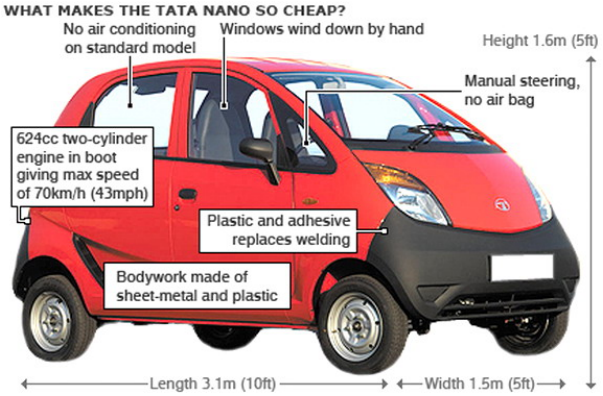

The Tata Nano: Bodacious Enough for US Jurisdiction?

Let's assume, as most of us on this blog do, that the Supreme Court will get rid of the public nuisance climate change when it decides *Connecticut v. AEP* a few weeks from now. Does that get rid of public nuisance climate cases? Not necessarily.

Whatever one may think of the Clean Air Act's displacement of federal common law, and even its potential pre-emption of state common law, it is virtually impossible to argue that the Clean Air Act would pre-empt *international* claims. The Act makes no pretense to regulating non-American sources. So could state attorneys general sue *foreign* producers of carbon emissions under federal common law nuisance? Consider Tata Motors, the Indian company that produces the Nano, the world's cheapest auto which will clog Indian highways in a short time. Tata Motors is part of the Tata Group, one of the world's largest corporate conglomerates, which maintains subsidiaries in the United States. Tata Motors itself is listed on the New York Stock Exchange. A lawsuit against Tata Motors would resemble California's public nuisance suit against US auto producers — except of course that Tata Motors is based in India. While there may be localized carbom emissions impacts, for climate change impacts, the location of the initial emissions is irrelevant: CO2 from a Nano is the same as Co2 from a Chevrolet.

Obviously, the threshold issue would be whether any US court could gain jurisdiction over Tata Motors as a defendant. But a Ninth Circuit case decided just two days ago, *Bauman v. DaimlerChrysler*, strongly suggests that it could. *Bauman* is an Alien Tort Statute claim, alleging that during the Argentinian "dirty war" of the 1970's, Daimler executives in Argentina assisted the military government in murdering the company's employees who protested government repression. Understand the jurisdictional challenges here: the plaintiffs, US residents, argue that US courts should hear a case involving executives of a German company for human rights violations that occurred in Argentina.

And the Ninth Circuit said that federal courts in California have "general" jurisdiction based upon DaimlerChrysler's minimum contacts with California. DaimlerChrysler has a subsidiary here, which it controls very closely. Nearly 50% of DaimlerChrysler's global sales are in the United States, and 2.4% of its total sales are in California. Good enough, said the Ninth Circuit.

Now let's go back to a public nuisance suit against Tata. That should be easier. If the case was brought in federal court in New York, then the complaint could allege minimum contacts based upon its registration on the New York Stock Exchange, and the parent company's otherwise vast business dealings in this country. Recall that Tata's actions in producing the Nano directly impact here in the United States; if it's good enough for *general* jurisdiction in *Bauman,* why wouldn't it be good enough for *specific* jurisdiction here? There is even Supreme Court precedent to support this contention: in 1984, the US Supreme Court in Calder v. Jones held that actress Shirley Jones could sue the National Enquirer for libel in a California court because of the effects in California, although its international implications are far from settled.

Who knows if *Bauman* will survive: the combination of the Alien Tort Statute, the suit against a major multinational conglomerate, and the fact that the opinion's author was Stephen Reinhardt practically puts a neon sign on it saying "Grant Cert"! (Or at least, "en banc me!"). But right now it is good law. If US courts can have jurisdiction over foreign corporation through their US subsidiaries for activities undertaken *outside* the United States, then it stands to reason that they can have jurisdiction for through their US subsidiaries for activities that have effects *inside* the United States.

All of which goes to show that no matter how the Supremes rule in *AEP*, public nuisance could be alive and well beyond our shores. And given the failure of global climate negotiations, it might be the most promising game in town.