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Q&A With Morrison & Foerster's Chris Carr

Law360, New York (April 25, 2013, 2:09 PM ET) -- Chris Carr is co-chairman of the Morrison & Foerster LLP's cleantech group and chairman of the firm's environment and energy group. Carr has focused his practice on permitting and litigation under the federal Endangered Species Act, the Clean Water Act, the National Environmental Policy Act and their California counterparts.

Carr frequently defends citizen suits brought under various federal environmental statutes and litigates challenges to environmental permits, approvals and review documents in federal and state courts. His clients include public agencies, land developers, private individuals, nonprofits and business concerns in the water, energy, timber, mining, agricultural, fishing, construction, manufacturing and wine industries.

Q: What is the most challenging case you have worked on and what made it challenging?

A: A federal Endangered Species Act citizen suit became a little shop of horrors for my home developer client even though a project opponent had transplanted the plant to the project site. Someone claiming to have "discovered" the plant on the building site called the California Department of Fish and Wildlife to alert the agency to its presence. Upon investigation, officers of the agency concluded the plant — the root wad of which was sitting on top of matted grass — had been transplanted, in a criminal violation of law, and confiscated it as evidence. The plaintiffs sued, claiming the agency had "taken" the plant in violation of the federal ESA and that the landowner was also liable for acting in concert with the agency.

The case presented two challenges:

- Acting as a lawyer and a psychotherapist trying to help my nonlawyer client understand how the law could be so absurd and how they could possibly have to go through litigation even though everyone knew what had actually happened and the responsible state agency had been carrying out its law enforcement duties

- Presenting the esoteric minutiae of the ESA, its regulations and guidance documents, as well as the interrelation of the act's plant protection provisions with the California Endangered Species Act, in a way that the district court and the Ninth Circuit would understand

The district court granted summary judgment against the plaintiffs, and the Ninth Circuit affirmed in the first and only published decision interpreting the ESA's plant protection provisions (Northern California River Watch v. California Department of Fish and Game, 620 F.3d 1075 (9th Cir. 2010).

Q: What aspects of your practice area are in need of reform and why?

A: The list is a long one. Federal environmental citizen suits are an absolute nightmare for any defendant — not because the statutes are strict liability but rather solely because of their fee-shifting provisions. The language of those provisions is neutral, making plaintiffs and defendants equally eligible to recover fees, yet the federal courts have interpreted them to be unilateral — such that only plaintiffs can recover. (Defendants can only recover where the suit was frivolous; i.e., would meet the Rule 11 standard). This one-way ratchet has created a racket in which, far too often, it is economically irrational for a defendant to defend themselves against nonmeritorious suits.

Similarly, here in California, Gov. Jerry Brown has, quite rightly, called efforts to reform the California Environmental Quality Act "the Lord's work." Environmental review of projects is obviously desirable and, indeed, necessary, to ensure that environmental values are given appropriate consideration. But far too many CEQA suits represent nothing but Nimbyism or are brought by opponents with no credible environmental interest in the project.

For example, CEQA suits by unions insisting on project labor agreements are rampant. This "greenmailing" regularly stalls socially important and desirable projects, ranging from renewable energy projects to schools to hospitals to transit-oriented apartment developments that would reduce vehicle trips and greenhouse gas emissions. Unfortunately, the California legislature is frozen and unable to reform CEQA because of interest groups that want to continue to use the law as a weapon to achieve their narrow economic ends.

Q: What is an important issue or case relevant to your practice area and why?

A: The U.S. Supreme Court case Sackett v. U.S. Environmental Protection Agency (2012), which held that compliance orders issued by the EPA, and by implication other federal agencies, are no longer immune from challenge on the ground that "pre-enforcement review" of agency action is not available.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Steve Sims of Brownstein Hyatt. Steve was a highly effective advocate for the Federal Water Contractors in the Bay-Delta ESA litigation before Judge Wanger. He was relentless in his cross-examination of challenging witnesses, knows how and when to hold his ground and is adept at setting a tone with the court. I learned a great deal from working alongside Steve. Being opposite him would be great fun and an even greater challenge.

Q: What is a mistake you made early in your career and what did you learn from it?

A: As a very junior associate, I made the mistake of not proofreading the cover page of a cert petition to the U.S. Supreme Court. The case name had a typo. Fortunately, I was instructed to file a day before the deadline in case there were any mistakes or the messengers run into traffic, etc. It taught me two lessons: at the end of the day, the lawyer bears responsibility for what goes out the door, and whenever possible, file a day early.

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