

legislative history or statutory language is available to determine whether it was intended that foreign parties should have a right to bring such an action under the federal question statute.

There is also a question of whether the federal common law claim for nuisance has been preempted by the passage of the Clean Air Act. The Supreme Court has recently decided Milwaukee v. People of the State of Illinois, which held that the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., preempted the federal common law of nuisance in the context of actions seeking damages and abatement of water pollution. It is not yet clear whether this ruling will also govern interpretation of the Clean Air Act.

In any nuisance action there would be a very difficult proof problem of establishing some casual connection between emissions from a particular source and the resulting injury to the complaining party. As the distance from the emitting source or sources increased, and additional (possibly Canadian) sources could be included as contributing to the resulting injury, the plaintiff's proof problems would appear to grow more complex. Successful resolution of the proof problem would rest, of course, on the quality of the evidence and expert testimony that a plaintiff was able to marshal.

A possible alternative to reliance on the federal common law of nuisance is reliance on state law in federal court in a diversity action in which jurisdiction rests on 28 U.S.C. 1332. In such a case, the federal courts would be required to apply the tort law of the appropriate state according to established principles concerning rules of decision. In any such action there must be complete diversity between the plaintiff and defendant, and the plaintiff's claimed damages must exceed \$10,000. Again the difficulties in proving causation would be present. However, this action under state law might be available even if the law becomes clear that the Clean Air Act preempts any federal common law claims.

#### Alien's Action for Tort

The Federal Judicial Procedure Code (28 U.S.C. 1350) provides that:

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."