance suits had passed.²⁴ A couple of other similar suits currently continue across the country.²⁵

A number of new targets for public nuisance litigation have emerged as well. In recent years, plaintiffs have sued, with varying degrees of success, power plants,²⁶ auto manufacturers,²⁷ poultry farmers,²⁸ beer

manufacturers,²⁹ pharmaceutical manufacturers,³⁰ oil companies,³¹ subprime lenders and other financial institutions,³² coal companies,³³ food manufacturers,³⁴ electric utilities,³⁵ gasoline companies,³⁶ and manufacturers of various chemicals (PCBs,³⁷ MTBE,³⁸ and dioxin³⁹). The sheer breadth of these targets suggests that plaintiffs are casting a wide net in attempting to find the next viable target for public nuisance suits. With the TVA decision, the plaintiffs' bar may have a victory that opens up its options in any number of ways, as detailed below.

B. Decision

On January 13, 2009, U.S. District Judge Lacy Thornburg of North Carolina ruled substantially in favor of the State of North Carolina in a public nuisance case filed against the TVA. The court found that the emissions from four of TVA's plants (three in eastern Tennessee and one in Alabama) had created a public nuisance in North Carolina.⁴⁰ It ordered TVA to clean up these four coal-fired plants and meet specific time limits for pollution reduction.⁴¹ The court also ordered the agency to clean up faster and reduce pollution more than is currently required under federal law.⁴²

The State of North Carolina sought injunctive relief to force TVA to employ tighter pollution controls to reduce harmful air emissions from its coal-fired power plants in states other than North Carolina.⁴³ It contended that airborne particles from TVA's plants entered North Carolina in unreasonable amounts, and "threaten[ed] the health of millions of people, the financial viability of an entire region, and the beauty and purity of a vast natural ecosystem."⁴⁴ It further contended that this "air pollution cost[] the state government and

¹⁸ See *State of Rhode Island v. Lead Indus. Ass'n Inc.*, No. 99-5226, 2001 R.I. Super. LEXIS 37 (R.I. Super Ct. Apr. 2, 2001); *Santa Clara v. Lead Indus. Ass'n, Inc.*, No. CV788657, Super. Ct., Santa Clara, California; *In re Lead Paint Litig.*, Case Code 702-MT-Civil Action, N.J. Super. Ct. Law Div.; *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002).

¹⁹ See Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 (2005).

²⁰ See Peter B. Lord, *Lead Paint Cleanup: A \$2.4-Billion Solution*, The Providence Journal, September 15, 2007, available at http://www.projo.com/news/content/Lead_Cleanup_09-15-07_CB738JA.3274607.html.

²¹ See *State of Rhode Island v. Lead Industries Ass'n Inc.*, 951 A.2d 428 (R.I. July 1, 2008).

²² *In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007).

²³ *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007).

²⁴ See *supra* note 5.

²⁵ See *Santa Clara v. Lead Indus. Ass'n Inc.*, No. CV788657, Super. Ct., Santa Clara, California; <http://www.legalnewsline.com/news/193286-dann-drawing-criticism-for-lead-paint-suit>.

²⁶ See Section C.2., *infra*.

²⁷ See *State of California v. General Motors Corp. et al.*, No. C06-05755 MJJ (N.D. Cal.), presently pending on appeal before the United States Court of Appeals for the Ninth Circuit, No. 07-16908; see also http://cdn.sfgate.com/chronicle/acrobat/2007/09/18/show_case_doc.pdf.

²⁸ See *City of Tulsa v. Tyson Foods Inc.*, Case No. 01CV0900B(X) (N.D. Okla.) (nuisance and trespass action); *State of Oklahoma v. Tyson Foods Inc.*, Case No. 05CV0329JOE-SAJ (N.D. Okla.) (nuisance and trespass action; motion to dismiss denied).

²⁹ See *Massachusetts Bay Ins. Co. v. Boston Beer Co.*, 2006 WL 3721237 (Mass. Super. 2006); *Alston v. Advanced Brands & Importing Co.*, 2006 WL 1374514 (E.D. Mich. 2006).

³⁰ See *Ashley County v. Pfizer Inc.*, No. 08-1491 (8th Cir. January 5, 2009) (affirming dismissal of suit against FDA-approved OTC cold remedies).

³¹ See *Native Village of Kivalina v. Exxon Mobil Corp. et al.*, Case No. C 08-01138 SBA (N.D. Cal.).

³² See *City of Cleveland v. Deutsche Bank Trust Co.*, Case No. CV 08 646970 (Court of Common Pleas, Cuyahoga County, Ohio).

³³ See Section C.2., *infra*.

³⁴ See *In re Genetically Modified Rice Litigation*, 2007 WL 3027581 (E.D. Mo. 2007).

³⁵ See Section C.2., *infra*.

³⁶ See *Corvello v. New England Gas Co.*, 460 F. Supp. 2d 314 (D. R.I. 2006) (allowing public nuisance suit against gasoline company to proceed; currently still active).

³⁷ See *Paulsen v. Monsanto*, Cause No. DV-2004-08 (10th Judicial District Ct., Fergus County, Mt.) (denying summary judgment for defendant and certifying class in public nuisance suit against PCB manufacturer).

³⁸ See *In re Methyl Tertiary Butyl Ether Products Liability Litig.*, 2008 WL 2047611 (S.D.N.Y. 2008) (permitting public nuisance, private nuisance, and trespass claims to go forward against makers of MTBE).

³⁹ See *Henry v. Dow Chemical Co.*, 2008 WL 207937 (Mich. App.) (certifying class action for public nuisance claim related to dioxin).

⁴⁰ TVA, 2009 WL 77998, *15-*16.

⁴¹ *Id.*, at *17-*18.

⁴² *Id.*

⁴³ *Id.*, at *1.

⁴⁴ *Id.*

its citizens billions of dollars every year in health care expenses, sick days, and lost tourism revenue[.]”⁴⁵

While the TVA did not “deny that some of its emissions enter[ed] North Carolina,” it disputed “the amount of [the] emissions and suggest[ed] that the adverse environmental effects experienced by North Carolina [were] largely attributable to [the] state’s own electric utilities and other industrial sources, or to private sources such as automobile and truck emissions.”⁴⁶ In addition, TVA argued that it was acting reasonably because millions of customers needed and relied on the energy produced by the TVA.⁴⁷ Finally, the TVA “point[ed] to its [] efforts to reduce its plants’ emissions, and argued that the “TVA emissions which do enter North Carolina do not do so in unreasonable amounts.”⁴⁸

The district court made a number of detailed findings about the deleterious effects of the emissions at issue. In particular, the court found that the TVA contributed significantly to the increase of two secondary pollutants in North Carolina—PM_{2.5} and ozone.⁴⁹ The court also found that these pollutants negatively affected the State of North Carolina in a number of ways:

(1) significant negative impacts on human health, even when the exposure occurs at levels at or below the applicable standard, including premature mortality and adverse cardiopulmonary effects, including increased or exacerbated asthma and chronic bronchitis;⁵⁰

(2) numerous social and economic harms to North Carolinians, including lost school and work days, increased pressure on the health industry due to extra emergency room and doctor visits, and the general loss of well-being that results from chronic health problems;⁵¹

(3) harm to the environment including killing local vegetation, removing nutrients necessary for healthy forest growth, and degrading water quality;⁵² and

(4) significant effects on visibility due to creating haze in many pristine areas of wilderness in western North Carolina.⁵³

As a result of this, the court found that untreated air pollution from the aforementioned TVA plants “unreasonably interferes with the rights of North Carolina citizens.”⁵⁴ Furthermore, TVA’s conduct in failing to install readily available pollution controls constitutes “a course of conduct . . . that, in its natural and foreseeable consequences, [is] proximately caus[ing] hurt, inconvenience, [and] damage.”⁵⁵ In addition, “TVA’s failure to speedily install readily available pollution control technology is not, and has not been, reasonable conduct under the circumstances.”⁵⁶ The court did note that TVA’s generation of power at low cost has a high social utility,

but found that “[n]onetheless, the vast extent of the harms caused in North Carolina by the secondary pollutants emitted by these plants outweighs any utility that may exist from leaving their pollution untreated.”⁵⁷

Of course, the TVA is likely to appeal the district court’s decision to the Fourth Circuit Court of Appeals. However, the Fourth Circuit has already affirmed in an interlocutory appeal the district court’s rejection of TVA’s argument that the case should be barred by the discretionary function doctrine and the Supremacy Clause, and permitted the case to proceed to trial.⁵⁸ Thus, prevailing on appeal will likely be an uphill battle for the TVA.

C. Significance of *State of North Carolina v. TVA*

The *State of North Carolina v. TVA* decision is important for five reasons.

1. Major Weapon for Environmentalists

First, the decision cements public nuisance’s status as a major weapon in the arsenal of environmentalists. Environmental groups, governmental entities, and others seeking redress for alleged environmental harms are familiar with public nuisance, and in recent years, it has become a page in their standard litigation play-book.⁵⁹ It has been used with some success against corporate defendants who have allegedly polluted the environment,⁶⁰ but since public nuisance is usually only one cause of action among many in such litigation, it has been difficult to gauge how effective public nuisance is as a standalone tort.

The success of public nuisance in the *State of North Carolina v. TVA* decision lays that question to rest—public nuisance by itself can be extremely effective as a means to redress alleged environmental harms. The re-

⁵⁷ *Id.*

⁵⁸ See *State of North Carolina v. Tennessee Valley Authority*, 515 F.3d 344 (4th Cir. 2008).

⁵⁹ See Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 Environmental Affairs 1 (2007) (noting that an alternative litigation response when federal avenues prove ineffective is reliance on state common law doctrines such as public nuisance); *Cox v. Dallas*, 256 F.3d 281, 291 (5th Cir. 2001) (“[t]he deepest doctrinal roots of modern environmental law are found in principles of nuisance,”) (quoting William H. Rodgers Jr., *Handbook on Environmental Law* 2.1 (1977)); Joseph F. Falcone III and Daniel Utain, *You Can Teach An Old Dog New Tricks: The Application of Common Law in Present-Day Environmental Disputes*, 11 Villanova Env’t L.J. 59, 65-69 (2000) (advocating for public nuisance as a way to battle environmental injustices); Tara Ulezalka, *Race and Waste: The Quest for Environmental Justice*, 26 Temple J. Sci. Tech. & Env. L. 51, 67-68 (Spring 2007) (similar); Daniel Riesel et al., *Determining Liability and Allocation of Response Costs in Hazardous Materials Litigation*, 92 American Law Institute-American Bar Association Continuing Legal Education Environmental Litigation Symposium 737, 813-14 (June 27-30, 2007) (similar).

⁶⁰ See, e.g., *City of Santa Monica v. Shell Oil Co. et al.*, Case No. 01CC04331, 2004 WL 332930 (Cal. Superior) (in 2003, the City of Santa Monica settled for \$312 million against various corporate defendants including Shell Oil Co. for exposure to MTBE); *State of California v. Sierra Pacific Industries Inc.*, Case No. SCV 17449, 2007 WL 2316058 (Cal. Superior) (in 2007, Sierra Pacific Industries Inc. settled with the State of California in a public nuisance suit for \$8.485 million related to the discharge of excessive nitrous oxide and carbon dioxide).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*, at *11.

⁵⁰ *Id.*, at *7-*8.

⁵¹ *Id.*, at *8.

⁵² *Id.*, at *9.

⁵³ *Id.*, at *9-*10.

⁵⁴ *Id.*, at *16.

⁵⁵ *Id.*, at *15.

⁵⁶ *Id.*, at *16.

course sought by North Carolina in the TVA case was not minor; North Carolina sought to force the TVA to expend between \$3 and \$5 billion to make the changes it wanted.⁶¹ Though the changes ordered by the court will end up costing a “mere” \$1 billion or so,⁶² that still constitutes one of the more successful results for an environmental plaintiff in recent years.

Perhaps even more importantly, this case demonstrates that it may be worthwhile for those seeking to redress environmental harms to bypass the traditional administrative procedures, such as going through the Environmental Protection Agency (EPA), and instead commence a public nuisance suit. As the district court in this case noted, “North Carolina began its pursuit of relief by utilizing the normal administrative channels established by the Clean Air Act.”⁶³ The court further noted that “[a]lthough the administrative route has certainly borne some interesting fruit, it has not, thus far, resulted in the reduction of emissions from upwind, out-of-state sources that North Carolina is ultimately seeking.”⁶⁴ In essence, the court went out of its way to note the failure of the administrative channel route and to cast itself as the only hope to make things right. The State of North Carolina was able to accomplish its goal of reducing emissions arguably a lot quicker and more efficiently through its public nuisance suit than going through administrative channels. It is likely others seeking reduction of emissions will seek to follow this model as well. This could result in a flood of new public nuisance suits.

In addition, and just as importantly, the TVA decision suggests courts need not take into account federal and state regulations when deciding whether certain emissions are a public nuisance. Environmentalists can seek a reduction of emissions regardless of whether a defendant is complying with federal and state regulations. The applicable standard is whether the emissions are “unreasonable”—a notoriously subjective word. All an environmental plaintiff needs to do is convince one federal judge (or jury as the case may be) that emissions should be lower—a much easier and less expensive task than convincing numerous legislators and administrators. At least one commentator has called this trend “regulation through litigation,”⁶⁵ and it is an apt description of what a public nuisance suit can become under certain circumstances.

Finally, state and local governments have long wrestled with the problem of pollution that arises in one state or locality but adversely affects another. The logical answer has been to ask the EPA to enforce its standards, but in recent years, state and local governments have become frustrated by what they perceive as a lack of interest in enforcement by the EPA. In explaining why he filed the TVA case, North Carolina’s attorney general “called the public lawsuit a ‘last resort’ arising from the [Bush] administration’s weakening of long-standing regulatory tools that had been used to make

individual plants clean up their emissions.”⁶⁶ State and local governments have learned that it is not enough merely to enact their own tough emissions standards. They are at the mercy of their neighboring governments, and if their neighbors do not also adopt strict standards, then they may have to deal with pollution even if it has been cleaned up within their own jurisdictions.

The TVA decision shows that one way to deal with this problem of extraterritorial pollution is with a public nuisance suit.⁶⁷ This could lead to a large uptick of public nuisance suits by states, cities, counties, and municipalities suing to clean up pollution that emanates from neighboring jurisdictions. In fact, the attorneys general of 19 states and the District of Columbia filed an amicus brief in support of North Carolina’s right to pursue a public nuisance suit against the TVA in the previously mentioned interlocutory appeal to the Fourth Circuit last year. Clearly, public nuisance is a weapon that many governmental entities want in their arsenal to combat pollution.

2. Coal-Fired Power Plants as Target

Over the past few years, it has not been uncommon to see coal-fired power plants sued for creating a public nuisance based on their emissions or generation of waste.⁶⁸ This is because coal-fired power plants are the largest domestic source of the greenhouse gas carbon dioxide, emitting 2 billion tons annually, about a third of the country’s total.⁶⁹ Coal-fired power plants also emit a number of chemicals that plaintiffs claim are toxic. However, the TVA decision is likely to significantly increase the number of public nuisance suits targeting coal-fired power plants. In fact, it is not inconceivable to expect coal-fired power plants to become the chief target in future public nuisance suits in much the same way handguns and lead paint have in the past. This is for three reasons.

⁶⁶ New York Times Editorial, *New Strategy on Clean Air*, (March 4, 2006).

⁶⁷ Notably, this is not a new solution; over 100 years ago, the United States Supreme Court in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), in an exercise of its original jurisdiction, issued an injunction against copper companies operating out-of-state “enjoin[ing] [them] from discharging noxious gas from their works in Tennessee over [Georgia’s] territory.” *Id.* at 236. Alleged damage in that case was strikingly similar to the alleged damage in the TVA suit and included harm “to the forests and vegetable life, if not to health, within the plaintiff State.” *Id.* at 239. Justice Holmes decreed that the judiciary was indeed a proper forum for such a suit and stated that “[w]hen the states by their union made the forcible abatement of outside nuisances impossible to each, they did not agree to submit to whatever might be done . . . and the alternative [] is a suit in this court.” *Id.* Thus, the TVA decision also brushes the dust off the *Tennessee Copper* case and its progeny which have been rarely invoked over the years.

⁶⁸ See *Giltmane et al. v. TVA*, Case No. 3:09-cv-00006 (E.D. Tenn., filed January 22, 2009); *Patrick et al. v. FirstEnergy Generation Corp.*, Case No. 2:08-cv-01025-JFC (W.D. Pa., filed July 22, 2008); *Freeman v. The Cincinnati Gas & Elec. Co.*, Case No. 1:05cv179 (S.D. Ohio, filed March 18, 2005).

⁶⁹ Associated Press, *Coal Power Goes on Trial Across U.S.*, MSNBC.com (January 14, 2008) available at <http://www.msnbc.msn.com/id/22652908/>.

⁶¹ TVA, 2009 WL 77998, *1.

⁶² *Id.*, at 12.

⁶³ *Id.*, at 4.

⁶⁴ *Id.* at 4-5.

⁶⁵ Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 974-977 (Winter 2007).

First, like all businesses, the plaintiff's bar⁷⁰ looks for high dividends when choosing which cases to litigate. The TVA decision resulted in the equivalent⁷¹ of a very large verdict—at a minimum \$1 billion. Very few suits have the potential to produce that large a verdict, and in the past, suits with that kind of potential have attracted a great deal of attention from enterprising lawyers. Legal commentators have previously noted that “[a]ll the plaintiffs’ bar really needs is a single precedent-setting victory with a public nuisance case[,]” and they would be “positioned to rake in billions of more dollars by leveraging the case to extract settlements across the nation from any number of” defendants.⁷² The TVA decision may be just such a precedent-setting victory if it is upheld on appeal.

In addition, the litigation in the TVA case was not terribly time-consuming or expensive for the plaintiffs. From start to finish, the litigation lasted just under three years. And that included an interlocutory appeal to the Fourth Circuit that was briefed, argued, and decided. In fact, from the time that the Fourth Circuit issued its decision affirming the district court’s order denying TVA’s motion to dismiss on January 31, 2008, the case was concluded in under a year. By comparison, many of the lead paint public nuisance suits have taken much longer to litigate. For instance, the Santa Clara lead paint lawsuit has been pending for almost a decade now, and it is not even close to a trial date.⁷³ Also, the costs to litigate the case for plaintiff’s counsel could not have been very high, compared to other large-scale public nuisances cases. The bench trial only lasted 12 days,⁷⁴ and from all indications, the amount of discovery in this case was relatively light. Thus, due to the potential of obtaining a very large verdict for little expense, it is likely that public nuisance suits against coal-fired power plants will be very attractive to the plaintiffs’ bar as a result of the TVA decision.

Second, the blueprint for prevailing in a public nuisance suit against a coal-fired power plant is already

⁷⁰ The discussion of the plaintiffs’ bar that appears in this section applies not only to traditional plaintiffs’ lawyers filing suit on behalf of either individuals or a class of individuals, but also plaintiffs’ lawyers who have contracted with various states, cities, or other municipalities to litigate on their behalf on a contingency fee basis. Whether such contingency fee contracts are permissible has been the subject of much litigation, and that very question is currently pending in front of the California Supreme Court in a lead paint public nuisance suit. See *County of Santa Clara et al. v. Atlantic Richfield Co. et al.*, No. S163681 (Cal. S. Ct.).

⁷¹ Without question, a suit seeking equitable relief is different than a suit seeking damages. Nevertheless, monetary damages can be awarded in public nuisance suits as was demonstrated by the jury verdict in the Rhode Island lead paint case, and if the State of North Carolina had sought monetary damages in the TVA case, it is not outside the realm of possibility that the court would have awarded them, considering the language of the decision. What is significant is not that monetary damages will be frequently awarded in such suits (because that is likely not true), but that the possibility for such a large recovery exists.

⁷² Lisa A. Rickard, *Will Plaintiffs’ Lawyers Find New Ways to Sue? They Bet Their Boat They Will*, <http://townhall.com> (Sept. 17, 2008).

⁷³ See *County of Santa Clara et al. v. Atlantic Richfield Co. et al.*, 137 Cal. App. 4th 292, 306, (2006), rev. den. 2006 Cal. LEXIS 7622 (case first filed in March 2000).

⁷⁴ TVA, 2009 WL 77998, *3.

there. The hardest part in any litigation from the perspective of a plaintiffs’ lawyer is sifting through all of the information and possible strategies and finding what is needed to prevail. The State of North Carolina has already found the winning strategy and used it to great effect in the TVA suit. Though a suit for money damages would necessarily have to be different, the core blueprint would remain the same. Having this blueprint already in place is yet another reason why coal-fired power plants will be an attractive target in the future for plaintiffs.

Third, the plaintiff’s bar has typically had the most success in pursuing high-stakes litigation when public sentiment has been in their favor, such as with tobacco. With speculation that the Obama administration will set new emissions limits on power plants⁷⁵ as well as declare carbon dioxide “dangerous,”⁷⁶ with the U.S. Supreme Court’s recent decision in *Massachusetts v. Environmental Protection Agency*, 127 S. Ct. 1438 (2007), that gave the EPA authority to regulate carbon dioxide emissions from new motor vehicles, and with a patch of bad publicity for coal-fired power plants such as the massive accidental coal fly-ash waste spill by the TVA into the Clinch River in Tennessee that dominated national news for several days,⁷⁷ public sentiment has rarely been more against coal-fired power plants than it is right now. The plaintiffs’ bar will likely take advantage of this and use the momentum of the TVA decision to file additional public nuisance suits against coal-fired power plants.

If the plaintiffs’ bar does focus on coal-fired power plants as their next big target, more experienced and successful plaintiffs’ attorneys will file suit, and more significantly, will not hesitate to invest lots of money to litigate them. This too will increase the chances that future public nuisance suits against coal-fired power plants will be successful.

3. Bolsters Public Nuisance in Other Areas

Third, the TVA decision is important because it reasserts public nuisance as a potentially viable tort theory in cases other than those seeking redress for environmental damage. As noted above, public nuisance suits have been filed against a number of product manufacturers in the past in an attempt to hold them liable for allegedly dangerous properties of the products they sell.⁷⁸ The momentum of this effort appeared to slow to a certain extent in the last two years as plaintiffs’ efforts to hold former lead paint/pigment manufacturers liable have been stymied by various appellate courts.⁷⁹ However, the TVA decision will likely reverse this trend. Even though the district court in TVA only awarded injunctive relief, the simple fact that such relief is worth approximately \$1 billion will no doubt serve as a reminder that it is possible to be awarded a significant

⁷⁵ See Paul Davidson, *Coal Power Plants May Have to Limit Emissions*, USA Today (November 13, 2008), available at http://www.usatoday.com/money/industries/energy/2008-11-13-coal-plants-emission-limits_N.htm.

⁷⁶ See Jim Efstathiou Jr., *Obama To Declare Carbon Dioxide Dangerous Pollutant*, Bloomberg.com (October 16, 2008), available at http://www.bloomberg.com/apps/news?pid=20601087&sid=a2RHlj_6hvV0&refer=home.

⁷⁷ See *Giltmane et al. v. TVA*, Case No. 3:09-cv-00006 (E.D. Tenn., filed January 22, 2009).

⁷⁸ See *supra* notes 6, 29, and 30, and text of Section A.

⁷⁹ See *supra* notes 21-23.

amount of money when suing under public nuisance if one prevails. This reminder alone will likely re-energize the plaintiffs' bar to continue to find new and novel ways to apply public nuisance—including against product manufacturers.

Even more importantly, the court found for North Carolina despite weak causation. Put simply, the decision in *TVA* if it withstands appellate scrutiny will constitute perhaps the most attenuated set of circumstances in which liability has been imposed for public nuisance and could herald a new era where weak causation is overlooked in such cases. One of the chief criticisms of suing under a public nuisance theory against products manufacturers was that there was a lack of causation, and a number of public nuisance cases involving guns, tobacco, asbestos, and lead paint were dismissed for just that reason.⁸⁰

But the court's decision in *TVA* found for North Carolina despite evidence that was even weaker than that against the aforementioned cases that were dismissed against product manufacturers. Consider this—the quintessence of public nuisance is one neighbor suing another due to bad odors emanating from his/her property. The distance between the alleged public nuisance and the victim was typically measured in mere yards. The emissions complained of in the *TVA* case were generated up to **100 miles away** from North Carolina and constituted only a small percentage of the total amount of pollutants in the state.⁸¹ The alleged harm was among other things, health effects, water contamination, and vegetation contamination.⁸² The link was fairly speculative when examined in detail—the pollutants at issue were secondary pollutants. These secondary pollutants were not emitted by the TVA but were formed when the primary pollutants underwent chemical changes.⁸³ These secondary pollutants in turn then allegedly contributed to acid deposition, which in turn made the soil more acidic, which in turn made naturally-occurring toxic aluminum more prevalent in the environment, which in turn damaged local vegetation.⁸⁴ Just as significantly, the court's decision did not take into account any alternative causes such as emissions from power plants sited in North Carolina.

The relatively attenuated link between the alleged harm and the emissions at issue demonstrates the potential power of public nuisance. If carried to its logical conclusion, then corporate defendants could be held accountable for any number of alleged harms. Watching the State of North Carolina prevail under a public nuisance theory with such weak causation will likely encourage other plaintiffs to attempt to do the same.

Finally, perhaps the most troubling thing about the *TVA* decision for corporate defendants is that the TVA was held liable despite the fact that it was fully complying with all applicable state and federal regulations related to their emissions.⁸⁵ One of the most effective de-

fenses that product manufacturers have employed in recent years has been that since their product was lawful, they could not be held liable for a public nuisance.⁸⁶ This defense is undermined by the *TVA* decision. In essence, the *TVA* decision stands for the proposition that any level of emissions can be declared a public nuisance if a judge or jury feels that it is higher than they think it should be. The same goes for products—a judge or jury could declare any product a public nuisance if they deem it is more dangerous than it should be. This possibility should be troubling to many corporate defendants.

4. Boost for Climate Change Litigation

One of the newer targets of the plaintiffs' bar for prosecuting public nuisance suits in recent years has been those who allegedly contribute to climate change. Many believe that public nuisance suits targeting global warming and climate change are the next big battlefield in tort law.⁸⁷

The first such suit was *Connecticut et al. v. Am. Elec. Power Co. et al.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), when the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont and Wisconsin (as well as the City of New York and several environmental groups) sued six electric utilities, including the TVA, seeking to abate the public nuisance of global warming. In particular, the plaintiffs asserted that the defendants were the five largest emitters of carbon dioxide in the United States, and that carbon dioxide is the primary greenhouse gas that causes global warming. This suit was dismissed on political question grounds, and was appealed to the Second Circuit Court of Appeals where it is still pending. At least four other such suits were subsequently filed. Three were dismissed at the motion to dismiss stage, two on political question grounds like the *American Electric Power*

⁸⁶ See, e.g., *Camden County Bd. v. Beretta USA Corp.*, 273 F.3d 536, 539-40 (3d Cir. 2001); *Sabater v. LIA*, 704 N.Y.S.2d 800, 806 (Sup. Ct. Bronx Co. 2000); *Bubalo v. Navegar Inc.*, 1998 U.S. Dist. LEXIS 3598 (N.D. Ill. Mar. 16, 1998).

⁸⁷ See, e.g., David Hunter & James Salzman, *Negligence In The Air: The Duty of Care In Climate Change Litigation*, 155 U. Pa. L. Rev. 1741, 1744 (June 2007).

⁸⁰ See, e.g., *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 131-33 (Conn. 2001); *Brenner v. Am. Cyanamid Co.*, 732 N.Y.S.2d 799 (App. Div. 2001); *Assoc. of Wash. Public Hospitals v. Philip Morris Inc.*, 79 F. Supp. 2d 1219 (W.D. Wash. 1999).

⁸¹ *TVA*, 2009 WL 77998, *11-12.

⁸² *Id.*, at *7-11.

⁸³ *Id.*, at *5-6.

⁸⁴ *Id.*, at *5-11.

⁸⁵ *Id.*, at *1-2.

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case.⁸⁸ One was filed just last year and is still pending.⁸⁹

Heretofore, these suits have not caught fire. But the TVA decision might provide the kindling to push climate change litigation forward toward more positive results. This is for three reasons. First, the environmental damage alleged by North Carolina was in many ways very similar to the damage to the climate alleged in the climate change suits. This is significant because legal commentators have noted that plaintiffs in climate change suits will likely face difficulties in proving causation.⁹⁰ The fact that North Carolina overcame similar difficulties in the TVA case will provide hope for future such plaintiffs.

The TVA decision contains findings of fact that blame deleterious effects on the ecosystem in North Carolina on emissions from TVA plants.⁹¹ And most of these deleterious effects are fairly tenuous from a causation perspective, as noted above.⁹² Specific damage alleged in climate change suits included increases in average temperature that in turn increased flooding and ocean levels along coastlines which in turn eroded the coastline.⁹³ Other impacts of global warming include increases in the frequency and duration of extreme heat events, and increases in the risk and intensity of wildfires.⁹⁴ Some of the damage that the court found had occurred in the TVA decision were likewise based a series of causative events as opposed to direct causation. For instance, some of the environmental damage alleged in the TVA suit include the lowering of the pH in the soil, increasing the presence of toxic aluminum in the ecosystem, removing essential nutrients necessary for healthy forest growth, and the formation of haze which the court found decreased visibility in some of the pristine areas of wilderness in western North Carolina.⁹⁵ That a court would actually find in favor of the plaintiff based on such a series of events will spur forward those seeking similar findings in climate change lawsuits.

Second, the largest obstacle thus far for the climate change suits has been the political question doctrine. Prior to the TVA decision, courts with one exception have all punted on deciding the existence of a public nuisance, instead deferring to the other branches of government. The court in the TVA decision rejected the application of the political question doctrine. The court noted that “the federal executive branch has tradition-

ally been the chief arbiter of interstate air pollution concerns,” and that “[t]he ancient common law of public nuisance is not ordinarily the means by which such major conflicts among governmental entities are resolved in modern American governance.”⁹⁶ However, the court went on to state that “the judiciary has always played a significant role in the abatement of public nuisances, particularly when such lawsuits are brought by the United States or by sovereign states.”⁹⁷ The court concluded the discussion by noting that unless Congress has narrowed the judiciary’s flexibility by enacting a particular statute, the court has the ability, and even the necessity, to exercise its discretion, provided it has the jurisdiction to do so.⁹⁸ This suggests that the political question doctrine, rather than applying more than usual in public nuisance cases, should actually apply less than usual. This ruling may assist climate change plaintiffs in the future.

Finally, climate change litigation is at a critical crossroads. After dismissals by trial courts, the *American Electric Power* case has been pending in the Second Circuit for well over two years now, and the *General Motors* case has been pending in the Ninth Circuit for longer than usual as well. At a minimum, the TVA decision may be helpful persuasive authority for supplemental briefs by the plaintiffs in those cases, and it is certainly possible that the TVA decision may swing some much-needed momentum in favor of the plaintiffs in those cases. As mentioned above in Section C.2., public (and perhaps governmental) sentiment seems to be shifting on climate change and will likely view climate change litigation more favorably in the future than it has been viewed in the past.

5. Possible Collateral Estoppel Effect

Many in the legal community did not pay close attention to the TVA decision because it sought merely injunctive relief as opposed to money damages. What many failed to realize, however, is that obtaining injunctive relief can eventually lead to money damages in the public nuisance context. Little time has been spent analyzing the ramifications of a declaration of a widespread public nuisance because they have been fairly rare. But it is an area that needs to be explored in light of the TVA decision where an enormous geographic area (arguably at least half of the state of North Carolina) has been found to have been damaged by a public nuisance. There is a very real possibility that a plethora of “piggyback” suits could be filed in North Carolina looking to benefit from the TVA decision by seeking money damages.

Nothing prevents other plaintiffs from claiming offensive collateral estoppel related to the ruling that the TVA has created a public nuisance.⁹⁹ Other North Carolina residents could file suit and argue that the liability of TVA has already been determined—the court need only consider the amount of damages to be awarded. For instance, one of the harms identified by the court in TVA was increased or exacerbated asthma and chronic bronchitis.¹⁰⁰

If a class of North Carolina residents who have asthma sought to recover for the health effects of the

⁸⁸ *People of State of California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal. 2007); *Comer v. Murphy Oil USA, Inc.*, 1:05 CV436-LTS-RHN (S.D. Miss.) (Mississippi property owners sued oil, coal and chemical companies, alleging their activities contributed to climate change and magnified the effects of Hurricane Katrina); *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006) (dismissed for other reasons but more or less invited a more focused, less ambitious lawsuit because it noted that coastal erosion was a big problem).

⁸⁹ *Native Village of Kivalina v. Exxon Mobil Corp. et al*, Case No. C 08-cv-01138 SBA (N.D. Cal.) (suit alleging carbon emissions by defendants caused global warming).

⁹⁰ See, e.g., Gilbert S. Keteltas, *Climate Change Lawsuits*, *The National Law Journal* at 12 (April 30, 2007).

⁹¹ TVA, 2009 WL 77998, *7-*11.

⁹² See *supra* Section C.3.

⁹³ See *supra* notes 81 & 82.

⁹⁴ See *supra* notes 81 & 82.

⁹⁵ TVA, 2009 WL 77998, *9-*11.

⁹⁶ *Id.*, at 1.

⁹⁷ *Id.*, at *3.

⁹⁸ *Id.*, at *2-*3.

⁹⁹ See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

¹⁰⁰ TVA, 2009 WL 77998, *8.

pollution in the amount of millions of dollars, it would be difficult to prevent such a recovery based on the finding of public nuisance. Any plaintiff who could demonstrate that he or she lives in North Carolina and suffers from asthma would arguably have a viable claim—the only question would be how much each plaintiff was entitled to in compensation. Even a nominal fee could end up being a huge amount once it is multiplied by the total number of asthma sufferers who reside in North Carolina.

The same could be said for the State of North Carolina. It would certainly be well within its rights to file a subsequent suit and seek compensation for the damages caused by the public nuisance found to be the fault of the TVA. The court in *TVA* noted in a number of instances that there were profound social and economic costs as a result of TVA's emissions, including "lost school and work days [and] increased pressure on the health industry due to extra emergency room and doctor visits"¹⁰¹ It has already prevailed on whether there is a public nuisance in North Carolina caused by TVA; in a subsequent suit, North Carolina could focus solely on the amount of damages to which it is entitled.

The *TVA* decision may end up being one of the first situations in which "piggyback" suits are attempted. The atmosphere in North Carolina is ripe to be exploited by such additional suits, and it is likely that the decision in the *TVA* case will only be the beginning of things rather than the end. Now that a federal court has declared that a public nuisance exists in North Carolina caused by TVA, a flood of new litigation seeking compensation is more than possible.

D. Conclusion

The *TVA* decision is one of the most important public nuisance victories for a plaintiff in quite some time.

¹⁰¹ *Id.*

While the usefulness of public nuisance as a tort theory had appeared to wane with several high-profile losses in the lead paint litigation, the *TVA* decision demonstrates that public nuisance is far from dead. Indeed, the *TVA* decision appears to have significantly expanded public nuisance in such a way as to potentially realize the fears of some courts that have in the past voiced real concerns about the rise in public nuisance litigation:

We see on the horizon, were we to expand the reach of the common-law public nuisance tort in the way plaintiff urges, the outpouring of an unlimited number of theories of public nuisance claims for courts to resolve and perhaps impose and enforce—some of which will inevitably be exotic and fanciful, wholly theoretical, baseless, or perhaps even politically motivated and exploitative.¹⁰²

Another court worried that public nuisance may yet become the "monster that would devour in one gulp the entire law of tort"¹⁰³ Though it is impossible to predict exactly where public nuisance litigation is headed in the future, one thing remains clear: The "recent dramatic resurgence of the public nuisance tort"¹⁰⁴ predicted several years ago continues with the *TVA* decision and shows no signs of abating (despite the detour of several lead paint losses). The *TVA* decision has reinvigorated public nuisance in a number of ways as noted above, and it is a threat that corporate America cannot afford to ignore.

¹⁰² See *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 197 (N.Y. App. Div. 1st Dep't 2003).

¹⁰³ See *Tioga Public School Dist. No. 15 of Williams County, State of N.D. v. United States Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

¹⁰⁴ See Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 746 (Spring 2003).