

COMMERCIAL & BUSINESS LITIGATION

■ Reducing Litigation Risks in Renewable Energy Power Purchase Agreements

BY GREGORY S. RICCIARDI

Recent extensions of federal tax credits for renewable energy projects pursuant to the Energy Improvement and Extension Act of 2008¹ and an increase in state programs designed to further subsidize the development of renewable energy projects to meet sustainable energy goals and renewable energy portfolio standards have increased the use and importance of power purchase agreements (PPAs) in renewable energy projects.² PPAs are used in a variety of circumstances to effect different power

generation, site financing, and risk allocation terms between parties in an energy transaction. PPAs are used in all kinds of renewable energy projects, including solar, geothermal, wind, and biomass energy. Increases in renewable energy project opportunities have also led to an increase in litigation over the terms and provisions contained in PPAs. This article highlights key terms that should be included in any PPA and identifies some of the prevalent litigation pitfalls in PPAs.

Put plainly, a PPA is a contract to buy the electricity generated by a power plant. However, these complex agreements are fraught with possibilities for disputes beyond typical purchase agreements and contracts. PPAs typically include provisions on installation, interconnection, renewable energy incentives, and renewable energy resource access. In addition, traditional contract issues take on a different light in the context of PPAs.

(Continued on page 14)

■ U.C.C. Section 2-318: The ABCs of Defense

BY SHAWN M. BATES AND DEBORAH J. KARAKOWSKY

With the roller-coaster ride of oil prices and the retraction of the world economy over the past year, one thing that litigators in the energy industry know is that business is booming. Our clients are suing and being sued with increasing frequency, as deals, projects, and company finances go good and bad. In the oil patch alone, many billions of dollars are spent each year on heavy equipment, much of it sold by manufacturers through middlemen to remote end users. As disputes arise over such equipment, the remote purchaser often wishes to sue the manufacturer. The manufacturer will, of course, not want to be pursued by a remote purchaser. Among the many legal considerations in such a dispute is whether the remote purchaser must have contractual privity with the manufacturer to sue successfully for breach of warranty.

Is the Remote Purchaser Vertically Challenged?

There are two types of privity: horizontal and vertical. Vertical privity is implicated when a remote purchaser wants to sue the manufacturer for breach of warranty. Prior to the adoption of the Uniform Commercial Code, an injured purchaser was required to establish privity with the manufacturer to recover for breach of warranty. This, of course, is difficult to accomplish when the ultimate user of

(Continued on page 17)

Letter from the Chairs

During the past year, the Commercial & Business Litigation Committee has focused on a variety of growth areas for trial lawyers through its programs, website, and newsletter. This issue of the committee newsletter is no exception, as energy-related legal issues and disputes are on the rise not just in the United States but around the world.

The contributing authors for this issue address a number of the most significant topics in energy-related litigation. Their articles cover timely matters related to wind energy, renewable energy power purchase agreements, green building risks, and market-based systems for controlling carbon emissions. This issue of the newsletter also provides helpful information related to motion practice in the rocket docket and defense strategies in disputes between manufacturers and remote purchasers. The committee chairs thank all of the contributing authors and the tireless editing team for their outstanding efforts to share such valuable information with the committee's members.

We also thank the many subcommittee chairs and members who were willing to donate their time to the betterment of the Section of Litigation this year. Through their hard work, the committee was able to host events and programs at the Section of Litigation Annual Meeting and the ABA Annual Meeting, update the committee members with blast emails covering breaking news and case developments critical to our group, and provide practice information and food for thought through the website postings and various publications. In sum, it was a year during which many great volunteers accomplished much work. As committee chairs, we want to say thank you.

As we kick off the 2009–2010 bar calendar year, which began with the ABA Annual Meeting in Chicago, we also want to alert you to some changes in leadership and encourage you to consider participating in the committee leadership for the upcoming year.

The committee thanks David Coale and Lamont Jefferson for their years of outstanding leadership as they now move on to other responsibilities. Barb Dawson will continue as a committee chair and welcomes Bart Greenwald and Byron Mason as her cochairs for 2009–2010. Barb, Bart, and Byron invite all committee members who are interested in participating in the committee's work to contact them:

Barb Dawson

Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004
bdawson@swlaw.com

Bart Greenwald

Frost Brown Todd LLC
400 W. Market St., 32nd Fl.
Louisville, KY 40202-3363
bgreenwald@fblaw.com

Byron K. Mason

Baker & Daniels LLP
300 N. Meridian St., Suite 2700
Indianapolis, IN 46204-1782
Byron.mason@bakerd.com

With the committee's active schedule, there are plenty of opportunities for all who would like to help by serving as a subcommittee chair, writing an article, posting information on the website, and participating in programs. With such involvement, we look forward to another terrific committee year.

Letter from the Editor

Dear Readers,

We are pleased to present you with the Fall 2009 *Commercial & Business Litigation* newsletter. This issue focuses litigation issues concerning energy and natural resources. It is our hope that you find the content of this issue informative and helpful to your practices.

Our next issue of *Commercial & Business Litigation* will focus on bankruptcy and should be mailed out around the holidays. Following the issue on bankruptcy, the winter issue of the newsletter will focus on UCC issues. If you wish to contribute an article to the Winter 2010 issue, please contact me at stioa@pepperlaw.com. A standard article is roughly 1,500 words, with all citations in the form of endnotes. The article should be written in MS Word format and may be submitted to my attention by email on or before November 1, 2009. You will be notified shortly after your submission if your article was selected for publication.

Also, if you are looking to keep abreast of current commercial and business litigation issues, be sure to visit the ABA's website at www.abanet.org/litigation/committees/commercial.

As always, thank you for your interest in the Committee on Commercial & Business Litigation.

Angelo A. Stio III

COMMERCIAL & BUSINESS LITIGATION

Committee on Commercial and Business Litigation

COMMITTEE CHAIRS

Barbara Dawson
Snell & Wilmer, LLP
400 E. Van Buren Street
One Arizona Center
Phoenix, AZ 85004
(602) 382-6070
bdawson@swlaw.com

Bart Greenwald
Frost Brown Todd LLC
400 W. Market Street
32nd Floor
Louisville, KY 40202-3363
(502) 568-0318
bgreenwald@fbtlaw.com

Byron K. Mason
Baker & Daniels LLP
300 N. Meridian Street
Suite 2700
Indianapolis, IN 46204-1782
(312) 237-0300
Byron.mason@bakerd.com

NEWSLETTER EDITOR

Angelo A. Stio III
Pepper Hamilton, LLP
301 Carnegie Center
Suite 400
Princeton, NJ 08543
(609) 452-0808

NEWSLETTER EDITORIAL BOARD

M. Vittoria "Giugi" Carminati
Weil, Gotshal & Manges
700 Louisiana Street
Suite 1600
Houston, TX 77002
(713) 546-5315
Giugi.Carminati@weil.com

Celeste R. Coco-Ewing
Barrasso Usdin Kupperman
Freeman & Sarver, LLC
LL&E Tower, Suite 2400
909 Poydras Street
New Orleans, LA 70112
(504) 589-9725
coco-ewing@barrassousdin.com

Nelson S. Ebaugh
Nelson S. Ebaugh, PC
1001 McKinney
Suite 550
Houston, TX 77002
(713) 752-0700
nebaugh@ebaughlaw.com

Kelly A. Kszywienski
Snell & Wilmer, LLP
One Arizona Center
400 East Van Buren
Phoenix, AZ 85004
(602) 382-6384
kkszywienski@swlaw.com

Michael S. LeBoff
Hodel Briggs Winter, LLP
8105 Irvine Center Drive
Suite 1400
Irvine, CA 92618
(949) 450-4435
mleboff@hbwillp.com

ABA PUBLISHING

Jeff Salyards
Associate Editor

Monica Alejo
Graphic Designer

Commercial & Business Litigation Journal (ISSN 1936-7597) is published quarterly by the Commercial & Business Litigation Committee, Section of Litigation, American Bar Association, 321 N. Clark Street, Chicago, IL 60654-7598; www.abanet.org/litigation. The views expressed within do not necessarily reflect the views or policies of the American Bar Association, the Section of Litigation, or the Commercial & Business Litigation Committee.

Copyright © 2009 American Bar Association. All rights reserved. For permission to reprint, contact ABA Copyrights & Contracts, 321 N. Clark Street, Chicago, IL 60654-7598; fax: (312) 988-6030; email: copyright@abanet.org.

Address corrections should be sent to the American Bar Association, c/o ABA Service Center, 321 N. Clark Street, Chicago, IL 60654-7598.

www.abanet.org/litigation/committees/commercial/home.html

Green Building Risks: Avoiding Litigation Traps

BY MICHAEL J. ZIMMER AND JENNIFER ROHLER

Green building design adds a layer of complexity to traditional construction projects and their financing that should be considered in the planning stages to avoid future litigation. Identifying the responsible party if a purported green building fails to attain the intended green certification will become a primary litigation issue. This is a new area of law; not many cases have been brought, and those that have were settled out of court.

The first green construction case in the United States was the Maryland case of *Shaw Development v. Southern Builders*.¹ In *Shaw*, a development group contracted for a building with green features to support a Leadership in Energy and Environmental Design (LEED) silver rating. The development group sought \$635,000 for lost state tax credits after a nine-month delay in project completion. The case settled out of court, and no other cases have reported opinions. However, as interest grows in green buildings and more financial incentives are enacted, claims such as those in the *Shaw* case, as well as claims for breach of warranty, fraud, unfair trade practices, and the like, are likely to proliferate. This article is intended to advise attorneys of potential issues to avoid green building litigation traps.

Project Design

“Thinking green” at the earliest stages of project planning reduces the likelihood of problems during the design and construction process and prevents built-in obsolescence. Green building projects face a greater potential for cost overruns and performance problems than traditional buildings. When green building considerations are added as an afterthought to an existing project design, those risks are compounded.

Using “fast-track” construction methods (in which construction of portions of a project begins before the design is completed on other portions) allows for projects to begin months earlier. However, because the engineering and architectural design documents have not yet been finalized, fast-track construction can lead to major cost overruns and a failure to attain green building certification. When evaluating proposed construction methods, question whether fast-track construction techniques will put your green certifications at risk. Also determine who will have responsibility for the various parts of the green certification and whether responsibilities have been properly allocated between prime contractors and subcontractors.

Energy Modeling

Energy modeling can be an effective tool to simulate a building’s energy use and to quantify the savings that can be attributed to the proposed green design elements.²

Energy modeling can also optimize the building design by allowing the design team to prioritize its investment in the design elements that will have the largest effect on the building’s energy use. Using energy modeling early in the project design phase will enable the design team to compare alternatives to show the relative differences between design options and their cost consequences in the financial pro formas for the project.

The Project Team

To ensure an experienced project team, request detailed references that demonstrate both the respondent’s and its subcontractor’s experience with green buildings and energy efficiency. Incorporate claimed experience into contract representations and warranties when negotiating project agreements. Limit personnel change-over through the use of liquidated damages for such changes. Above all, clearly assign responsibility for each green building element among the project team members to avoid confusion, particularly among subcontractors, and properly allocate the expertise among the project phases.

Materials, Equipment, and Resources

Because green building materials are still relatively new and not widely available, obtaining the correct materials and equipment can introduce significant project delays. Identify materials and equipment with long lead times for advance ordering. Design professionals should make decisions about sustainable products, using technical data provided by the manufacturers, not promotional materials, because allegations of “greenwashing” are an increasing market threat. These technical performance parameters should be incorporated into warranties and performance guarantees in the agreements. Design professionals should keep their clients regularly informed of any risks (performance, schedule, or cost) that they uncover during their green due diligence support for the project.

Managing Expectations

Manage expectations about the green building’s performance from the initial design stages. A clear definition of project scope requires balancing aesthetic and other demands with green building requirements. The legal practitioner should clearly define the level of performance and standard of care owed by project team participants in the project agreements. In contract default provisions and remedies, clearly define the consequences that will result if the design does not attain the desired level of building certification.

COMMON CLAIMS

Certain common industry claims lead to financial risks for design and construction professionals and financing risks for lenders in the green building sector:

Unfilled expectations: dissatisfaction because of unrealistic expectations from project inception. Clients will demand perfection and support of their certification objectives.

Cost recovery: attempts to offset unrealized cost savings and other benefits.

Express warranties: reliance on enthusiastic promises of success or benefits.

Fraud or misrepresentation: accusations of deceptive practices or "greenwashing."

Switch of key personnel: With limited exceptions, the professionals who sold you the project should perform on the project.

Building Certification and Commissioning

The project design team must have a thorough understanding of the requirements of the project and building certification process to ensure that the level of certification sought is actually attained. This involves fulsome knowledge of the details of any necessary registration process, the certification timeline, requisite documentation, and third-party verification requirements. Unanticipated delays in the certification process may delay the overall project schedule for a building and could result in a loss of local, state, and federal financial incentives or tax benefits.

Building commissioning is as critical a project phase as design and construction; however, this phase is frequently overlooked, unless required. Commissioning is a risk reduction method for new construction or major capital improvements conducted through a systematic and documented confirmation that the building systems function according to the specifications in the project documents and satisfy the owner's operational needs. Commissioning is particularly critical for green buildings, which tend to have a more complex design and systems. During commissioning, the building should be treated as a system to perform functional tests to optimize overall energy and non-energy performance (air quality, water use, renewable energy performance, integration with control systems).

State and Local Regulations

Increasing numbers of towns, cities, and counties are adopting mandated green building codes for various classes of construction, while numerous others have voluntary programs.

Conducting thorough research into the current state and local codes where the green building project will be located is critical.

Local Building Codes and Regulations

Changes to building codes or interpretations of those codes that occur mid-project may require the project to be redesigned and ultimately delayed. Further, the regulatory requirements for securing tax credits, grants, stimulus funding, and other economic development incentives that are part of the developer's value proposition (like expedited permitting, density bonuses, and floor-area ratio bonuses) must be translated effectively into the project contracts. New requirements in land use planning and development are prompting a transition from low-density exurbs to higher density, transportation-oriented development.

Permitting

Zoning variances may be required for the higher density and building heights for certain levels of green building certification. Green building attributes can be used as bargaining chips when seeking a zoning variance for any type of project. Because many government incentives are issued prior to the project certification, permitting authorities will often include the applicable green building eligibility criteria in project conditions of approval. Therefore, local permits and policy documents should specify the consequences that will result if the building does not achieve the specified green building goal.

Contract Considerations

Achieving a building certified to the intended level may depend on individual material, equipment, and systems choices. Contract for a design with specificity in support of certification that requires specific materials and systems that can verifiably deliver necessary green performance. If the material or system called for in the building specification is unavailable or is delayed, an "or equal to" clause can permit the substitution of another material or system.

Allocating Liability

A building owner should include a waiver that prohibits designers or contractors from relying on compliance with green building certification requirements as a defense to traditional construction and design claims. In addition, the owner may enforce green building requirements by specifying that a project participant's failure to perform his or her respective green building obligations is a breach of contract. The contract may only state that the design professional should "endeavor" to meet the requisite green building rating; however, the design professional could be held liable to the owner for failure to attain the rating.

An owner's waiver of consequential damages may preclude recovery of damages in the event that the project loses tax

credits or other economic incentives due to project delays because those damages may be considered consequential. Each project is unique—form contracts, like those provided by The American Institute of Architects, have provisions that allow the construction team to assert claims against the owner, and leave the owner to bear the risk of all uncertainties.

Even after commissioning, green buildings require accountability for the dynamic systems in the building from multiple parties over different timelines. This accountability must be incorporated into the contract. Auditing of operations and maintenance services should be linked back to verify compliance with specifications and design in the contract.

Aligning Contract Incentives for Project Participants

The contract incentives for all project participants should be aligned to advance green building goals. Prime contracts should define substantial completion so as to obligate the contractor to complete building commissioning before being relieved from liability for late completion. Design contracts should require that design services continue through project completion, and if applicable, building certification. Include the treatment of all procurement requiring long lead time issues in the contracts.

Aligning Contracts and Performance Guarantees with Tenant Leases

Oftentimes, leasehold improvements are completed after the lease is signed; therefore, both the landlord and tenant will participate in the design process. If it is the tenant that is seeking green certification of the space, ensure that the landlord agrees that the tenant may disapprove elements of the design plans that are inconsistent with that objective. Define what each party means by “green” and allocate responsibilities between the landlord, tenants, vendors, and contractors. Specify critical design elements in the lease; if any of these features are common area improvements, building materials,

or building systems, the lease should obligate the landlord to maintain them throughout the lease term. Further, specify the obligation to maintain green status—one time as opposed to ongoing certification. If ongoing, state the frequency of recertification as well as the definition and consequences of failure.

Insurance

Determine whether a contractor’s general liability policy provides coverage for an owner’s claim for lost tax credits, grants, or other incentives in the event of project delays. Architects and engineers who sign green building certification submittal templates may trigger an exclusion in their professional liability insurance. Most coverage for errors and omissions contains exclusions for warranties and guarantees. Such design professionals thus must insist on language indicating that their signature is solely for the satisfaction of the particular rating system credit and that it does not constitute any type of warranty or guarantee.

Insurance Scope

The scope of insurance coverage for green building elements is still undergoing development. Most policies will likely exclude nanotechnology in system materials. New insurance risks are appearing for green building operations. With vegetative roofs, traditional policies contain limits for trees and shrubs. Treatment of gray water through recycling pipes and tanks may face underground exclusions.

Conclusion

All levels of government are taking a more active role to encourage green building investment through financial, energy, efficiency, and climate change policies. As developers take advantage of these incentives, the pace of green building construction will increase and managing the risk of attaining green certifications will be critical. Green buildings provide numerous business opportunities, but a savvy attorney must help the client avoid the litigation traps and pitfalls that accompany those opportunities.

Michael J. Zimmer and Jennifer Rohleder are with Thompson Hine, LLP, in Washington, D.C. Mr. Zimmer is also a member of the USGBC Energy Atmospheric TAG Committee, cochair of the American Bar Association’s Renewable Energy Resource Committee, and ABA vice-chair of the Energy and Carbon Trading and Finance Committee.



Commercial & Business Committee on the Web

[HOMEPAGE](#)

www.abanet.org/litigation/committees/commercial

[SUBCOMMITTEES](#)

www.abanet.org/litigation/commercial/subcommittees

Endnotes

1. *Shaw Development v. Southern Builders*, No. 19-C-07-011405 (Somerset County Cir. Ct. Feb. 16, 2007).
2. Marc Rosenbaum, *Understanding the Energy Modeling Process: Simulation Literacy 101*, THE PITTSBURGH PAPERS (Building Green 2003), available at http://www.buildinggreen.com/features/mr/sim_lit_101_2.cfm.

Wind Energy: An Uncertain Future in the Courts

BY JACOB A. DE LEON

In a time of heightened awareness of global warming and the need for renewable energy, wind energy has taken off as the fastest growing source of electricity in the United States. In 2008, the wind industry added record-breaking wind power capacity by installing over 8,000 megawatts of electricity, accounting for close to 42 percent of new power-producing capacity installed that year.¹ This growth has brought the total U.S. wind energy capacity to over 25,000 megawatts, up from only 6,740 megawatts in 2004, placing the United States ahead of Germany as the world leader in wind electricity generation.²

Recognizing these many benefits, state and federal governments have helped drive the growth of wind energy by enacting incentives and requirements. On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009, which extended the federal tax credit for the production of electricity from wind facilities through December 31, 2012. The production tax credit grants a credit of 2.1 cents per kilowatt-hour for electricity produced by a wind farm during its first 10 years of operation.

While some states are taking on active roles, most decisions regarding the siting of wind energy projects are made at the local level through local zoning ordinances. However, at least one court has recently ruled that state law governs the siting of wind farms and preempts local land use and zoning laws.³ Thus, although most decisions to accept or reject wind projects are currently made by local governments, a future trend might be toward increased statewide control.

Common-Law Nuisance Challenges

Wind power opponents, particularly local residents who do not want wind farms near their property, have used common-law nuisance claims to challenge wind energy developments. The allegations that make up the typical nuisance claim include turbine noise, light flicker, deterioration of aesthetics and views, decrease of property values, and interference with electromagnetic communications.⁴ Property owners have attempted to enjoin large-scale wind projects on nuisance grounds.⁵

In June 2007, in *Burch v. Nedpower Mt. Storm, LLC*, the Supreme Court of Appeals of West Virginia ruled that a wind power electric generating facility with about 200 wind turbines in close proximity to residential property could constitute a nuisance.⁶ Seven homeowners who all live about one half mile to two miles from the projected wind turbines filed a suit to permanently enjoin the construction and operation of the facility alleging a private nuisance because they would be negatively affected by noise from the turbines, the eyesore created by the flicker or strobe effect of the light off of the turbine blades, potential danger from broken blades, ice throws,

and collapsing towers, and because the turbines will cause a reduction in their property values.

The court found that although the State Public Service Commission (PSC) approved the wind generating facility, such approval did not disregard or abrogate the common-law doctrine of nuisance. The court found that the wind farm was not a nuisance per se, but this does not mean that the use could not turn into a nuisance, and therefore the court determined that the allegations were legally sufficient to state a claim to enjoin a nuisance prospectively. The ruling allows the neighbors to attempt to adduce sufficient evidence to prove their allegations in an effort to abate the alleged nuisance.

The court's holding will allow the landowners a day in court and the opportunity to prove their allegations to the circuit court, which would then have the power to decide whether to enjoin construction of the wind farm permanently. The

court did note, however, that although the PSC's approval of the wind farm did not preclude the circuit court's jurisdiction to hear the nuisance claim, the PSC's decision is "persuasive evidence of the reasonableness and social utility" of the operation of a wind farm on this land.

Burch indicates how common-law nuisance can be used to hinder or prevent wind power development. At least in West Virginia, the combined allegations of noise, light flicker, and decreased property values are sufficient to state a claim to enjoin a nuisance prospectively. If other courts follow this approach, the result could bring significant delay and obstruction to wind development.

By contrast, Texas's Eleventh Court of Appeals recently upheld a lower court ruling that there can be no successful nuisance claim against a wind farm based on the fact that the thing was just plain ugly. In *Rankin v. FPL Energy, LLC*, multiple neighbors of the Horse Hollow Wind Energy Center near Abilene filed suit in 2005 because, among other things and as the court noted, the now reportedly 60,000-acre 400-turbine wind farm "had permanently and significantly diminished the area's scenic beauty and, with it, the enjoyment of their property."⁷ The court noted that the plaintiffs' evidence makes clear that if the wind farm

Burch indicates how common-law nuisance can be used to hinder or prevent wind power development.

is a nuisance, it is because plaintiffs' emotional response to the loss of their view due to the presence of numerous wind turbines substantially interferes with the use and enjoyment of their property.

The question, then, was whether plaintiffs' emotional response was sufficient to establish a cause of action. The court concluded that under Texas law, it was not, notwithstanding the fact that one plaintiff had characterized the wind farm neighboring her property as "the death of hope." The defendant, FPL Energy, was using its property lawfully, and Texas case law "recognizes few restrictions on the lawful use of property." The court noted, however, that it did not intend to minimize the impact of the wind farm on the plaintiffs simply because the impact was emotive (and not, for instance, physically invasive).

This decision indicates that at least in Texas, the leading state for wind development,⁸ it may not be easy to make out a successful nuisance challenge to wind turbines. Successful plaintiffs would need to establish something more than negative aesthetic impacts and related emotional issues, no matter how significant these complaints may seem.

It will be interesting to see whether this decision will be adopted across the country or whether some states will hold differently. It will be especially interesting to see how this plays out with the ongoing Nantucket Sound wind project. Senator Lamar Alexander was quoted as saying that the proposed windmills are "gigantic public nuisances."

Conclusion

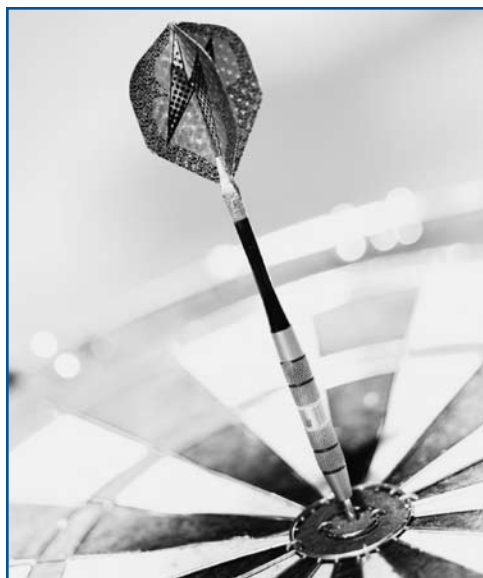
As the movement toward green energy progresses, the proliferation of wind power is likely to continue. The future of wind power is, however, far from certain. This is so especially in light of the current economic downturn. Although the benefits of wind energy are widely recognized, opposition in

the form of common-law nuisance claims may pose significant delays to the development of wind power.

Jacob A. De Leon practices in the Houston office of Sedgwick, Detert, Moran & Arnold LLP and focuses his practice on business and commercial litigation.

Endnotes

1. See Press Release, Am. Wind Energy Ass'n, Wind Energy Grows by Record 8,300 MW in 2008 (Jan. 27, 2009), available at http://www.awea.org/newsroom/releases/wind_energy_growth2008_27Jan09.html.
2. Although Germany still leads in capacity (23,000 MW), the United States is the world leader in wind electricity generation, thanks to stronger winds. See Am. Wind Energy Ass'n, Another Record Year for Wind Energy Installations, available at http://www.awea.org/pubs/factsheets/Market_Update.pdf.
3. Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC), 165 Wash. 2d 275, 197 P.3d 1153 (Wash. 2008).
4. See e.g., Burch v. Nedpower Mt. Storm, LLC, 220 W.Va. 443, 647 S.E.2d 879 (W. Va. 2007) (neighbors alleged nuisance based on noise, light flicker, and decrease in property values). See also NYSEDA, Wind Energy Model Ordinance Options (Note 90) (to address nuisance issues, municipalities may want to include provisions for noise and electromagnetic interference).
5. See Burch, 220 W.Va. 443, 647 S.E.2d 879 (W. Va. 2007); see also Rankin v. FPL Energy, LLC, 266 S.W.3d 506 (Tex. App. 2008).
6. Burch, 220 W.Va. 443, 647 S.E.2d 879 (W. Va. 2007).
7. Rankin, 266 S.W.3d 506 (Tex. App. 2008).
8. See Am. Wind Energy Ass'n, Another Record Year for Wind Energy Installations, available at http://www.awea.org/pubs/factsheets/Market_Update.pdf.



THE BENEFITS OF MEMBERSHIP

Trial Without Error

The Section of Litigation Podcast allows you to learn from the past experience of the largest group of trial lawyers in the world.

Listen to our podcast and develop insights and skills without having to go through the mistakes associated with learning. The Section of Litigation Podcast, striving for trials without errors.

To subscribe to our free monthly podcast go to:
www.abanet.litigation/podcast



A Winning Motions Practice in the Rocket Docket

BY STEPHEN E. BARIL

The infamous “Rocket Docket” seems to be attracting more litigation than usual these days. There are two reasons for this development. Because a significant number of Internet providers are now located in Northern Virginia (e.g., AOL Time Warner), the U.S. District Court for the Eastern District of Virginia, better known as the Rocket Docket,¹ has become a magnet for complex business litigation. Also, plaintiffs’ lawyers have historically liked the Rocket Docket’s rapid pace of play and the predictability of a quick result whether by settlement or trial. That attitude has caused an explosion of patent and trademark infringement litigation.²

Whether these litigants are searching for lead counsel or local counsel, they first want to know whether “the rumors” are true about the Rocket Docket. The answer is an emphatic yes. The Rocket Docket has long prided itself on being the fastest civil docket in the country. It boasts of resolving *all* civil cases within nine months of filing.

For lawyers who want to excel in the country’s fastest civil docket, this article is for you. This article focuses primarily on practical tips for best results in motions practice. The reason is simple: The Rocket Docket is notorious for resolving a high percentage of civil cases on dispositive motions. A seasoned lawyer has a decided advantage in making the Rocket Docket’s pace and idiosyncrasies work to his or her client’s favor.

Practical Tips

Before launching headlong into dispositive motions, a few practical tips are in order for the uninitiated. Let’s start with the certainty of your trial date—around which everything else revolves. Although each division³ has its own docketing system, you can rest assured that the court will set a trial date swiftly. Once set, the trial date becomes immutable. One of the icons of the Rocket Docket, the late Honorable Robert R. Merhige Jr., delighted in telling a story about the lawyers from Miami who announced at a pretrial conference that they had agreed to a continuance. Without batting an eye, Judge Merhige asked his law clerk for *Black’s Law Dictionary* because, he said, the lawyers were using a term with which he was not familiar—a “continuance.” Whereupon, the lawyers asked if they could confer privately, after which they reported that they had settled their case. The story speaks volumes about the philosophy of the Rocket Docket, that is, the fastest way to resolve any case is to set it for trial and hold the lawyers’ feet to the fire.

Not only does each division have a different docketing system, but each division has its own pretrial process, and some of the judges within a division use significantly different

pretrial orders. Some pretrial orders literally manage every aspect of the case from start to finish, requiring strict adherence to every detail. Also, the process for obtaining hearing dates varies among the divisions and from judge to judge within a division. Some judges hear oral arguments on certain motions, but not on others. Some judges permit hearings by conference call; some do not. And some motions, such as discovery motions, may be referred to a U.S. magistrate judge for resolution. It can be confusing.

There is certainty, however, in the universal application of the Local Civil Rules. They are strictly enforced, without exception, across the Rocket Docket. Woe to the lawyers who attempt to depart from these rules “by agreement of counsel,” without leave of court. The Local Civil Rules contain many quirks that are not obvious to a visitor, but they can be identified by good local counsel. For example, the moving lawyer must be able to represent, before scheduling a dispositive motion for hearing, that he has conferred with opposing counsel to narrow the area of disagreement.⁴ Dispositive motions must be accompanied by a separate written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies.⁵ A strict page limitation is enforced, as brevity is a virtue in the Rocket Docket.⁶ As if the pace of play were not fast enough, the Rocket Docket has its own peculiar response time for briefs in opposition and reply briefs designed to shorten the briefing schedule otherwise permitted by Federal Rules of Civil Procedure.⁷

Motions to Dismiss

Lawyers instinctively will consider the propriety of filing a traditional Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. In the Rocket Docket, you should not overlook the utility of the other Rule 12(b) motions, particularly lack of subject-matter or personal jurisdiction. The Rocket Docket zealously guards its jurisdiction and, if it finds justification in the facts and the law, is primed to dismiss or transfer a deserving case.

Turning to Rule 12(b)(6), this motion tests the legal sufficiency of the allegations found in the complaint, assuming always that the allegations are true. The seasoned practitioner knows that antitrust claims, business tort and conspiracy claims, RICO and other exotic claims⁸ are automatically suspect in the Rocket Docket and thus will be subjected to close scrutiny. Hence, the Supreme Court’s 2007 decision in *Bell Atlantic Corp. v. Twombly* was a bonanza for the defense bar. Before *Twombly*, the Supreme Court had steadfastly adhered to the liberal rule that a complaint should not be dismissed

unless “no set of facts” could support the requested relief.⁹ In *Twombly*, a class action alleging violations of section 1 of the Sherman Antitrust Act, the Court replaced the “no set of facts” standard with a “plausibility” standard. Under the more rigorous test in *Twombly*, plaintiffs must allege facts demonstrating more than the “possibility” of entitlement to the relief sought; rather, they must allege the factual “plausibility” of their theory of recovery to survive a motion to dismiss.¹⁰ As a consequence, *Twombly* reinforced the Rocket Docket’s predisposition to “clean up” specious claims, or entire complaints for that matter, that might survive in other U.S. district courts.

A few other wrinkles about motions to dismiss are worth noting. In the Rocket Docket, a motion to dismiss is not considered a responsive pleading under Federal Rule of Civil Procedure 15(a). Thus, unless an answer is filed with a Rule

12(b) motion, the plaintiff can file an amended complaint as a matter of right.¹¹ Also, a defendant is not in default when a Rule 12(b)(6) motion is filed as to one count in a multi-count complaint, yet no answer is filed to the other counts.¹² Although the attachment of extraneous exhibits ordinarily converts a motion to dismiss to a motion for summary judgment, this is not true when the attachment hap-

pens to be the contract in question or a material document incorporated into the complaint.¹³ The point here is that a plaintiff’s failure to attach such material exhibits to the complaint is a red flag in the Rocket Docket that a motion to dismiss may be in order.

Motions for Summary Judgment

Motions for summary judgment, unlike motions to dismiss, test the sufficiency of the facts developed during discovery. For example, if an exotic business tort should survive a motion to dismiss, summary judgment is the vehicle to determine whether there is any genuine issue of material fact that would justify the time and expense of trial. In this regard, motions for summary judgment play into the philosophy of the Rocket Docket of narrowing the issues for trial and forcing the parties to settle whenever possible.

In the absence of a mandate in a pretrial order, the Local Civil Rules state that a motion for summary judgment shall not be considered unless it is filed, briefed, and set for hearing within a reasonable time before trial to permit the court to hear oral argument and consider the merits of the motion and briefs.¹⁴ The moving party must list in a specially captioned

section all material facts as to which the party contends there is no genuine issue of material fact and cite to the record to support the alleged undisputed facts.¹⁵ The responding party must respond in kind, listing all material facts as to which the party believes there is a genuine issue necessary to be litigated and citing the record to support the alleged disputed facts. The court “may” (read *shall*) assume the facts identified by the moving party are admitted unless each fact is specifically controverted by the opposing party in the brief in opposition.

The Local Civil Rules do not specify how counsel should present the undisputed or disputed facts, or the citations therefor. The best practice is to list the facts in short, concise, separately numbered paragraphs, together with pinpoint cites to the record. Counsel should attach to the brief relevant parts of the record as exhibits, using numbered or lettered tabs. Be sure to use excerpts from the record; do not attach, for example, the entire deposition transcript when you are relying upon only a quote or two. Make your presentation as simple, straightforward, and user-friendly as possible under the circumstances. This may seem difficult given the complexity of your case, but the good lawyer will always find a way to do this.

Because discovery is the gristmill for the facts supporting summary judgment, a few comments about discovery are appropriate here. With your trial date rapidly approaching and various deadlines whirling by, you will not be afforded the luxury of procrastinating or pursuing marginally relevant theories of the case. The Rocket Docket places a heavy premium on developing and executing a purposeful discovery plan. It is not unusual in complex cases, for example, for counsel to double- or triple-track depositions in various parts of the country while some team members are working simultaneously on written discovery and others are working on dispositive motions. Also, bear in mind that motions to expand the number of interrogatories will be granted sparingly, and you can expect only a modest increase in the number of permitted depositions. The Rocket Docket’s goal is to turn up the heat as high as possible until one or both parties run out of the kitchen.

Oral Argument

The topic of a winning motions practice would not be complete without mentioning oral argument. Before going into the Rocket Docket, or any court for that matter, counsel should be prepared to answer three simple questions: (1) What relief does your client want? (2) What is the authority for the relief requested? and (3) Why is the relief important or necessary in your case? Shockingly, too many lawyers appear in the Rocket Docket who cannot answer these questions. Regrettably, their client’s cause is doomed to failure.

In the Rocket Docket, you can safely assume that your judge has flyspecked the briefs and exhibits, has read the authorities cited by the parties, and is prepared to rule on the spot. Oftentimes, the judge will not be interested in an oration. In fact, the judge may have resolved certain issues on

The Rocket Docket places a heavy premium on developing and executing a purposeful discovery plan.

the briefs and only wants to hear from counsel about specific issues in the case. This can be disappointing given all the time and effort invested in your preparation. On the other hand, you can expect a prompt decision on the merits that will move your case along or bring it to an end.

Conclusion

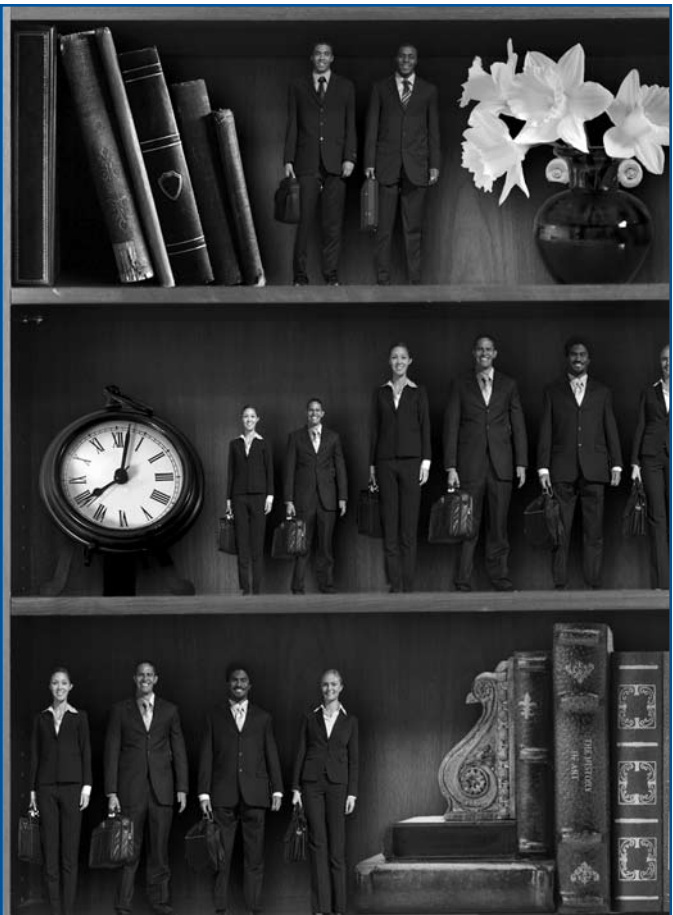
The Rocket Docket is indeed fast paced. The “method in the madness,” so to speak, is calculated to force the parties into a prompt resolution of their dispute. Beware that the Rocket Docket is a potential trap for the uninitiated. Accordingly, visiting litigants and lawyers alike would be well advised to retain experienced lead or local counsel to help them safely navigate the Rocket Docket. In the right hands, the breakneck speed of the Rocket Docket can work to your client’s advantage.

Good luck!

Stephen E. Baril is a partner in the Richmond, Virginia, office of Williams Mullen and is chair of the Complex Business Litigation practice.

Endnotes

1. The Rocket Docket is located in the central and eastern areas of Virginia, roughly along I-95 South from Washington, D.C., through Alexandria and Richmond, to the North Carolina line, and east along I-64 through Norfolk and Virginia Beach to the Chesapeake Bay and the Atlantic Ocean.
2. The increase in intellectual property filings caused the Rocket Docket to adopt case management procedures that permit the court to transfer new intellectual property filings among the three divisions, irrespective of where the cases were originally filed.
3. The Rocket Docket is divided into three divisions with courthouses located in the city of Alexandria to the north, the city of Richmond in the heart of the district, and the city of Norfolk to the east.
4. See LOCAL CIV. R. 7(E). Discovery motions must actually contain a statement of counsel that a good faith effort has been made to resolve the discovery matters at issue. See LOCAL CIV. R. 37(E).
5. See LOCAL CIV. R. 7(F)(1).
6. See LOCAL CIV. R. 7(F)(3).
7. See LOCAL CIV. R. 7(F)(1).
8. More than one U.S. district court judge in the Rocket Docket has declared that civil RICO claims are prima facie sanctionable under Rule 11. Tread lightly down that path, if at all.
9. *Conley v. Gibson*, 355 U.S. 41, 45 (1957).
10. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).
11. See *United States v. Thomas Howell Kiewit, Inc.*, 149 F.R.D. 125 (E.D. Va. 1993).
12. See *Godlewski v. Affiliated Computer Servs., Inc.*, 210 F.R.D. 571 (E.D. Va. 2002).
13. See Rule 12(d) and the annotations thereto.
14. See LOCAL CIV. R. 56(A).
15. See LOCAL CIV. R. 56(B).



THE BENEFITS OF MEMBERSHIP

Q: Why belong to the largest collection of litigators in the world?

A: To have access to their experience and knowledge.

Join the Section of Litigation CLE Teleconference Series on the second Tuesday of each month to learn from some of the best and brightest litigators in the world. Listen by phone or online to develop your skills and earn 1 hour of CLE credit. Experience Collective Wisdom.

Litigation Series CLE Teleconferences
www.abanet.org/litigation/programs



The Future of a Market-Based System for Controlling Carbon Emissions

BY KATHRYN E. KRANSDORF AND NEAL H. LEWIS

The Obama administration is pursuing a number of climate change and energy priorities, including the creation of a clean-energy economy. President Obama has indicated that he hopes these goals can be achieved, in part, through the use of a market-based carbon-cap system to reduce emissions and move the United States toward cleaner sources of energy.

Perhaps in response to the attention placed on this issue by the White House, two bills have recently been introduced in the United States House of Representatives that would—at least in part—create such a market-based system for reducing the amount of carbon emissions released into the atmosphere. Although both of these bills appear to be in line with President Obama's desires, one lays out a much more comprehensive system, addressing a number of the concerns raised by critics of market-based systems for controlling carbon emissions.

Congress will likely act on these bills during this session. In April 2009, the U.S. Environmental Protection Agency determined that carbon dioxide and similar tailpipe emissions are harmful to the health and well-being of humansⁱ—making even more obvious the need to implement similar restrictions on these emissions. Absent action by Congress, the agency's findings pave the way for regulation of these emissions under the Clean Air Act.² The findings, together with the nationwide fuel crisis, heighten the likelihood that a government-mandated market-based carbon-cap system will be a reality in the near future.

The Focus on Market-Based Caps

President Obama has made clean energy a focal point of his administration, seeking to make changes that would decrease the nation's dependence on foreign oil. He has recognized that to accomplish this goal, it will be necessary not only to look to a variety of new energy sources but also to implement measures that will help move the country toward a clean-energy economy—one that will both reduce dependence on foreign oil and greatly limit America's carbon pollution.³ Under President Obama's proposal, carbon emissions would be reduced 14 percent below 2005 levels by 2020, and 83 percent below those levels by 2050.⁴

Among the initiatives proposed by the Obama administration to achieve this goal is the establishment of a market-based cap on carbon emissions. The cap would be aimed at reducing—and eventually eliminating—what is known as the “carbon loophole,” which is the result of limits having been placed on numerous other pollutants—including sulfur dioxide and nitrogen dioxide—but not on carbon dioxide and other greenhouse gases.⁵

To close the carbon loophole, President Obama has

MARKET-BASED CAP SYSTEMS

Market-based cap systems are not a new idea for the reduction of emissions into the atmosphere. In recent years, a number of entities have voluntarily participated in market-based systems with the goal of reducing their emissions of greenhouse gasses. One such example is the Chicago Climate Exchange, established in 2003.ⁱ Similarly, the Regional Greenhouse Gas Initiative has been established by the 10 eastern states to auction permits for greenhouse gas emissions.ⁱⁱ

i. See History of the Chicago Climate Exchange, available at <http://www.chicagoclimatex.com/content.jsf?id=1>.

ii. Carbon Auction Raises \$117 mln., OIL DAILY, Mar. 23, 2009.

recommended the establishment of a market-based cap on carbon dioxide. He has explained that this system would involve setting a ceiling on the amount of carbon dioxide and other greenhouse gases that America's economy would be permitted to produce. The total would include emissions from automobiles, coal-fired power plants, energy-intensive industries, and other sources. The ceiling would be lowered over the course of years, more tightly limiting the amount of emissions permitted in the country.

The result of establishing such a ceiling—a cap—is that emissions will become a commodity. The ability to pollute our environment will then become a limited resource. A market will be created in which companies may buy and sell the right to produce certain amounts of carbon emissions. Companies will be placed in the position of being allowed to determine whether they want to spend money to become cleaner or more efficient, or whether they prefer to spend that money to generate an allowable amount of pollution. They will also be placed in the position of determining how much money they want to spend on either of these alternatives. As the cap is lowered and the commodity becomes scarcer, the price of producing carbon emissions increases, strengthening the incentive to invest in cleaner and more efficient energy.

The Obama administration hopes that this market-based cap will not only close the carbon loophole but also create a means to systematically address the numerous facets of the energy crisis facing America today. Ideally, this system will lower America's dependence on foreign oil, reduce the country's use of fossil fuels, and promote new industries—the

result being that alternative clean power sources, such as wind and solar energy, will become more economical than traditional sources.⁶

The American Clean Energy and Security Act of 2009

Following the lead of the Obama administration, Representatives Henry A. Waxman (D-Cal.) and Edward J. Markey (D-Mass.) introduced the American Clean Energy and Security Act of 2009 (ACES) earlier this year.⁷ This legislation, intended as comprehensive energy legislation, contains a number of President Obama's climate change and energy priorities, only one of which is the establishment of a market-based system for capping carbon emissions.⁸

Title III of the ACES addresses reducing global warming emissions and sets out—in part—a plan to establish a market-based program for reducing global warming pollution from specified entities that collectively produce 85 percent of America's global warming emissions. These covered entities include oil companies, electric utilities, and large industrial sources, among others. Sources of emissions that produce less than 25,000 tons of carbon dioxide equivalent each year are not covered by this provision of the ACES.

A carbon-cap restriction is an integral part of the proposed legislation. Under the ACES's plan, covered entities would receive tradable federal permits, known as allowances. An allowance would enable the source to emit one ton of pollution into the atmosphere. Each year, the number of available allowances issued would be reduced. The result would be a 3 percent reduction below the 2005 levels in 2012 and, ultimately, an 83 percent reduction below those levels in 2050.

Incentives are also part of the proposed legislation. The ACES provides a \$10 billion incentive to finance the development of new technology that would capture and store emissions of carbon dioxide from burning coal—intended in part to make the legislation more appealing to those from coal-producing states.⁹

Although all market-based carbon-cap systems are scrutinized, the ACES has been criticized for failing to address how pollution allowances would be distributed. It is also devoid of any explanation of what percentage of those allowances would be auctioned off and if any percentage would be given to producers for free. The ACES also does not address the way that the proceeds raised from the permits would be spent, or whether any portion of those funds would be returned to consumers as a means of offsetting increased energy bills. In the attempt to draft a comprehensive piece of legislation aimed at a number of the Obama administration's goals, the proposed carbon-cap system was left slightly unfinished.

The Cap and Dividend Act of 2009

The House of Representatives has also seen the introduction of the Cap and Dividend Act of 2009 (CDA) earlier this year, introduced by Representative Chris Van Hollen (D-Md.).

Unlike the ACES, which addresses a wide array of the climate change and energy concerns, the CDA is aimed solely at the establishment of a market-based system for reducing greenhouse gas emissions.¹⁰ The result is a much more detailed outline of a proposed market-based system contained in a more succinct piece of proposed legislation.

The CDA, while similar in many respects to the carbon-cap provision of the ACES, fills many of the gaps left by the ACES, drawing a clearer picture of the way its proposed system would work. Under the CDA, a set number of carbon permits would be sold at public auctions each year to covered entities. A limit would be established to restrict the number of carbon permits that a single entity could purchase at a single auction or hold at any one time. A minimum price per permit would also be set. Entities may sell, exchange, or transfer permits, but must do so consistent with the established limits on the number of permits that may be held by a single entity.

Under the CDA, covered entities would be required to surrender a specified number of held carbon permits each year. Failure to do so would result in a monetary penalty. The CDA also provides an incentive for entities that safely and verifiably capture and sequester carbon dioxide, rewarding them with additional carbon permits—in an amount equivalent to the amount of carbon dioxide the entity captured and sequestered—over the limits established under the CDA.

The CDA also differs from the ACES in its inclusion of a system for using the revenue generated by the sale of carbon permits. The legislation contemplates both the establishment of a Healthy Climate Trust Fund and the calculation and distribution of consumer dividend payments. However, it differs in its lack of funding for the development of new technology that would capture and sequester carbon emissions.

The goal reductions set out in the CDA do not differ greatly from those targeted by the ACES and the Obama administration: The 2012 emissions are set to be equal to the amount of carbon dioxide emitted in 2005, but by 2050, emissions are targeted to be reduced by 85 percent from the 2005 levels.

The Prospects for Market-Based Caps

Despite the fact that market-based caps are not a completely new idea, there are fears that a government-mandated system—applicable to the majority of entities in the United States—may result in a number of negative side effects.

A major concern is that utility and energy companies will pass the cost of obtaining the required allowances or permits along to their customers. It is estimated that the result could be an increase of 12 cents per gallon in the cost of gasoline and a 7 percent increase in the average electricity bill. Some estimates place the additional cost to the average household at between \$98 and \$140 a year by the middle of the next decade—even when 40 percent of the revenues brought in by the market-based system are distributed to consumers.¹¹ In states that are more dependent on coal, these increases could

be even higher.¹² Other criticisms of market-based systems include the potential loss in private sector jobs and a reduction in personal income.¹³

Despite these concerns, given the state of the fuel crisis in the United States and the Obama administration's focus on moving toward a clean-energy climate, it is quite likely that a market-based cap system will be passed by Congress in the coming years. Currently, the CDA appears to be the most viable legislation because of its more comprehensive approach to developing a carbon-cap marketplace. But given the complexity of the issues, the relative inexperience of a new administration, and the substantial potential impact of this legislation on American business and the American public, it is difficult to predict whether the system that is ultimately developed will look anything like those that have been proposed.

Kathryn E. Kransdorf and Neal H. Lewis are attorneys with Hancock, Daniel, Johnson & Nagle, P.C., in Richmond, Virginia.

Endnotes

1. President's Remarks on Clean Energy, Trinity Structural Towers Manufacturing Plant, Newton, Ia. (Apr. 22, 2009); see also *Marked Shift in Policy*, ENERGYBIZ INSIDER, Apr. 23, 2009.

2. President's Remarks, *supra* note 1.

3. *Id.*

4. John Carey, *Obama's Cap-and-Trade Plan: The U.S. Chamber of Commerce Is Gearing Up to Rally Coal-State Politicians to Alter the President's Plan to Control Carbon Emissions*, BUS. WK., Mar. 5, 2009.

5. President's Remarks, *supra* note 1.

6. *Id.*

7. John M. Broder, *Democrats Unveil Climate Bill*, N.Y. TIMES, Apr. 1, 2009.

8. Discussion Draft Summary of the American Clean Energy and Security Act of 2009 (United States House of Representatives Committee on Energy and Commerce).

9. Broder, *supra* note 8.

10. H.R. 1862, 111th Cong. (2009).

11. EPA Publishes Carbon Price Estimates under Cap-and-Trade System, OIL DAILY, Apr. 23, 2009.

12. Carey, *supra* note 4.

13. Study: Cap-and-Trade Plan Would Cost Western Jobs and Investments, NAT. GAS WEEK, Apr. 20, 2009.



Renewable Energy

(Continued from page 1)

Installation Issues

The PPA should identify the upfront cost of installing the system. The responsibility for the cost of installation varies with the size, scope, and type of renewable energy project. For example, in some geothermal power purchase agreements, power purchasers treat the PPA as a "put" requiring the seller to make a binding commitment to build the project. In these instances, PPAs lay out project milestones, including a commercial operation date, which is often tied to termination and damages provisions.³ In some solar or wind turbine PPAs, where the generation asset is installed on a rooftop, the PPA may also include lease provisions for rooftop space or a separate lease agreement for access. Parties must carefully draft access terms such that the installation does not interfere with the site owner's regular operations. Construction schedules and notice provisions should be used to facilitate the cooperation between the power seller and the landowner. These leasing issues are further compounded when the power purchaser is not the owner of the building, but rather a tenant under a separate lease. In such circumstances, an extra layer of consent and scrutiny of the proposed project and PPA is necessary. Furthermore, commercial leases typically have common area maintenance charges connected to utility costs, which may result in complex lease modifications.

In other PPAs, installation may be conditioned on governmental approval of renewable energy incentives to construct the project. For example, the tax credits that were extended under the Energy Improvement and Extension Act of 2008 have rigorous criteria including "in service" dates, ownership requirements, and other issues.⁴

These credits are the life blood for many projects, and without them, installation and construction will not occur. In addition to renewable energy incentives, PPAs are also frequently contingent on obtaining other sources of financing. Some PPAs include incremental cost increases for nonstandard installation designs. Parties should be careful in drafting financing and nonstandard installation provisions to mitigate the risk of litigation over expanding project budgets and termination rights.

Renewable Energy Credits and Incentives

A discussion of the types and availability of renewable energy credits and incentives in the United States would require a separate article altogether; however, for the purposes of assessing litigation risk in PPAs, one consideration rules them all. The PPA must be absolutely clear on which party is entitled

VISIT THE SECTION OF
LITIGATION ON THE WEB.

www.abanet.org/litigation

to receive all current and future rebates and incentives. Renewable energy laws are ever changing, and in the course of a 10- to 15-year PPA, new rebates, credits, and program opportunities may arise. The PPA needs to contemplate the current and future possibilities. Although alternative energy credits may be bought and sold, their precise nature as a property right has not been developed and settled in the law.⁵ A number of states have seen litigation over the ownership of renewable energy credits. As a preliminary consideration, the courts have held that states have the authority to decide which entity owns the renewable energy credits.⁶ The Pennsylvania Supreme Court recently held that if a PPA is silent on the ownership of the renewable energy credits, the credits belong to the electric distribution company.⁷ However, states such as California and Texas have held that energy producers—not utility companies—are the owners of the alternative energy credits.⁸ Regardless, the Pennsylvania Supreme Court and other state courts have held that “where the contracts themselves are entirely silent on the issue of these rights . . . any attempt to determine the parties’ intent or how they may have structured the contract if they had anticipated the future creation of saleable credits is speculative at best.”⁹ It is absolutely critical that the PPA expressly delineate the rights of the parties with respect to the ownership of renewable energy credits.

Risk of Loss/Interconnection Point

Under several PPAs, the risk of loss for damage or injury to persons or property is transferred at the interconnection point for the renewable energy system. The interconnection point is where the generation asset connects to the electric distribution system. Interconnection is an important aspect of renewable energy development because the power generated must be compatible with the other power in the grid. The agreement should be clear on which party is liable for property damage and liability for injuries to persons at each stage of the generation and transmission process.

Renewable Energy Resource Access

Another area in PPAs that poses a heightened potential for litigation relates to provisions that require access to the renewable energy resource. For example, many solar energy PPAs require that the system remain unobstructed from direct sunlight. This may require the property owner to obtain solar easements for the site, which could result in unexpected costs and expenses. In addition, states such as California and New Jersey, with active renewable energy economies, have statutes imposing certain requirements on solar access easements.¹⁰ A widely publicized case in 2008 involving a dispute between a property owner with a rooftop solar power system and an adjacent property owner whose redwood trees cast a shadow over the generation asset ultimately spurred the development of amendments to California’s Solar Shade Control Act.¹¹

Right of Purchase and End-of-Term Obligations

In PPAs where the power is generated by an entity that is not the owner of the underlying property, there are often purchase provisions in the agreement. These types of clauses can be difficult. The obvious benefit to an end-of-term purchase is that the system is installed and functional, making for a more seamless transition to self-generation. However, end-of-term purchases are also problematic. First, the technology in place after the 10- to 15-year term of the PPA will likely be obsolete, as renewable energy technology is seeing consistent advancements in efficiency and production. Second, the agreement must provide a clear mechanism for valuing the asset through an appraisal process.

Conclusion

Though not comprehensive, this article has touched on some of the key terms in PPAs and identified some of the litigation pitfalls in drafting and implementing a PPA. Renewable energy is an exciting frontier for new business opportunities. Keep these concepts in mind when approaching your next renewable energy project.

Gregory S. Ricciardi is an attorney with Pepper Hamilton LLP in Princeton, New Jersey.

Endnotes

1. Energy Improvement and Extension Act of 2008, Pub. L. No. 110–343 (pt. B) (2008) (codified as amended in scattered sections of 26 U.S.C.).
2. For example, New Jersey, Maryland, and California have established benchmark renewable energy goals and offer a variety of programs to subsidize the development of renewable energy projects.
3. William H. Holmes, Brief Anatomy of a Geothermal Power Purchase Agreement, N. AM. CLEAN ENERGY, Sept./Oct. 2008, at 78.
4. For example, the “in service” date for geothermal or solar energy facility, small irrigation power facility, landfill gas facilities, trash combustion facilities, and qualified hydropower facilities was extended to January 1, 2011, for the section 45 credit. See 26 U.S.C.A. §§ 45(c)-(d) (West 2008). The energy must be sold to an unaffiliated organization. See *id.*
5. ARIPPA v. Pennsylvania, 966 A.2d 1204, 1212, 2009 Pa. Commw. LEXIS 79, *20 (Commw. Ct. 2009).
6. See *In re Ownership of Renewable Energy Certificates*, 389 N.J. Super. 481, 490 (N.J. Super. Ct. App. Div. 2007). See also *Am. Re-Fuel Co.*, 105 F.E.R.C. P61,004 (2003) (stating that the issue of credit ownership is controlled by state law, rather than the Public Utility Regulatory Policies Act of 1978).
7. See ARIPPA, 966 A.2d at 1214.
8. See Renewable Portfolio Standard Program, Rulemaking Proceeding 04-04-026, Decision 05-05-011, 2005 Cal. PUC LEXIS 178 (Cal. Pub. Util. Comm’n 2005); Petition of Sw. Pub. Serv. Co. for Declaratory Order Interpreting Comm’n Subst. R. § 25.173

Implementing Pub. Util. Regulatory Act § 39.904, No. 29815, 2005 Tex. PUC LEXIS 6 (Tex. Pub. Util. Comm'n 2005).

9. See ARIPPA, 966 A.2d at 1214.

10. Scott Anders, Kevin Grigsby & Carolyn Kuduk, California's Solar Shade Control Act: A Review of the Statutes and Relevant Cases (Energy Policy Initiatives Ctr., Univ. of San Diego School of Law, Jan. 2007), available at www.sandiego.edu/epic/publications/

documents/070123_SSCAPaperFINAL_001.pdf. New Jersey Solar Easement Act, N.J. STAT. ANN. § 46:3-24 (2009); California Solar Shade Control Act, CAL. PUB. RES. CODE § 25980 (2008).

11. Marla Dickerson, Hey, Your Shade Trees are Blocking My Solar Array, L.A. TIMES, Nov. 15, 2008, at C1, available at <http://articles.latimes.com/2008/nov/15/business/fi-solarspat15>.



THE BENEFITS OF MEMBERSHIP

Are You Missing Out?

If the ABA does not have your email on file, you could be missing out on important ABA Section of Litigation committee news and announcements. By registering your email address, you will be eligible to receive CLE program announcements, *Litigation News* monthly emails, the *ABA Journal*, and more from the Section and the ABA.

Log on to MyABA today to ensure your address is up to date.

www.abanet.org/abanet/common/MyABA





The ABCs of Defense

(Continued from page 1)

defective equipment is not the direct purchaser. To counter the harsh result of this rule, the model code was revised in 1952 to include section 2-318.¹ However, many states declined to adopt section 2-318 as it was first drafted. In response, the model code was again amended in 1966 to include two more optional variations of 2-318. The Uniform Commercial Code now contains three different versions of section 2-318, known as Alternatives A, B, and C.

The general purpose of model section 2-318 is to extend the coverage of a manufacturer's warranty to end users that can be expected to use a product even if they are not in privity with the seller. Section 2-318 permits certain non-privity plaintiffs to bring their warranty claims as third-party beneficiaries of the upstream warranties.² Of course, the devil is in the details, as always. That is because different states have adopted different versions of section 2-318, and California, Louisiana, and Texas have not adopted the section at all.³

Inevitably, then, consideration of whether privity is present or even required in your client's particular dispute will center on the question: What's the governing law?

"A" Spells "Conservative"

Alternative A, the most conservative version of section 2-318, has been adopted by 28 states (listed in the sidebar). Alternative A "reflects only a limited abolition of privity and is not intended to allow recovery by all persons foreseeably affected by the defects in the seller's product."⁴ Alternative A limits the class of potential plaintiffs in several ways that are of particular importance to corporate entities. First, the plaintiff must be a "natural person."⁵ Accordingly, Alternative A of section 2-318 is of no help to corporations and partnerships.⁶ Second, the plaintiff must have sustained personal injury; if the damage is only to property or the loss merely economic, the plaintiff must establish privity. Finally, the defendant must be a "direct" seller; thus, vertical privity is required.

It should be noted, however, that some Alternative A states have expanded the class of potential plaintiffs and defendants relying on the Official Comments to section 2-318. Thus, the application of the privity requirement may vary if the jurisdiction has altered the parameters of the statute with case law.⁷

SECTION 2-318 ALTERNATIVES AND ADOPTION BY STATE

Alternative A: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty."	Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, Wisconsin
Alternative B: "A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty."	Alabama, Delaware, Kansas, New York, South Carolina, Vermont
Alternative C: "A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty."	Colorado, Hawaii, Iowa, Minnesota, North Dakota, South Dakota, Utah, Wyoming
Alternative C, paraphrased version	Maine, Massachusetts, New Hampshire, Rhode Island, Virginia
Section 2-318 not adopted	California, Louisiana, Texas

In those jurisdictions, the adoption of Alternative A does not necessarily foreclose warranty claims by purchasers against remote manufacturers. Several jurisdictions that have adopted Alternative A have abolished the vertical privity requirement for implied warranty, such as Alaska, Florida, Indiana, Montana, Nebraska, Nevada, New Jersey, Oklahoma, Pennsylvania, and West Virginia. Other states, such as Alabama, Arizona, Idaho, Kentucky, North Carolina, Oregon, Tennessee, and Wisconsin have retained the common-law vertical privity rule.⁸

“B” a Bit More Broad

Alternative B has been adopted by six states. Alternative B goes further and extends coverage to “any natural person who may reasonably be expected to use, consume or be affected by the goods,” thereby extending the class of potential plaintiffs and the class of potential defendants. However, Alternative B, like Alternative A, requires that the plaintiff be a natural person and have sustained a personal injury, rendering Alternative B just as unhelpful to corporate entities as Alternative A.⁹ In addition, Alternative B expands the class of potential defendants to include remote sellers, eliminating the vertical privity requirement.

“C” the Defense to a Warranty Claim Disappear

Alternative C has been adopted by 13 states. Alternative C weakens the lack of privity defense the most. Like Alternative B, Alternative C eliminates the vertical privity requirement. However, Alternative C is more liberal than either of the other versions because it does not require personal injury. Thus, non-privity plaintiffs who have sustained only property damage or economic loss may have standing to use under Alternative C.¹⁰ In addition, unlike Alternatives A and B, Alternative C is not limited to “natural persons”; rather, it applies to corporations, partnerships, and other types of organizations.¹¹ Thus, in states that have adopted Alternative C, privity poses only a very narrow obstacle to a plaintiff’s warranty claim.¹²

The Bottom Line

As the foregoing shows, if your energy industry litigation involves a purchaser’s claim against a manufacturer that did not directly sell to the purchaser, you should look to the state law governing your dispute to determine which version of section 2-318 (if any) has been adopted. In the context of corporate clients, this will quickly tell you whether privity is a requirement for a breach of warranty claim. In light of the privity restrictions enforced in states that have adopted

Alternatives A and B, generally speaking only in disputes where the governing law is provided by an Alternative C state should a remote purchaser reasonably expect to avoid the privity defense. Of course, these guidelines are general, and you should carefully check the applicable jurisdiction’s law to determine the merits of your particular dispute. In any event, as we litigators continue to be knee-deep in lawsuits for our energy industry clients, we should always be aware of the ABCs of a privity defense.

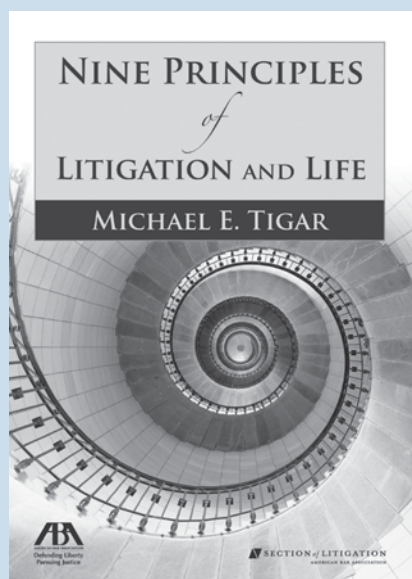
Shawn M. Bates is a partner with Houston’s Yetter, Warden & Coleman LLP. He specializes in litigating and arbitrating complex business disputes. Deborah J. Karakowsky is an associate with Yetter, Warden & Coleman LLP. Her practice encompasses a variety of complex business disputes.

Endnotes

1. HAWKLAND’S UNIFORM COMMERCIAL CODE SERIES § 2-318:1 (2001); *Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 954–55 (Ind. 2005).
2. A third-party beneficiary of a warranty under section 2-318 differs from a third-party beneficiary of a contract. It is generally easier for a non-privity plaintiff to obtain standing to sue under section 2-318 than under common-law third-party-beneficiary doctrines.
3. California has omitted the section entirely but has created another statute that is similar in effect to Alternative C.
4. *Lukwinski v. Stone Container Corp.*, 726 N.E.2d 665, 670 (Ill. Ct. App. 2000).
5. U.C.C. § 2-318.
6. *St. Paul Fire and Marine Ins. Co. v. Elkay Mfg. Co.*, 2003 WL 139775 (Del. Super. Ct. 2003).
7. *See Tex Enters., Inc. v. Brockway Standard, Inc.*, 66 P.3d 625, 628 (Wash. 2003).
8. *See Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 957 n.8 (Ind. 2005).
9. *Westfield Ins. Co. v. HULS Am., Inc.*, 714 N.E.2d 934, 950 (Ohio Ct. App. 1998).
10. *Stoney v. Franklin*, 2001 WL 683963, *7 (Va. Cir. Ct. 2001).
11. U.C.C. §§ 1-201(30) and 1-201(28).
12. As noted previously, California has adopted a statute that is similar in effect to Alternative C. Louisiana has never adopted any version of 2-318 but has abolished the vertical privity requirement for breach of warranty. *See Aucoin v. S. Quality Homes, LLC*, 984 So. 2d 685, 692–93 (La. 2008). Texas’s version of 2-318 takes no position on privity, leaving it instead to the courts to decide. TEX. BUS. & COM. CODE § 2.318.

NOW AVAILABLE!

NINE PRINCIPLES OF LITIGATION AND LIFE



2009, 302 pages, 5 x 7, paper
ISBN: 978-1-60442-400-3
PC: 5310383
\$39.95 Regular price
\$29.95 Section of Litigation
member price

“ . . . In *Nine Principles*, Michael Tigar shares not just the ‘how’ of his own amazing courtroom achievements, but also the ‘how to’ of practical tips that all of us can implement and, even more importantly, the ‘why’ of the importance of trial attorneys who are willing to fight for their clients’ rights, even against staggering odds. Every lawyer and everyone else who cherishes the special role of trial lawyers in our society should read this book.”

—Steve Easton, Professor, University of Missouri
School of Law, Former U.S. Attorney
Author, *Attacking Adverse Experts*

In this new book, *Nine Principles of Litigation and Life*, Michael Tigar, who is widely regarded as one of the top trial lawyers alive today, reflects on the principles of action that are needed in litigation and in life. He draws compelling parallels between being a successful trial lawyer and living a purposeful life. Unique and introspective, Tigar examines legal history and his own “real-life” experiences to craft a message for all trial lawyers about the importance of their work and the principles that shape their lives.

AMERICAN BAR ASSOCIATION

www.ababooks.org
Phone: 1-800-285-2221
Fax: 1-312-988-5568

Publications Orders
P.O. Box 10892
Chicago, IL 60610-0892



Section of Litigation

American Bar Association
321 N. Clark Street
Chicago, IL 60654

COMMERCIAL & BUSINESS
LITIGATION
Volume 10 Number 4 ■ Summer 2009

In This Issue

- | | | | |
|---|---|----|--|
| 1 | Reducing Litigation Risks in Renewable Energy Power Purchase Agreements | 4 | Green Building Risks: Avoiding Litigation Traps |
| 1 | U.C.C. Section 2-318: The ABCs of Defense | 7 | Wind Energy: An Uncertain Future in the Courts |
| 2 | Letter from the Chairs | 9 | A Winning Motions Practice in the Rocket Docket |
| 3 | Letter from the Editor | 12 | The Future of a Market-Based System for Controlling Carbon Emissions |