Climate Change and the Courts: Litigating the Causes and Consequences of Global Warming

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There is a growing consensus that our global climate is warming and that human activity, primarily the combustion of fossil fuels, is the primary cause. There is still considerable dispute, however, over how best to respond to global warming. International efforts, such as carbon cap and trade regimes and other mechanisms developed under the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change, will do little to reduce the global emissions of carbon dioxide (CO_2) and other so-called greenhouse gas (GHG) emissions. In the United States, some states have taken steps toward regulating GHG emissions, but the federal government thus far has failed to produce domestic strategies to address the problem in any meaningful way.

Frustration over the failure of government policy makers to confront the issue of global warming has driven some public interest groups and state and local governments to seek redress for both the causes and effects of global warming in the courts. The past several years have seen a dramatic increase in the number of lawsuits that raise issues related to climate change and global warming. *See* Arnold & Porter, LLP, Climate Change Litigation in the U.S., www.arnoldporter.com/public_document.cfm?id=9417&key=10H1. Some of these cases have focused on bringing the control of greenehouse gas GHG emissions within existing statutory and regulatory frameworks. Others have sought to impose liability directly on companies, such as electrical power producers and automobile manufacturers, whose activities and products are significant sources of those emissions. This article outlines the types of climate change theories and litigation strategies that are being used, discusses some of the key climate change cases, and offers suggestions on how businesses can respond to potential liability risks presented by climate-change-related litigation claims.

Generally speaking, climate-change-related legal theories can be grouped in one of three broad categories. The first involves cases that seek to bring GHG emissions within the overall scope of regulation under the federal Clean Air Act (CAA). As a matter of policy, the U.S. Environmental Protection Agency (EPA) under President Bush took the position that the principal identified GHG, CO_2, is not a pollutant that either EPA or states with approved programs to implement the CAA have statutory authority to regulate. As discussed below, the U.S. Supreme Court forcefully rejected that EPA position earlier this year with its landmark decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). That decision opens the door for EPA to promulgate regulations specifically addressing carbon emissions from motor vehicles and other sources, although the scope and timing of any federal regulatory action is not at all yet clear.

A second category of climate-change-related litigation involves cases brought under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331, and corresponding state laws requiring the review of significant environmental impacts of government-approved projects, permits, and programs. It is now almost standard practice for project opponents to raise climate change impacts as an issue to be addressed in environmental assessments and review documents under these laws; in some cases, particularly in states such as California with substantive impact mitigation requirements, the threat of litigation has forced dramatic changes in the ways companies do business.

Finally, there have been a few cases that have focused on common-law theories, e.g., public nuisance, rather than statutory claims, to challenge companies over their direct and indirect GHG emissions. Nuisance actions have been brought against both U.S. and foreign automobile manufacturers and major electrical power producers in the Midwest, seeking both damages and injunctive relief for alleged climate change impacts around the country. To date, however, common-law-based claims have shown only limited prospects for success and are unlikely to have a significant impact on the development of federal or state climate change policy.

CAA Cases: Massachusetts v. EPA *and Its Fallout*

The most notable case brought to clarify the federal government's authority to regulate GHG emissions is *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), which considered whether EPA's claim had authority to regulate CO_2 emissions from mobile sources under Section 202(A)(1) of the CAA, 42 U.S.C. § 7521(a)(1). The Court reviewed EPA's denial of the plaintiffs' petition that EPA adopt regulations

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on the grounds that CO_2 is not an "air pollutant" under Section 7602 of the Act and that even if it could regulate carbon emissions, it would decline to do so because that could conflict with other administration priorities. On April 2, 2007, the Supreme Court rejected EPA's arguments in a 5–4 decision, ruling not only that EPA does possess authority to regulate mobile source carbon emissions, but also that EPA must either take steps to regulate those emissions from new automobiles or provide a reasoned justification for not doing so. The Supreme Court held that EPA's refusal to regulate GHG emissions presented an "actual" and "imminent" risk of harm to public health and the environment.

In ruling against EPA, the Supreme Court noted that "air pollutant" had been defined for purposes of Section 7602 to encompass "any air pollution agent . . . including any physical, chemical . . . substance . . . emitted into . . . the ambient air" and that CO_2 and other GHGs are undoubtedly physical and chemical substances falling within the scope of the statutory definition. The Court found unpersuasive EPA's argument that its regulation of CO_2 emissions would entail tightening of motor vehicle mileage standards, a task that Congress has assigned to the Department of Transportation (DOT). The Court held that while DOT's mandate to promote energy efficiency by setting mileage standards might overlap with EPA's environmental responsibility, DOT's mandate does not license EPA to shirk its responsibility to protect public health and welfare. Finally, the Court ruled that while the CAA does condition EPA's obligation to adopt regulations on its formation of a "judgment" that regulation is necessary, EPA's judgment must relate to whether an emission "cause[s], or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare." Congress defined "welfare" in § 7602(h) to include "effects on weather . . . and climate." The Court noted that the use of the word "judgment" is not a license to ignore the statutory language but is a direction to exercise discretion within the defined statutory limits.

After the *Massachusetts* decision, EPA can avoid taking regulatory action with respect to GHG emissions from new motor vehicles only if (1) it determines that CO_2 emissions do not contribute to climate change or (2) it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do make a contribution. EPA had offered a list of reasons why its decision not to regulate was justified, including the existence of voluntary executive branch programs on global warming and the potential impairment of the president's ability to negotiate with developing nations to reduce emissions. The Court found, however, that these policy judgments had nothing to do with the contribution of carbon emissions to climate change and did not amount to a reasoned justification for declining to form a scientific judgment on that subject. Moreover, the Court found that EPA cannot avoid its statutory obligation to regulate on the basis of uncertainty surrounding various features of climate change; instead, if the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether GHGs contribute to global warming, the agency must say so.

Standing was also an issue in the case. Because only one of the litigants needs to have standing for the litigation to proceed, the Court only considered whether the Commonwealth of Massachusetts, of the numerous parties that joined the litigation, had standing to seek redress for its alleged climate-change-related injuries. The Supreme Court based its decision on two grounds: (1) the fact that Massachusetts was a sovereign state and not a private litigant and (2) the fact that Massachusetts had demonstrated a sufficiently particularized injury to meet the injury-in-fact, causation, and redressability requirements articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Justice Stevens, writing for the majority, was persuaded that Massachusetts had standing because, *inter alia*, it was jeopardized imminently by global-warming-caused rising sea levels, which "have already begun to swallow Massachusetts' coastal land." Moreover, those changes had, and would continue to have, a direct and particularized impact on the Commonwealth, which owns a substantial portion of the state's coastal property and operates or maintains a wide variety of coastal-related public resources and infrastructure.

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While the Court's decision in *Massachusetts* nominally was limited to carbon emissions from motor vehicles, it has broad implications for other mobile sources, such as oceangoing vessels, as well as stationary sources, such as power plants and oil refineries, subject to regulation under the CAA. For example, in *Coke Oven Environmental Taskforce v. EPA*, No. 06-1131 (D.C. Cir., filed Apr. 7, 2006), ten states, two cities, and three environmental groups challenged EPA's refusal to regulate CO_2 emissions from power plants under EPA regulations governing stationary sources. The case focuses on EPA's 2006 new source performance standards (NSPS), which set limits on emissions of certain pollutants from new (or significantly modified) stationary sources (certain utility and power plants.) Petitioners had asked EPA to promulgate standards for GHG emissions as part of the 2006 rulemaking, but EPA refused to do so, prompting litigation over the final rule. The case had been stayed before the United States Court of Appeals for the District of Columbia Circuit, pending a deci-

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sion by the Supreme Court in *Massachusetts*. The *Coke Oven* petitioners have since moved (on May 2, 2007) to proceed with the litigation, asking the Court of Appeals to summarily vacate the NSPS rule and remand the matter back to EPA for further rulemaking proceedings in light of *Massachusetts*.

The *Massachusetts* decision clarified EPA's authority to regulate GHG emissions. It does not address, however, state authority to do the same thing. Lower courts disagree. In one case, a court held that states may be preempted under the CAA and other federal laws from adopting their own independent rules regulating carbon emissions in certain circumstances. In *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, 2007 WL 135688 (E.D. Cal. Jan. 16, 2007), plaintiffs had brought an action to enjoin enforcement of regulations that had been approved by the California Air Resources Board in 2004, pursuant to Section 43018.5(b)(1) of the California Health and Safety Code. That statute had been enacted by the California legislature in 2002, specifically to direct the Board to adopt state regulations "that achieve the maximum feasible and cost-effective reduction of GHG emissions from motor vehicles." The regulations were challenged as preempted by federal law on three separate grounds: (1) under Section 7543(a) of the CAA, which specifically prohibits states from adopting or attempting to enforce "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines;" (2) under the Energy Policy and Conservation Act of 1975 (EPCA); and (3) under the foreign policy of the United States and the foreign affairs powers of the federal government (foreign policy preemption). The court agreed that the CAA preempted the California regulations unless California received a waiver under Section 7543(b). The claims of preemption under EPCA and foreign policy preemption were stayed pending the Supreme Court's decision in *Massachusetts*. Although that decision came down in April 2007, those additional claims have not been revisited. In 2006, California applied to EPA for a Section 7543(b) waiver to allow it to go forward with its 2004 rules on motor vehicle emissions. In early November 2007, California filed suit in the U.S. Circuit Court of Appeals for the District of Columbia against EPA for EPA's unreasonable delay in issuing a decision on California's waiver petition.

The opposite result was reached by the district court in Vermont, which ruled that Vermont's car regulations, which adopted the California rules, are not preempted by the CAA or any other provision of federal law. *Green Mountain Chrysler Plymouth Dodge Jeep v. Torti*, 508 F. Supp. 2d. 295 (D.C. Vt., 2007). In that case a group of automobile manufacturers asserted that a Vermont regulation adopting California's car rules was preempted by the EPCA, the federal law regulating motor vehicle fuel economy. Plaintiffs argue that state motor vehicle standards for CO_2 are preempted by EPCA. In support of this argument, the automobile manufacturers cited a statement by the National Highway Traffic Safety Administration (NHTSA) that "[s]ince the way to reduce carbon dioxide emissions is to improve fuel economy, a state regulation seeking to reduce those emissions is a 'regulation' related to fuel economy standards . . . [A] state law that seeks to reduce motor vehicle carbon dioxide emissions is both expressly and impliedly preempted." 70 Fed. Reg. 51,414, 51,457 (Aug. 30, 2005). However, the U.S. District Court for the District of Vermont rejected the preemption challenges, relying in part on the fact that the Vermont rules technically went beyond strictly vehicular emissions (e.g., by applying to GHG emissions from automobile air conditioning systems). Not surprisingly, the auto manufacturers in the Vermont case are seeking review of the district court decisions from the Second Circuit Court of Appeals.

The increasingly likely prospect that EPA will be forced to adopt broad regulations covering GHG emissions from a variety of sources has prompted a number of environmental organizations to bring project- and permit-specific challenges, mostly against coal-fired power plant operators, to stop plant projects, upgrades, and improvements. Generally these challenges have involved applications for Prevention of Significant Deterioration (PSD) or other construction permits, and, in some instances, have intervened in New Source Review (NSR) enforcement cases. Settlements in these cases generally include CO_2 emission reductions, the addition of renewable energy sources, and investment in energy-efficiency projects; however, none of these cases has resulted in a court decision on the scope of federal regulation of GHG emissions, and the Supreme Court's decision in *Massachusetts* is only likely to reinforce the incentives to settle future cases without court intervention.

One such settlement involved a March 2, 2006, appeal by the Sierra Club over issuance of a PSD permit to Great Plains Energy and Kansas City Power & Light Company (KCP&L) for construction and modifications to KCP&L's Iatan Generating Station. The parties entered into a settlement requiring KCP&L to offset an estimated 6 million tons of annual CO_2; add 100 megawatts (MW) of wind power by 2010 and 300 MW of wind power by 2012; undertake energy-efficiency projects designed to reduce annual electricity demand by 100 MW; and undertake additional energy-efficiency projects designed to reduce annual electricity demand by an additional 200 MW by 2012.

In another case, the Sierra Club challenged the conditions of the PSD permit issued to the City of Springfield for a proposed coal-fired electric generating unit at its Dallman Generating Station. The parties entered into a settlement requiring the city to reduce CO_2 emissions to 7 percent below 1990 levels; expend $400,000 expanding its existing energy-efficiency and demand-side management programs; and purchase at least 120 MW of wind power for ten years.

NEPA Cases

In the last several years, there have been a number of NEPA cases brought to challenge the alleged failure of various federal agencies to consider climate change impacts in their review of the environmental impacts of projects in which at least some federal decision making was involved. One of the first cases was *Border Power Plant Working Group v. DOE*, 260 F. Supp. 997 (S.D. Cal. 2003), which focused on the failure of

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the Department of Energy (DOE) and the federal Bureau of Land Management (BLM) to prepare an Environmental Impact Statement (EIS) for the construction of transmission lines to connect new power plants in Mexico to the California power grid. DOE and BLM both had prepared initial environmental assessments for the project and issued findings of no significant impact that concluded no further environmental review was required. The plaintiff filed an action challenging the agencies' NEPA review as inadequate, in part because the environmental assessments failed to evaluate the impact of carbon emissions from the Mexican power plants.

As an initial matter in *Border Power Plant Working Group*, the district court found that the association filing the lawsuit had standing to bring its claims under the seminal 1992 U.S. Supreme Court decision in *Lujan v. Defenders of Wildlife*, based on extra-record declarations by association members that allegedly lived "near" the project and shared "a concern for the environmental health of the border region." The court then concluded that while the proposed Mexican power plants were outside U.S. jurisdiction and therefore properly excluded from the scope of the proposed federal action for NEPA purposes, one of the plants was to be constructed solely for purposes of supplying the U.S. energy grid over the proposed transmission line, and the plant and proposed transmission project were sufficiently linked to require consideration of the plant's emissions under NEPA. In discussing the potential environmental impacts of power plant emissions of CO_2 on climate change, the court simply noted that the "record shows that carbon dioxide is one of the pollutants emitted by a natural gas turbine and that it is a greenhouse gas," that emissions from the turbines to be used at the proposed power plants in Mexico "have potential environmental impacts," and that the government's failure to "disclose and analyze" the significance of CO_2 emissions is "counter to NEPA." DOE subsequently issued an EIS that included an evaluation of emissions from the proposed Mexican power facilities as part of its analysis of project alternatives. The EIS also was challenged in court, but initial claims attacking the document's cumulative impacts analysis subsequently were dropped, and the court's final decision in the matter did not address the adequacy of the EIS's analysis of potential climate change impacts.

Mayo Foundation v. Surface Transportation Board, 472 F.3d 545 (8th Cir. 2006), more directly addresses the extent to which a federal agency proposing a major federal action that may affect climate change must include an analysis of the project's climate change impact in its NEPA review. The case involved a decision by the federal Surface Transportation Board (the Board) to approve construction of a 280-mile rail line from South Dakota to the Wyoming Powder River Basin (PRB). The purpose of the project was to transport low-sulfur coal from the PRB to coal-fired power generation plants in the Midwest. The Board approved the project in 2002, but its decision was challenged by a number of environmental groups on the ground that the EIS prepared for the project failed to fully analyze its likely environmental impact. The Eighth Circuit agreed and remanded the matter back to the Board for further environmental review and specifically directed the Board to examine the indirect impacts to air emissions (including impacts from CO_2 emissions) that might result from increased use of coal caused by lower rail transportation rates.

The plaintiff filed an action challenging the agencies' NEPA review as inadequate, in part because the environmental assessments failed to evaluate the impact of carbon emissions from the Mexican power plants.

On remand, the Board prepared a supplemental EIS (SEIS) that included a quantitative sensitivity analysis on the effect of lower transportation rates on regional and national coal usage. The SEIS found that "little additional coal would be consumed" as a result of the project. It also found that any changes in PRB coal usage would translate to "minimal changes in air emissions from the electric power sector, both nationally and regionally." The Board dismissed comments it received on the potential impact of increased emissions on global warming, stating that "the scope of the air emissions analysis in the . . . SEIS was sufficiently broad, and there was no need for a full evaluation of global warming . . . as some commenters suggested." Moreover, according to the Board, "the modest project-related increases in overall coal usage . . . imply that any impacts of this project on global warming . . . would necessarily be modest as well." Based on the analysis of potential increased emissions provided in the SEIS, the Board issued a second decision approving the proposed PRB rail project, which prompted another petition for review by the court of appeals, which affirmed the Board's decision in all respects. 472 F.3d 545 (8th Cir. 2006). The court noted that the Board's decision and underlying environmental review documents "extensively discuss the potential impacts on air quality that may result from the implementation of the project." The court concluded that "the Board more than adequately considered the 'reasonably foreseeable significant adverse effects [of increased coal consumption] on the human environment' on remand."

A recent significant case addressing climate change issues under NEPA is *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007), an action against the Oversees Private

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Investment Corporation (OPIC) and the Export-Import Bank of the United States (Ex-Im), two quasi-governmental agencies, to compel them to conduct environmental assessments to address the impacts to global warming from projects supported by the agencies outside the United States. Both OPIC and Ex-Im had adopted guidelines requiring assessments of the environmental impacts of certain approved projects. OPIC's guidelines were adopted pursuant to Section 117 of the Foreign Assistance Act, 22 U.S.C. § 2151p. Under those guidelines, OPIC is required to conduct an "Environmental Impact Assessment," or an "Initial Environmental Audit," or both for projects that are "likely to have significant adverse impacts that are sensitive (e.g. irreversible, affect sensitive ecosystems, involve involuntary resettlement, etc.) diverse, or unprecedented." Crude oil refineries, large thermal power projects, major oil and gas developments, and oil and gas pipelines are among the types of projects that would qualify for this type of environmental analysis. Ex-Im's environmental review guidelines specifically required "adherence to [NEPA's] environmental review procedures" for long-term project financing, loans, and guarantees, although an environmental review is not mandatory for short- and medium-term transactions, credit and working capital guarantees, and insurance products.

The existing decisions make clear that NEPA litigation is unlikely to be an effective tool for responding to the complex challenges of global warming and climate change.

In its decision, the district court held that NEPA requires OPIC and Ex-Im to address the impacts of GHG emissions from fossil-fuel projects the agencies support in developing countries where such projects constitute "major federal actions" for NEPA purposes. Between 1990 and 2001, Ex-Im allegedly provided over $25 billion in loans and financial guarantees to 474 fossil fuel projects. Between 1990 and 2006, OPIC allegedly provided financial support to 64 fossil-fuel projects that will emit CO_2. Plaintiffs maintained that GHGs from projects supported by OPIC and Ex-Im constituted roughly 8 percent of 2003 global emissions, although they conceded that they cannot quantify the precise impacts of such emissions on the domestic environment. The district court found, however, that the record contained insufficient evidence to determine whether the projects are major federal actions and thus subject to NEPA review. The court rejected the plaintiffs' contention that Ex-Im and OPIC operate energy "programs" that may require preparation of a programmatic EIS under the NEPA, noting that the various energy projects supported by the defendants were not "a group of concerted actions to implement a specific policy or plan." The court rejected the contention that the fossil-fuel-based energy projects were components of a larger action intentionally divided by the defendants into multiple actions. The court also held that the projects lacked the geographical or temporal nexus required to make proposed actions "cumulative actions" subject to a single EIS.

The court next considered whether individual projects could be considered major federal actions in and of themselves, focusing in particular on the amount and nature of funding OPIC and Ex-Im provided for the projects. The court concluded that it was unable to determine, based on the record, whether the amount of financing provided by the defendants was sufficient to render the projects major federal actions, although it also found that the viability of the projects absent EX-IM or OPIC support indicated that they lacked the control over and responsibility for the projects to conclude that the projects were major federal actions. The court held both that the plaintiffs failed to demonstrate the projects are major federal actions and that the defendants failed to show the projects are not major federal actions. The court dedicated only a footnote to the key issue of whether NEPA is the correct tool for addressing global warming. The court did not address the merits of the plaintiffs' claims or the wisdom in using NEPA to address global warming. Instead, it held that it could not determine whether the defendants are a legally relevant cause of the alleged effects on the domestic environment.

As of the writing of this article, OPIC and Ex-Im are seeking an interlocutory appeal from the Ninth Circuit to review the lower court's rulings in the *Mosbacher* case. Regardless of how the Ninth Circuit responds to the appeal, however, the existing decisions make clear that NEPA litigation is unlikely to be an effective tool for responding to the complex challenges of global warming and climate change. The cases so far have shown that the impacts of GHG emissions from federally approved projects are a legitimate issue for consideration under NEPA, but they have not shown how those impacts can be addressed by specific mitigation measures that might have a material effect in reducing those impacts. To the contrary, they have in many ways only highlighted the limitations of project-specific litigation in confronting what is essentially a nonproject-specific, global phenomenon that will continue to develop, with potentially severe consequences, in the absence of well-considered domestic and international policy initiatives.

[***Ed. note.*** As this article was being finalized the Ninth Circuit decided *Center for Biological Diversity v. National Highway Traffic Safety Administration*,___F.3d___, 2007 WL 3378240 (9th Cir., Nov. 15, 2007), a challenge to a rule

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establishing new corporate average fuel economy (CAFE) standards for light trucks. Among other things, the court held that NHTSA violated NEPA by failing to consider cumulative GHG impacts as part of its environmental assessment for the proposed rule. The court also rejected the agency's finding that the rule would have no significant impact on the environment and ordered NHTSA to prepare a full EIS to address climate change issues.]

Climate Change and the Common Law

Perhaps the most innovative but problematic litigation strategy being pursued to address climate change is use of nonstatutory common-law claims, particularly claims based on public nuisance. In *Connecticut v. American Electric Power*, 406 F. Supp. 2d 265 (S.D. N.Y. 2005), various state and non-profit land trusts sued electric utilities under federal common law, or in the alternative, state law, to abate what the plaintiffs described as the "public nuisance" of "global warming." The plaintiffs claimed that the defendants collectively emitted approximately 650 million tons of CO_2 annually, that CO_2 is the primary GHG, and that GHGs trap atmospheric heat and cause global warming. The plaintiffs maintained that global warming will cause irreparable harm to property in New York State and New York City and that it threatens the health, safety, and well being of New York's citizens, residents, and environment. The defendants moved to dismiss the complaints for lack of jurisdiction and failure to state a claim upon which relief could be granted. The district court granted the defendants' motions, holding that the issues were nonjusticiable political questions consigned to the political branches and not the judiciary. The plaintiffs appealed, and arguments were heard before the U.S. Court of Appeals for the Second Circuit in June of 2006.

In *Comer v. Murphy Oil, U.S.A.*, No. 1:05-CV-00436 (D.C. Miss., filed Apr. 19, 2006), the plaintiffs filed a class action against oil, coal, chemical, and insurance companies (the defendants), claiming that the defendants emit substantial quantities of GHGs, which are increasing the GHG concentration in Earth's atmosphere, and that these emissions have increased the frequency and intensity of hurricanes. The plaintiffs further allege that the defendants' actions were a proximate and direct cause of the increase in the destructive capacity of Hurricane Katrina and consequently the plaintiffs' damages. Specific causes of action brought by the plaintiffs include (1) unjust enrichment; (2) civil conspiracy and aiding and abetting; (3) public and private nuisance; (4) trespass; (5) negligence; and (6) fraudulent misrepresentation and concealment. Damages claimed by the plaintiffs include (1) loss of property; (2) loss of the use and enjoyment of their property; (3) loss of their business and/or income; (4) incurred past, present, and future cleanup expenses; (5) disruption of the normal course of their lives; (6) loss of loved ones; (7) mental anguish and emotional distress; (8) hedonic damages; (9) litigation, expert witness fees, and court costs; and (10) such other elements of damage as may be shown at trial. There has not been a trial in this matter to date.

In September 2006 the State of California brought a public nuisance action against General Motors, Toyota, Ford, Honda, Chrysler, and Nissan (the defendants) for monetary damages for the defendants' past and ongoing contributions to global warming. California alleged that the millions of automobiles produced by the defendants emit massive quantities of CO_2 in the United States and have thus contributed to an elevated level of CO_2 in the atmosphere, which causes global warming. It further alleged that global warming has already injured the state, its environment, its economy, and the health and well being of its citizens. Specifically, it claimed that the State of California is spending millions of dollars on planning, monitoring, and infrastructure changes to address a large spectrum of anticipated impacts, including reduced snow pack, coastal and beach erosion, increased ozone pollution, sea water intrusion into Sacramento Bay-Delta drinking water supplies, responses to impacts on wildlife, and wildfire risks. Nevertheless, the district court dismissed the case, saying that the legal framework for assessing global warming nuisance damages was not well established and that the court lacked "guidance in determining what is an unreasonable contribution to the sum of carbon dioxide in the earth's atmosphere, or in determining who should bear the costs associated with the global climate change[s] that admittedly result from multiple sources around the globe." *California v. General Motors*, Slip Copy, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

Prospects for the Future

The recent decision in *California v. General Motors* highlights the limitation of tort litigation based on common-law theories developed before the Industrial Revolution as a coherent strategy for addressing the complex challenges of climate change. The likelihood that any of these cases will make a significant difference on climate change policy decisions is therefore unclear at best. In contrast, the regulatory claims under the CAA, NEPA, and the EPCA appear to be pushing the federal government to face issues of global warming more directly.

Businesses that significantly contribute to GHG emissions should be prepared for potential statutory and common-law litigation challenges to their business practices and requests for government licenses and permits. Many companies are taking it upon themselves to "go green" and reduce their "carbon footprint," knowing that such reductions will at some point in the future likely be mandatory. Voluntary reductions are often viewed favorably by environmental organizations, thus lowering the company's risk of potential litigation from those organizations. Other companies with higher litigation risks, such as utilities and large manufacturers, may choose to maintain their current carbon emission rates yet prepare internally to offer carbon reductions as a settlement in threatened litigation. No matter how companies choose to prepare, it is certainly in their best interests to be ready for the expense and potential project delays associated with climate change litigation and future climate change regulation.

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