Legal Opinion Letter

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JUDGE'S THEORY UNLIKELY TO SUPPORT "GLOBAL WARMING" LAWSUITS

by
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Can a resident of South Carolina sue an Idaho county for allowing chlorofluorocarbons ("CFCs") to leak into an Idaho garbage dump? This unlikely scenario might be permitted under the reasoning in a concurrence in *Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2004). In *Covington*, Ninth Circuit Judge Ronald Gould described a novel theory of universal standing under the Clean Air Act ("CAA") for personal injury claims based on degradation of the ozone layer by the release of CFCs.

The *Covington* case involved a family in Jefferson County, Idaho, which lives across the street from a County dump. The Covingtons filed suit against the County under the Resource Conservation and Restoration Act ("RCRA") and the CAA after the County ignored their complaints about the dump. One such complaint was that the County did not prohibit or clean up CFCs leaking from old refrigerators.

The Ninth Circuit opinion, authored by Judge Gould, held that the Covingtons had standing to bring the RCRA and CAA claims. On the CAA claim, the court held that evidence of leakage of CFCs showed injury in fact because the leakage had increased the risk of harm to the Covingtons' property. The (unanimous) majority opinion did not go beyond this analysis of CAA standing and did not discuss any potential personal injuries to the Covingtons.

Judge Gould took the unusual step of writing a concurrence to his own opinion to describe an additional theory of standing under the CAA based on ozone degradation. After reviewing the scientific evidence linking CFCs to ozone layer degradation, Judge Gould described the dangers, such as skin cancer, that the ozone layer protects people against, and stated that: "[t]he Covingtons, with every person on this planet, face an increased risk of these maladies if the landfill releases CFCs into the air." *Id*. at 650. Judge Gould recognized the minimal contribution to this risk of the 100 or so old refrigerators in the Jefferson County dump, and wrote that: "[t]he Covingtons suffer no greater injury than any other person . . ." because of the CFCs in the dump. *Id*.

Judge Gould then asked whether "current Supreme Court precedent supports standing for a citizen suit asserting environmental claims raising a threat of widespread or even global injury." *Id* at 651. Interestingly, he did not try to develop a new theory of standing, but rather analyzed whether existing precedent fit the facts as he saw them.

Judge Gould noted that the Supreme Court in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), appeared to reject the idea that injury to all is injury to none for standing purposes. In *Akins*, voters

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opposed to the views of an advocacy group sued to challenge a decision of the Federal Election Commission ("FEC") not to bring an enforcement action against group for violation of the Federal Election Campaign Act of 1971 ("FECA"). The FEC argued that the plaintiffs did not have standing because their alleged harm — the failure to obtain certain information that would be public if the group were forced to comply with FECA — is one that was shared by all or a large class of citizens, and was the kind of generalized grievance that did not confer standing.

Judge Gould summarized *Akins* thus: "the Supreme Court's precedent may be read to support a general rule of standing along these lines: If the injury is not concrete, there is no injury in fact even if the injury is particularized; and if the injury is concrete and particularized, there is injury in fact even if the injury is widespread." 358 F.3d at 651

With respect to the causation element of standing, Judge Gould noted the "scientifically proven link" *Id*. at 654 between CFC releases and ozone depletion. To him, any release of CFCs anywhere increases the risk of skin cancer to everyone everywhere; this is exactly analogous to *Akins* in which the FEC's actions affected every U.S. citizen. Risk of skin cancer provided Judge Gould with a concrete and particularized injury to the Covingtons — and everyone else.

With respect to the redressability aspect of standing, Judge Gould acknowledged that CFCs that have been released cannot be recaptured, but argued that the civil penalties available under the CAA will "deter future violations," citing *Friends of the Earth v. Laidlaw Environmental Services,* 528 U.S. 167, 120 S. Ct. 693 (2000).

Laidlaw was a challenge under the Clean Water Act to discharges of mercury into the North Tyger River in South Carolina, and sought civil penalties and other relief. The defendant argued that civil penalties were irrelevant to redressability because the penalties were paid to the government, not to the plaintiffs. The Court rejected this argument, holding that: "[i]t can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description." 120 S. Ct. at 706. The Court noted that the deterrent power of civil penalties can become "so insubstantial or so remote that it cannot support citizen standing," but held that "[t]he fact that this vanishing point is not easy to ascertain does not detract from the deterrent power of such penalties in the ordinary case." In the case before it, the Court found that the civil penalties at issue "carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [plaintiffs'] injuries by abating current violations and preventing future ones . . . ." *Id*. at 707.

Members of the plaintiff organizations in *Laidlaw* offered proof that they lived near the North Tyger River and used to swim, boat and fish in the river and hike and picnic near it. These facts make the ideas of actual harm, causation and redressability as to these plaintiffs seem reasonable and not speculative. Whether it is reasonable for a plaintiff 2,000 miles from the Jefferson County dump to claim harm, or speculative to consider whether civil penalties will change an Idaho polluter's behavior, are obvious problems that Judge Gould tried to address by invoking the prudential standing rule, citing *Allen v. Wright*, 468 U.S. 737 (1984).

The plaintiffs in *Allen* sued the IRS for not adopting standards and procedures for denying tax-exempt status to racially discriminatory schools. The Court held that they did not have standing to bring the action because they did not allege any individual, particularized injury. Under Judge Gould's reasoning in the *Covington* case, however, every person in the world has an individual, particularized injury arising from the 100 leaky refrigerators in the Jefferson County dump.

Thus, a person living by the North Tyger River could sue Jefferson County, Idaho over the leaky refrigerators just as easily as the Covingtons did. And so could everyone in the world. Whether such lawsuits would be viable under prudential standing, or common sense, is open to serious doubt.

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